MORNING BUSINESS

Mr. PRESSLER. Mr. President, I ask unanimous consent that there now be a period for morning business.

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

NOTICE OF PROPOSED RULEMAKING

Mr. THURMOND. Mr. President, pursuant to section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. sec. 1384(b)), a notice of proposed rulemaking was submitted by the Office of Compliance, U.S. Congress. This notice proposes rulemaking on the following statutes made applicable by the Congressional Accountability Act: the Fair Labor Standards Act, Family Medical Leave Act, Worker Adjustment and Retraining Notification Act, and Employee Polygraph Protection Act.

Section 304 requires this notice to be printed in the CONGRESSIONAL RECORD, therefore I ask unanimous consent that the notice be printed in the RECORD.

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

FAIR LABOR STANDARDS ACT

PROPOSED REGULATIONS RELATING TO THE SENATE AND ITS EMPLOYING OFFICES

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Extension of Rights and Protections Under the Fair Labor Standards Act of 1938 (Notices of Proposed Rulemaking with respect to Interns and Irregular Work Schedules were issued on October 11. The comment period closed on November 13. Final rules will be issued separately pursuant to Section 304 of the CAA.)

Notice of proposed rulemaking

Summary: The Board of Directors of the Office of Compliance is publishing proposed rules to implement section 203(c) of the Congressional Accountability Act of 1995 (P.L. 104–1, Stat. 10) (''CAA''). The proposed regulations, which are to be applied to the Senate and employees of the Senate, set forth the recommendations of the Executive Director for the Senate, Office of Compliance, as approved by the Board of Directors, Office of Compliance.

Dates: Comments are due within 30 days after publication of this Notice in the CONGRESSIONAL RECORD.

Addresses: Submit written comments to the Chair of the Board of Directors, Office of Compliance, Room LA 200, Library of Congress, Washington, D.C. 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 (''FAX'') machine to (202) 252–3115. 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, D.C., Monday through Friday, between the hours of 9:30 a.m. and 4:00 p.m.

For further information contact: Deputy Executive Director for the Senate, Office of Compliance at (202) 252–3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this Notice in an alternative format should be made to Mr. Russell Jackson, Director, Service Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, (202) 224–2705.

Supplementary information:

I. Background

A. Introduction

The Congressional Accountability Act of 1995 (''CAA''), PL 104–1, was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 203(a) of the CAA applies the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1) and (d), 207, 212(c) (''FLSA'') to covered employees and employing offices. Section 203(c) of the CAA (2 U.S.C. Section 1313(c)) directs the Board of Directors of the Office of Compliance established under the CAA to issue regulations to implement the section. Section 203(c)(2) (2 U.S.C. Section 1313(c)(2)) further states that such regulations, with the exception of certain irregular work schedule regulations to be issued under section 203(a)(3), ''shall be the same as substantive regulations issued by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) except insofar as the Board may 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 this section.''

B. Advance notice of proposed rulemaking

On September 28, 1995, the Board of the Office of Compliance issued an Advance Notice of Proposed Rulemaking (''ANPRM'') soliciting comments from interested parties in order to obtain participation and information early in the rulemaking process. 141 Cong. R. S14542 (daily ed., Sept. 28, 1995). In addition to inviting comment on specific questions arising under five of the statutes made applicable by the CAA in the ANPRM, the Board and the statutory appointees of the Office sought consultation with the Chair of the Administrative Conference of the United States, the Secretary of Labor and the Director of the Office of Personnel Management with regard to the development of these regulations in accordance with section 304(g) of the CAA. The Office has also consulted with interested parties to further its understanding of the need for and content of appropriate regulations. Based on the information gleaned from these consultations and the comments on the ANPRM, the Board of Directors of the Office of Compliance is publishing these proposed rules, pursuant to Section 203(c)(1) of the CAA (2 U.S.C. Section 1313(c)(1)).

1. Modification of the regulations of the Department of Labor

In the ANPRM, the Board asked the question, ''Whether and to what extent should the Board modify the Secretary's Regulations?'' The Board received 15 comments on the ANPRM: two from Senators, four from House Members (one from the leadership of the Committee with primary jurisdiction for the CAA and one from three of the sponsors of the CAA), one from the Secretary of the Senate and three from House offices (two from institutional offices and one from a Member's Chief of Staff), four from business coalitions or associations representing an array of private employers, and one from a labor organization.

Those commenters who expressed views on the ANPRM cited both the statute and the legislative history in taking the position that the CAA presumes that the regulations of the Department of Labor should not be modified. Illustrative comments included the following:

''[Section 304 of the CAA] evidences clear legislative intent that the Board apply these rights and protections to Congressional employees in a manner comparable to and consistent with the rights and protections applicable to employees in the private sector under regulations adopted by the Secretary (DOL). . . . The [CAA] requires that the regulations issued by the Board be the same as those issued by DOL unless the Board determines that modification would more effectively implement the rights and protections of the laws made applicable under the [CAA].''

''[I]f a law is right for the private sector, it is right for Congress; . . . Consistent with [this] principle, we would urge the Office not to deviate (except in those few areas where expressly authorized by the CAA) from applying the laws in the same manner in which they are applied to the private sector.

* * * * *

[W]e have not identified any situations in which modifications [of the DOL regulations] would be appropriate.''

''There are no circumstances that justify 'good cause' for adopting regulations that deviate from those currently applied to private sector employers.''

''[Section 203(c)(2)] confers on the Office of Compliance only very limited authority to deviate from the present DOL regulations. The legislative history to the 'good cause' exception likewise makes clear that this authority is to be use by the Office of Compliance sparingly.''

* * * * *

''The legislative history of the CAA demands that the Office of Compliance apply to Congress the same regulations as those imposed on the private sector.''

''[W]e urge the Board to refrain from modifying regulations promulgated by the Department of Labor and other Executive agencies. Use of established regulations will provide the Board, employees and employing offices with a body of instructive case law and interpretive documents.''

''While the Office serves an important implementation and enforcement role, it must not place itself in the position of shielding Congress from substantive requirements imposed on private businesses.''

Based on the comments and the Board's understanding of the law and the institutions to which it is being made applicable, the Board is issuing the Secretary's regulations with only these limited modifications: Technical changes in the nomenclature and deletion of those sections clearly inapplicable to the legislative branch.

2. Notice posting and recordkeeping

The ANPRM also invited comment on whether the recordkeeping and notice posting requirements of the various laws made applicable by the CAA are incorporated as statutory requirements of the CAA. The ANPRM inquired whether, if such requirements were not incorporated, could and should the Board develop its own requirements pursuant to its ''good cause'' authority. The ANPRM also invited comment on proposing guidelines and models for recordkeeping and notice posting.

Commenters were in agreement that recordkeeping and notice posting are important to the effective implementation of several of the statutes incorporated in the CAA. However, opinions as to whether the Board should require notice posting and recordkeeping were widely divergent. Several commenters expressed the view that the Board lacks the statutory authority to adopt notice posting and recordkeeping requirements

and that the notice posting and recordkeeping requirements of the FLSA do not apply to Congress. Other commenters expressed the view that the Board has the authority to issue regulations to impose recordkeeping and notice posting requirements and that such regulations should be, in substance, the same as those with which the private sector must comply.

The Board agrees with those commenters who took the position that, if employing offices are to be treated the same as private sector employers are treated under FLSA, they should have to comply with the statute's notice posting and recordkeeping requirements. Moreover, the Board notes that notice posting and recordkeeping promote the full and effective enforcement of these incorporated rights and protections. In the Board's view, notice posting and recordkeeping may well be in employers' interests both as a sound personnel practice and in order to defend against subsequent litigation.

But while the CAA incorporates certain specific sections of the FLSA, the CAA explicitly did not incorporate the notice posting and recordkeeping requirements of Section 11, 29 U.S.C. §211 of the FLSA. Because the Board's authority to modify the Secretary's regulations for ''good cause'' does not authorize it to adopt regulatory requirements that are the equivalent of statutory requirements that Congress has omitted from the CAA, the Board has determined that it may not impose such requirements on employing offices. However, as various commenters suggest, the Board will provide guidance to employing offices concerning model recordkeeping practices as part of carrying out its program of education under section 301(h) of the CAA (2 U.S.C. 1381(h)).

The Board would also note that based upon their collective years of experience representing employers and employees with regard to various labor and employment laws, including the FLSA, the absence of recordkeeping and notice posting requirements may create a void which can only partially be filled by the program of education to be carried out by the Board pursuant to Section 301(h)(1) and the optional notice which will be distributed by the Board pursuant to Section 301(h)(2). The Board also would emphasize that employees will in many circumstances be able to establish a prima facie case simply by their own testimony estimating the hours worked by the employees where the employing office has failed to maintain adequate, accurate records. An employing office may find that its ability to respond to an employee's prima facie case is substantially burdened by its failure to keep accurate payroll and time-records. If Congress wishes to experience the same burdens as faced by the private sector and also to address these issues, it should enact recordkeeping requirements comparable to those of the FLSA. (Of course, like the regulations under those statutes, such recordkeeping requirements may leave to the discretion of each employing office the precise form and manner in which records will be kept.) But, in light of the text and structure of the CAA, the Board believes that it is up to Congress to decide whether to do so.

II. The proposed regulations

A. Background

Congress committed enforcement of the Fair Labor Standards Act of 1938 to the Department of Labor and its Wage and Hour Division, whose regulations and interpretations of that Act comprise almost one thousand pages of Chapter V, Title 29 of the Code of Federal Regulations. In enacting the CAA, however, Congress expressly refused to commit enforcement to the executive branch of the Federal government nor did Congress bring its employing offices under the FLSA itself. Instead, Congress carefully specified, through sectional references to the FLSA, the substantive rights and protections afforded to legislative employees, and precisely mandated procedures by which those rights and protections would be largely enforced by a new and independent office in the legislative branch, the Office of Compliance. Further, in granting the Board rulemaking authority with respect to the FLSA in Section 203(c)(1) of the CAA, Congress affirmatively commanded the Board to issue substantive regulations, with the important directive that they ''shall be the same as substantive regulations promulgated by the Secretary of Labor * * * except as the Board may determine, for good cause shown * * * that a modification of such regulations would be more effective for the implementation of rights and protections under'' the CAA.

In the Board's view, and notwithstanding what has been urged by some of the commenters, this unusual statutory framework neither mandates nor allows an uncritical, wholesale incorporation of all the regulations and interpretive statements issued by the Labor Department under the FLSA. Rather, this statutory framework requires the Board to cull from the vast body of FLSA material found in the Code of Regulations only those items that constitute ''substantive regulations'' as the term is understood under settled principles of administrative law. (See *Batterton* v. *Francis,* 422 U.S. 416, 425, n. 9 (1977)). Moreover, the statutory framework authorizes the Board to delete those substantive regulations that either have no application in the employing offices of the Congress or that are not likely to be invoked. For these reasons, the Board is not proposing their adoption, unless public comments establish a justification to the contrary. Finally, by limiting itself to substantive regulations, the Board is not adopting those portions of 29 C.F.R. chapter V that constitute the interpretative bulletins or statements of the Department of Labor and its Wage and Hour Division.

B. Proposed regulations

1. General provisions

The proposed regulations include an initial Part 501 which contains matters of general applicability including the purpose and scope of the regulations, definitions, coverage, and the administrative authority of the Board and the Office of Compliance. In addition, a section explains the effect of interpretative bulletins and statements of the Department of Labor, and another section provides for the application of the Portal to Portal Act. These latter sections are discussed below.

It is noted that the definition section incorporates the general provisions of section 101 of the CAA which defines ''employee,'' ''covered employee,'' ''employing office,'' and ''employee of the House of Representatives.'' Section 203 of the CAA, which applies the rights and protections of the FLSA, also contemplates the promulgation of a definitional regulation that excludes ''interns'' from the meaning of ''covered employee.'' The Board in a separate NPRM issued on October 11, 1995, proposed such a regulation, together with a regulation governing irregular work schedules and the receipt of compensatory time in lieu of overtime compensation. The Board is reviewing the public comments received in response to that NPRM and will issue a separate final rule on those issues.

It should be noted that section 225(f)(1) of the CAA provides that, except where inconsistent with definitions of the CAA itself, the definitions in the laws made applicable by the CAA shall also apply under the CAA. Thus, attention must be paid to those definitions found in the FLSA that are consistent with the CAA even if they are not expressly incorporated in the proposed regulations. In this regard, one commenter expressed concern over whether employing offices would be obligated to pay minimum wages and overtime compensation to individuals who do volunteer work, in light of the fact that under the FLSA ''employee'' may include certain volunteers. See 29 U.S.C. §203(e)(4)(A), which excludes from the definition of ''employee'' only certain volunteers who perform work for a State, political subdivision, or interstate governmental agency. Similarly, it is noted that, in enacting the CAA, Congress did make separate provision for excluding interns. Thus, the Board has concluded that, to the extent that volunteer activity would bring an individual under the coverage of the FLSA, similarly situated individuals would be treated in the same manner under the CAA.

2. Provisions derived from regulations of the Department of Labor

Those regulations of the Department of Labor that are being adopted in substance include:

Part 531, which governs the manner in which an employee's wages are calculated taking into account the reasonable cost to an employer of furnishing board, lodging, or other facilities. This Part is derived from Section 3(m) of the FLSA, which directs how the ''wage'' paid to an employee is determined. Section 3(m) must be treated as applicable under the CAA by virtue of Section 225(f)(1), which authorizes generally the inclusion of those definitions and exemptions that are consistent with definitions and exemptions of the CAA. However, it is noted that section 3(m) is inconsistent with the CAA insofar as the implementing regulations in Part 531, Title 29, C.F.R., provide procedures by which the Wage and Hour Administrator makes determinations in specific cases with respect to the furnishing of board, lodging, or other facilities. Because the Administrator has no role in the enforcement of the CAA by reason of Section 225(f)(3), and because the Board is not at this time is not authorizing the Office of Compliance to make such specific determinations, the Board proposes to delete the provisions setting forth those procedures. Similarly, the reference to ''tipped employees'' and the method by which their wages are determined are deleted because the applicable sections assign responsibility to the Administrator.

Part 541, which defines and delimits the bona fide executive, administrative, and professional employees who are exempt under Section 13(a) of the FLSA from the minimum wage and maximum hours requirements. The Board has determined that this exemption, commonly known as the ''white collar'' exemption, is applicable to employing offices of Congress by virtue of Section 225(f)(1) of the CAA.

In the ANPRM, the Board solicited public comment on whether and to what extent it should modify the Labor Department's regulations regarding this exemption. Generally, the commenters did not question the applicability of this exemption to covered employees under the CAA, and several commenters urged the adoption of all of the Department's regulations in Part 541, 29 C.F.R., including the interpretative bulletins, without any modification. Two commenters contended that the Board's regulations should grant a sweeping exemption for nearly all staff employees working in elected members' offices because they exercise independent judgment and discretion in performing their responsibilities.

Other commenters urged the Board to modify the Labor Department regulations to take into account the unique job responsibilities of staff working for an elected member either in a personal office, in a leadership office or on committee. Recognizing that job titles alone cannot be dispositive of who is an exempt employee, these commenters urged the Board to identify with particularity those job duties which, if performed by an employee, would render him or her an exempt executive, administrative, or professional employee.

The Board is proposing to adopt the Labor Department's substantive regulations contained in Subpart A of Part 541 of 29 C.F.R. that set forth the fundamental criteria for satisfying each of the three exemptions. But, for the reasons explained below, the Board is not formally adopting the interpretative bulletins contained in Subpart B of Part 541 of 29 C.F.R., which discuss and illustrate through examples the Department's understanding of the exemption criteria.

With respect to some commenters' request that the Board modify the white collar exemptions, upon reflection, the Board has reluctantly concluded that such a modification would not satisfy the ''good cause'' requirement of Section 203(c)(2) of the CAA. The Board recognizes that the Secretary's regulations and interpretations were promulgated in a different era, with different employment paradigms in mind. Thus, the Board appreciates the many difficulties that employing offices will have in interpreting and reconciling these regulations to present day realities. Moreover, the Board is mindful of the significant impact the application of the administrative, executive and professional exemption will have on the structuring, functioning and expense of the Members' and Senators' personal offices and committee offices. However, the Board notes that private sector and state and local government employers face the same difficulties. And the Board has not found any sound, principled basis for modifying the exemption regulation for Congress and its instrumentalities. That resolved, the Board nonetheless wishes to make clear its intent to provide, as time and resources permit, appropriate general guidance to the Congress and its instrumentalities on how to identify and justify which employees are exempt. Such efforts made through the Office's education and information programs, will attempt to assist employing offices in determining which job duties will be considered exempt under the executive, administration or professional criteria.

Part 547, which defines, pursuant to Section 7(e)(3)(b) the standard that bona fide thrift or savings plans must meet in order not to be included within an employee's regular rate of pay for purposes of calculating overtime obligations under Section 7 of the FLSA. This is included in light of Section 203(a)1) of the CAA, which specifically applied the rights and protections of Section 7 of the FLSA.

Part 570, which sets forth the limitations on the use of child labor. This Part implements Section 12(c) of the FLSA, prohibiting oppressive child labor, as defined by Section 3(l) of the same Act. The former section is specifically referenced in Section 203(a)(1) of the CAA, while the latter must be referenced by reason of Section 225(f)(1) of the CAA. The inclusion of this Part in the separate regulations of the Senate is necessitated by the fact that the Senate allows for the appointment of congressional pages below the age of 16, unlike the House of Representatives, which by law sets a minimum age of 16 for such employees. For children under age 16, the FLSA regulations impose limitations on hours worked during the school year. Part 570 is also included in the separate regulations applicable to all other covered employees and employing offices. Given the hazardous nature of some of the activities of the support functions, such as maintenance and repair, Part 570 regulations are being proposed in the event that such instrumentalities employ children under 18 years of age. It is noted that the Board has not adopted regulations comparable to those set forth in the Labor Department's Subpart B (29 C.F.R. Sections 570.5-.27), authorizing the issuance of certificates of age. In addition, with respect to Section 570.52, governing the hazardous occupation of motor-vehicle driver and outside helper, the Board is not adopting the special exemption for school bus driving because by its terms no employing offices would satisfy the criteria of the regulation.

C. Secretary of Labor's regulations that the Board proposes not to adopt

In reviewing the remaining parts of the Labor Department's regulations, it is readily apparent that some have no application to the employing offices within the legislative branch. For this reason, the Board is not including them within its substantive regulations. Among the excluded regulations are: Part 510, which pertains to the application of the minimum wage provisions to Puerto Rico; Part 511, establishing a wage order procedure for American Samoa; Part 515, authorizing the utilization of State government agencies for investigations and inspections; Part 530, governing the employment of industrial homeworkers in certain industries; Part 549, defining the requirements of a ''bona fide profit-sharing plan or trust;'' Part 550, defining the term ''talent fees;'' Part 552, regulating the application of the FLSA to domestic service; Part 575, addressing child labor in certain agricultural employment; Parts 578, 579, and 580, implementing the civil money penalties provisions of the FLSA; and Part 679, dealing with industries in American Samoa. Unless public comments suggest otherwise, the Board intends including in the adopted regulations a provision stating that the Board has issued regulations on all matters for which the CAA requires a regulation. See Section 411 of the CAA.

Other substantive regulations could have application in the event that an employing office wished to avail itself of certain special wage rates, subminimum wage exemptions or overtime exemptions under the FLSA. These are found in: Parts 519–528, which authorize subminimum wages for full-time students, student-learners, apprentices, learners, messengers, workers with disabilities, and student workers; Part 548, which authorizes in the collective bargaining context the establishment of basic wage rates for overtime compensation purposes; and Part 551, which implements an overtime exemption for local delivery drivers and helpers. Unless public comments provide a sufficient justification to the contrary the Board is not proposing the adoption of regulations covering the foregoing subjects.

III. The Interpretive Bulletins and Other Relevant Guidance

In addition to the substantive regulations found in Subchapter A, the Department of Labor has issued, under Subchapter B, ''Statements of General Policy or Interpretations Not Directly Related to Regulations.'' 29 C.F.R Parts 775–794. Usually called Interpretive Bulletins, these statements make available in one place the official interpretations which guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties. As the interpretations of an administering agency, such statements are usually given some deference by the courts. As the Supreme Court has observed: ''the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore* v. *Swift,* 323 U.S. 134, 140 (1944).

However, unlike ''substantive regulations,'' these interpretations are not issued by the agency pursuant to its statutory authority to implement the statute and, more significantly, do not have the force and effect of law. See *Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977). The Board's mandate is only to issue substantive regulations that are ''the same as the substantive regulations of the Secretary of Labor to implement the statutory provision [of the FLSA] applied'' by Section 204(a) of the CAA unless modified for good cause (CAA Section 203 (c)(2)). Therefore, the Board, does not propose to adopt the non-substantive interpretations of the DOL and its Wage and Hour Division as substantive regulations under the CAA. Moreover, the Board is not proposing to issue the Department's interpretations as its own interpretations of the FLSA rights and protections made applicable under the CAA at this time. However, as discussed below, employing offices should be advised that, pursuant to the Portal to Portal Act, the Board will give due consideration to the Secretary's interpretations of the FLSA.

Application of the Portal to Portal Act.—The Portal to Portal Act, 61 Stat. 84 (1947), codified generally at 29 U.S.C. Sections 216 and 251, et seq. (''PPA''), contains provisions which affect the rights and liabilities of employees and employers with regard to alleged underpayment of minimum or overtime wages under the FLSA. Section 4 of the PPA excludes from the definition of hours worked both activities preliminary to or postliminary to the worker's principal activities and travel time absent a contract, custom or practice to the contrary. 29 U.S.C. Section 254. Sections 9 and 10 of the PPA provide the employer with a defense against liability or punishment in any action or proceeding brought against it for failure to comply with the minimum wage and overtime provisions of the FLSA, where the employer pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of the Wage and Hour Administrator of the Department of Labor. 29 U.S.C. Sections 258–259. The PPA also contains provisions which restrict and limit employee suits under section 16(b) of the FLSA. For example, section 11 of the PPA provides that in any action brought under section 216 of the FLSA, the court may in its discretion, subject to prescribed conditions, award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16(b) of the FLSA. 29 U.S.C. Section 260.

The Board has determined that the above provisions of the PPA are incorporated into section 203 of the CAA, either as an amendment to section 16(b) of the FLSA (which is expressly applied to the legislative branch under section 203(b) of the CAA), or by virtue of section 225(f) of the CAA, which applies the definitions and exemptions of the FLSA to the extent not inconsistent with the CAA. To that end, the Board will give due consideration to the interpretations of the FLSA of

the Secretary of Labor. Moreover, employing offices may utilize these interpretations in attempting to understand the rights and protections under the FLSA that have been made applicable by the CAA. Unless and until the Secretary's interpretive statements are superseded or interpretative guidance or decisions to the contrary are issued by the Board or the courts, they may be relied upon for purposes of defending against claims brought under the CAA to the same extent as private sector employers may properly rely upon them in actions brought under the FLSA.

Joint Employer Doctrine.—The Board solicited comments in the ANPRM on whether and to what extent the joint employment doctrine as developed under the FLSA is applicable under the CAA. The comments generally advocated adoption of the doctrine to employing offices of the Congress. However, since the issue of joint employment is addressed through a DOL interpretive bulletin set forth in Part 791, 29 C.F.R., rather than a substantive regulation, the Board is not adopting it as such nor issuing it as its own interpretive statement. See discussion at Section III.

Equal Pay Act.—With respect to the Equal Pay Act (EPA), which is included in Section 6(d) of the FLSA, 29 U.S.C. Section 206(d), the Secretary of Labor promulgated interpretative regulations that were originally included in 29 C.F.R. Part 800. Pursuant to the provisions of Reorganization Plan No. 1 of 1978, as confirmed by the Congress in Public Law 98–532, 98 Stat. 2705 (1984), enforcement and administration of the EPA was transferred from the Secretary of Labor to the Equal Employment Opportunity Commission (EEOC). The EEOC promulgated its own interpretations implementing the EPA at 29 C.F.R. Part 1620. Thereafter, the Secretary deleted its interpretations. 52 FR 2517 (Jan. 23, 1987). Thus, there are no substantive regulations implementing the EPA. Under the rationale previously stated regarding the Portal to Portal Act, the Board declines to incorporate the EEOC interpretations as substantive regulations under the CAA but will recognize them as is appropriate.

Opinion letters.—Commenters asked that the Board consider establishing a process under which the Office or the Board would issue opinion letters and upon which employing offices could rely, similar to the procedure followed by the Wage and Hour Administrator in sometimes providing such opinions at the request of private sector employers. The Board understands employing offices' desire for guidance and clarity regarding their obligations under the CAA.

To the extent that the Board itself can address issues through regulations or interpretations, it will do so. Moreover, the Office intends to provide appropriate education and technical assistance as part of its education and information responsibilities. But for the reasons stated here, the Board and the Office's ability to do so is limited by legal, resource and policy considerations. As is the case in the private sector context, many issues under these statutes can only be definitively resolved through case-by-case adjudication on particular facts. Moreover, except in the context of statutes subject to the Portal to Portal Act, it is doubtful that the Board or the Office has the statutory authority to issue guidance with legal effect (outside of the adjudicatory or rulemaking contexts); we are not aware of any such legal authorization for Executive Branch agencies to do so in the context of applying these same laws to the private sector. Further, the resources of the Board and the Office are limited: the first year appropriation is for $2.5 million. These resources are substantially less than those available to analogous Executive Branch agencies that administer fewer laws. Finally, public comment has not provided the Board with the facts necessary for yet making any of these determinations—and a detailed evidentiary record is necessary for such judgment to be made. In short, particularly in light of the various statutory responsibilities of the Office and the Board, it is not possible to give answers with legal effect to each individual request for information and guidance. While the Board will structure education and information programs to assist employees and employing offices, it is forced to respond that, like private employers, employing offices will generally have to rely on their own counsel and human resource advisors in determining their compliance with the Congressional Accountability Act.

IV. 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 21st day of November, 1995.

GLEN D. NAGER,
Chair of the Board,
Office of Compliance.

SUBTITLE A—REGULATIONS RELATING TO THE SENATE AND ITS EMPLOYING OFFICES—S SERIES

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART H501—GENERAL PROVISIONS

Sec.

§ S501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (CO) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

Part 531: Wage payments under the Fair Labor Standards Act of 1938—Part S531.

Part 541: Defining and delimiting the terms ''bona fide executive,'' ''administrative,'' and ''professional'' employees—Part S541.

Part 547: Requirements of a ''Bona fide thrift or savings plan''—Part S547.

Part 570: Child labor—Part S570.

SUBPART A—MATTERS OF GENERAL APPLICABILITY

§ S501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§206(a)(1) and (d), 207, 212(c)) shall apply to covered employees of the legislative branch of the Federal government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSA, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to Sections 203(c) and 304 of the CAA, which require that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of §203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

§ S501.102 Definitions.

For purposes of this chapter:

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

(b) *FLSA* or *Act* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201 et seq.).

(c) *Covered employee* means any employee of the Senate, including an applicant for employment and a former employee.

(d) *Employee of the Senate* includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(e) *Employing office* and *employer* mean (1) the personal office of a Senator; (2) a committee of the Senate or a joint committee; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the Senate.

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

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

§ S501.103 Coverage.

The coverage of Section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§ S501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of Section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of Sections 203(c) and 304 of the CAA.

(c) The Board may in its discretion from time to time issue interpretative statements providing guidance to employees and to employing offices on the rights and protections established under the FLSA that are made applicable by Sections 203(a) and 225 of the CAA.

§ S501.105 Effect of Interpretations of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutorily-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977). See also 29 C.F.R. §790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the FLSA. See 29 C.F.R. §790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No.8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore* v. *Swift,* 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing Section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§ S501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with Section 225 of the CAA, the Portal to Portal Act (PPA), 29 U.S.C. §§216 and 251 *et seq.,* is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. §259, provides in pertinent part: [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] * * * or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon:

(1) Any written administrative regulation, order, decision, ruling, approval or interpretation, or any administrative practice or enforcement policy, of the Board.

(2) Any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided,* that such regulation, order, ruling approval or interpretation had not been superseded at the time of reliance by any regulation, order, decision, ruling, approval or interpretation, or any administrative practice or enforcement policy, of the Board or the courts.

PART S531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

SUBPART A—PRELIMINARY MATTERS

Sec.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

SUBPART A—PRELIMINARY MATTERS

§ S531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

531.1 Definitions.—S531.1.

531.2 Purpose and scope.—S531.2.

531.3 General determinations of ''reasonable cost''.—S531.3.

531.6 Effects of collective bargaining agreements.—S531.6.

§ S531.1 Definitions.

(a) Administrator means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) Act means the Fair Labor Standards Act of 1938, as amended.

§ S531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term ''wage'' to include the ''reasonable cost', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the ''fair value'' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of ''fair value'' Whenever so determined and when applicable and pertinent, the ''fair value'' of the facilities involved shall be includable as part of ''wages'' instead of the actual measure of the costs of those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of ''wages'' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the ''reasonable cost'' and ''fair value'' of board, lodging, or other facilities having general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§ S531.3 General determinations of "reasonable cost."

(a) The term reasonable cost as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer: *Provided,* That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term good accounting practices does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term depreciation includes obsolescence.

(d)(1) The cost of furnishing ''facilities'' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer;

(iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ S531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be ''bona fide'' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART S541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE,'' ''ADMINISTRATIVE,'' OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL)

SUBPART A—GENERAL REGULATIONS

Sec.

SUBPART A—GENERAL REGULATIONS

§ S541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

541.1 Executive.—S541.1.

541.2 Administrative.—S541.2.

541.3 Professional.—S541.3.

541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees.—S541.5b.

§ S541.01 Application of the exemptions of section 13(a)(1) of the FLSA.

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of Section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c) and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections of covered employees.

§ S541.1 Executive.

The term *employee employed in a bona fide executive* * * * *capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section

§ S541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either: (1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or (2) The performance of functions in the administration of the Congressional Page School or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or (2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers of the Congressional Page School: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ S541.3 Professional.

The term *employee employed in a bona fide* * * * *professional capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of: (1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the Congressional Page School, or (4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring

invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further*, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6½ times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ S541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work,'' the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

PART S547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN.''

Sec.

§ S547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

547.0 Scope and effect of part.—S547.0.

547.1 Essential requirements of qualifications.—S547.1.

547.2 Disqualifying provisions.—S547.2.

§ S547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ S547.1 Essential requirements for qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § S547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however*, That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: *Provided, however*, That a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a ''bona fide thrift or savings plan'' within the meaning of section 7(e)(3)(b) of the Act if: (1) The plan meets all the other standards of this section; (2) The plan contains none of the disqualifying factors enumerated in § S547.2; (3) The employer's contribution is based to a substantial degree upon retention of savings; and (4) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided*, That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ S547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PART S570—CHILD LABOR REGULATIONS

SUBPART A—GENERAL

Sec.

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

SUBPART A—GENERAL

§ S570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance Regulations under Section 202 of the CAA:

Secretary of Labor Regulations—OC Regulations.

570.1 Definitions.—S570.1.

570.2 Minimum age standards.—S570.2.

570.31 Determinations.—S570.31.

570.32 Effect of this subpart.—S570.32.

570.33 Occupations.—S570.33.

570.35 Periods and conditions of employment.—S570.35.

§ S570.1 Definitions.

As used in this part:

(a) Act means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219).

(b) Oppressive child labor means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in Sec. S570.2 of this subpart.

(c) Oppressive child labor age means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) [Reserved]

(e) [Reserved]

(f) Secretary or Secretary of Labor means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(g) Wage and Hour Division means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) Administrator means the Administrator of the Wage and Hour Division or his authorized representative.

§ S570.2 Minimum age standards.

(a) All occupations except in agriculture. (1) The Act, in section 3(1), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions: (i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see subpart C of this part); and (ii)

The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being. (2) The Act exempts from its minimum age requirements the employment by a parent of his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

SUBPART B [RESERVED]

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

§ S570.31 Determination.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

§ S570.32 Effect of this subpart.

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in § S570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

§ S570.33 Occupations.

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(1) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with: (1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means; (2) Warehousing and storage; (3) Communications and public utilities; (4) Construction (including demolition and repair); except such office (including ticket office) work, or sales work, in connection with paragraphs (f)(1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

§ S570.35 Periods and conditions of employment.

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods: (1) Outside school hours; (2) Not more than 40 hours in any 1 week when school is not in session; (3) Not more than 18 hours in any 1 week when school is in session; (4) Not more than 8 hours in any 1 day when school is not in session; (5) Not more than 3 hours in any 1 day when school is in session; and (6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

FAIR LABOR STANDARDS ACT

PROPOSED REGULATIONS RELATING TO THE HOUSE OF REPRESENTATIVES AND ITS EMPLOYING OFFICES

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Extension of Rights and Protections Under the Fair Labor Standards Act of 1938 (Notices of Proposed Rulemaking with respect to Interns and Irregular Work Schedules were issued on October 11. The comment period closed on November 13. Final rules will be issued separately pursuant to Section 304 of the CAA.)

Notice of proposed rulemaking

Summary: The Board of Directors of the Office of Compliance is publishing proposed rules to implement section 203(c) of the Congressional Accountability Act of 1995 (P.L. 104–1, Stat. 10) (''CAA''). The proposed regulations, which are to be applied to the House of Representatives and employees of the House of Representatives, set forth the recommendations of the Deputy Executive Director for the House of Representatives, Office of Compliance, as approved by the Board of Directors, Office of Compliance.

Dates: Comments are due within 30 days after publication of this Notice in the Congressional Record.

Addresses: Submit written comments to the Chair of the Board of Directors, Office of Compliance, Room LA 200, Library of Congress, Washington, D.C. 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 (''FAX'') machine to (202) 252–3115. 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, D.C., Monday through Friday, between the hours of 9:30 a.m. and 4:00 p.m.

For further information contact: Deputy Executive Director for the House of Representatives, Office of Compliance at (202) 252–3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this Notice in an alternative format should be made to Mr. Russell Jackson, Director, Service Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, (202) 224–2705.

Supplementary Information:

I. Background

A. Introduction

The Congressional Accountability Act of 1995 (''CAA''), PL 104-1, was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 203(a) of the CAA applies the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1) and (d), 207, 212(c) (''FLSA'') to covered employees and employing offices. Section 203(c) of the CAA (2 U.S.C. Section 1313(c)) directs the Board of Directors of the Office of Compliance established under the CAA to issue regulations to implement the section. Section 203(c)(2) (2 U.S.C. Section 1313(c)(2)) further states that such regulations, with the exception of certain irregular work schedule regulations to be issued under section 203(a)(3), ''shall be the same as substantive regulations issued by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) except insofar as the Board may 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 this section.''

B. Advance notice of proposed rulemaking

On September 28, 1995, the Board of the Office of Compliance issued an Advance Notice of Proposed Rulemaking (''ANPRM'') soliciting comments from interested parties in order to obtain participation and information early in the rulemaking process. 141 Cong. R. S14542 (daily ed., Sept. 28, 1995). In addition to inviting comment on specific questions arising under five of the statutes made applicable by the CAA in the ANPRM, the Board and the statutory appointees of the Office sought consultation with the Chair of the Administrative Conference of the United States, the Secretary of Labor and the Director of the Office of Personnel Management with regard to the development of these regulations in accordance with section 304(g) of the CAA. The Office has also consulted with interested parties to further its understanding of the need for and content of appropriate regulations. Based on the information gleaned from these consultations and the comments on the ANPRM, the Board of Directors of the Office of Compliance is publishing these proposed rules, pursuant to Section 203(c)(1) of the CAA (2 U.S.C. Section 1313(c)(1)).

1. Modification of the regulations of the Department of Labor

In the ANPRM, the Board asked the question, ''Whether and to what extent should the Board modify the Secretary's Regulations?'' The Board received 15 comments on the ANPRM: two from Senators, four from House Members (one from the leadership of the Committee with primary jurisdiction for the CAA and one from three of the sponsors of the CAA), one from the Secretary of the Senate and three from House offices (two from institutional offices and one from a Member's Chief of Staff), four from business coalitions or associations representing an array of private employers, and one from a labor organization.

Those commenters who expressed views on the ANPRM cited both the statute and the legislative history in taking the position that the CAA presumes that the regulations of the Department of Labor should not be modified. Illustrative comments included the following:

''[Section 304 of the CAA] evidences clear legislative intent that the Board apply these rights and protections to Congressional employees in a manner comparable to and consistent with the rights and protections applicable to employees in the private sector under regulations adopted by the Secretary (DOL). . . . The [CAA] requires that the regulations issued by the Board be the same as those issued by DOL unless the Board determines that modification would more effectively implement the rights and protections of the laws made applicable under the [CAA].''

''[I]f a law is right for the private sector, it is right for Congress; . . . Consistent with [this] principle, we would urge the Office not to deviate (except in those few areas where expressly authorized by the CAA) from applying the laws in the same manner in which they are applied to the private sector.

* * * * *

[W]e have not identified any situations in which modifications [of the DOL regulations] would be appropriate.''

''There are no circumstances that justify 'good cause' for adopting regulations that deviate from those currently applied to private sector employers.''

''[Section 203(c)(2)] confers on the Office of Compliance only very limited authority to

deviate from the present DOL regulations. The legislative history to the 'good cause' exception likewise makes clear that this authority is to be used by the Office of Compliance sparingly.''

* * * * *

''The legislative history of the CAA demands that the Office of Compliance apply to Congress the *same* regulations as those imposed on the private sector.''

''[W]e urge the Board to refrain from modifying regulations promulgated by the Department of Labor and other Executive agencies. Use of established regulations will provide the Board, employees and employing offices with a body of instructive case law and interpretive documents.''

''While the Office serves an important implementation and enforcement role, it must not place itself in the position of shielding Congress from substantive requirements imposed on private businesses.''

Based on the comments and the Board's understanding of the law and the institutions to which it is being made applicable, the Board is issuing the Secretary's regulations with only these limited modifications: Technical changes in the nomenclature and deletion of those sections clearly inapplicable to the legislative branch.

2. Notice posting and recordkeeping

The ANPRM also invited comment on whether the recordkeeping and notice posting requirements of the various laws made applicable by the CAA are incorporated as statutory requirements of the CAA. The ANPRM inquired whether, if such requirements were not incorporated, could and should the Board develop its own requirements pursuant to its ''good cause'' authority. The ANPRM also invited comment on proposing guidelines and models for recordkeeping and notice posting.

Commenters were in agreement that recordkeeping and notice posting are important to the effective implementation of several of the statutes incorporated in the CAA. However, opinions as to whether the Board should require notice posting and recordkeeping were widely divergent. Several commenters expressed the view that the Board lacks the statutory authority to adopt notice posting and recordkeeping requirements and that the notice posting and recordkeeping requirements of the FLSA do not apply to Congress. Other commenters expressed the view that the Board has the authority to issue regulations to impose recordkeeping and notice posting requirements and that such regulations should be, in substance, the same as those with which the private sector must comply.

The Board agrees with those commenters who took the position that, if employing offices are to be treated the same as private sector employers are treated under FLSA, they should have to comply with the statute's notice posting and recordkeeping requirements. Moreover, the Board notes that notice posting and recordkeeping promote the full and effective enforcement of these incorporated rights and protections. In the Board's view, notice posting and recordkeeping may well be in employers' interests both as a sound personnel practice and in order to defend against subsequent litigation.

But while the CAA incorporates certain specific sections of the FLSA, the CAA explicitly did not incorporate the notice posting and recordkeeping requirements of Section 11, 29 U.S.C. §211 of the FLSA. Because the Board's authority to modify the Secretary's regulations for ''good cause'' does not authorize it to adopt regulatory requirements that are the equivalent of statutory requirements that Congress has omitted from the CAA, the Board has determined that it may not impose such requirements on employing offices. However, as various commenters suggest, the Board will provide guidance to employing offices concerning model recordkeeping practices as part of carrying out its program of education under section 301(h) of the CAA (2 U.S.C. 1381(h)).

The Board would also note that based upon their collective years of experience representing employers and employees with regard to various labor and employment laws, including the FLSA, the absence of recordkeeping and notice posting requirements may create a void which can only partially be filled by the program of education to be carried out by the Board pursuant to Section 301(h)(1) and the optional notice which will be distributed by the Board pursuant to Section 301(h)(2). The Board also would emphasize that employees will in many circumstances be able to establish a prima facie case simply by their own testimony estimating the hours worked by the employees where the employing office has failed to maintain adequate, accurate records. An employing office may find that its ability to respond to an employee's prima facie case is substantially burdened by its failure to keep accurate payroll and time-records. If Congress wishes to experience the same burdens as faced by the private sector and also to address these issues, it should enact recordkeeping requirements comparable to those of the FLSA. (Of course, like the regulations under those statutes, such recordkeeping requirements may leave to the discretion of each employing office the precise form and manner in which records will be kept.) But, in light of the text and structure of the CAA, the Board believes that it is up to Congress to decide whether to do so.

II. The proposed regulations

A. Background

Congress committed enforcement of the Fair Labor Standards Act of 1938 to the Department of Labor and its Wage and Hour Division, whose regulations and interpretations of that Act comprise almost one thousand pages of Chapter V, Title 29 of the Code of Federal Regulations. In enacting the CAA, however, Congress expressly refused to commit enforcement to the executive branch of the Federal government nor did Congress bring its employing offices under the FLSA itself. Instead, Congress carefully specified, through sectional references to the FLSA, the substantive rights and protections afforded to legislative employees, and precisely mandated procedures by which those rights and protections would be largely enforced by a new and independent office in the legislative branch, the Office of Compliance. Further, in granting the Board rulemaking authority with respect to the FLSA in Section 203(c)(1) of the CAA, Congress affirmatively commanded the Board to issue substantive regulations, with the important directive that they ''shall be the same as substantive regulations promulgated by the Secretary of Labor * * * except as the Board may determine, for good cause shown * * * that a modification of such regulations would be more effective for the implementation of rights and protections under'' the CAA.

In the Board's view, and notwithstanding what has been urged by some of the commenters, this unusual statutory framework neither mandates nor allows an uncritical, wholesale incorporation of all the regulations and interpretive statements issued by the Labor Department under the FLSA. Rather, this statutory framework requires the Board to cull from the vast body of FLSA material found in the Code of Regulations only those items that constitute ''substantive regulations'' as the term is understood under settled principles of administrative law. (*See Batterton* v. *Francis*, 422 U.S. 416, 425, n. 9 (1977)). Moreover, the statutory framework authorizes the Board to delete those substantive regulations that either have no application in the employing offices of the Congress or that are not likely to be invoked. For these reasons, the Board is not proposing their adoption, unless public comments establish a justification to the contrary. Finally, by limiting itself to substantive regulations, the Board is not adopting those portions of 29 C.F.R. chapter V that constitute the interpretative bulletins or statements of the Department of Labor and its Wage and Hour Division.

B. Proposed regulations

1. General provisions

The proposed regulations include an initial Part 501 which contains matters of general applicability including the purpose and scope of the regulations, definitions, coverage, and the administrative authority of the Board and the Office of Compliance. In addition, a section explains the effect of interpretative bulletins and statements of the Department of Labor, and another section provides for the application of the Portal to Portal Act. These latter sections are discussed below.

It is noted that the definition section incorporates the general provisions of section 101 of the CAA which defines ''employee,'' ''covered employee,'' ''employing office,'' and ''employee of the House of Representatives.'' Section 203 of the CAA, which applies the rights and protections of the FLSA, also contemplates the promulgation of a definitional regulation that excludes ''interns'' from the meaning of ''covered employee.'' The Board in a separate NPRM issued on October 11, 1995, proposed such a regulation, together with a regulation governing irregular work schedules and the receipt of compensatory time in lieu of overtime compensation. The Board is reviewing the public comments received in response to that NPRM and will issue a separate final rule on those issues.

It should be noted that section 225(f)(1) of the CAA provides that, except where inconsistent with definitions of the CAA itself, the definitions in the laws made applicable by the CAA shall also apply under the CAA. Thus, attention must be paid to those definitions found in the FLSA that are consistent with the CAA even if they are not expressly incorporated in the proposed regulations. In this regard, one commenter expressed concern over whether employing offices would be obligated to pay minimum wages and overtime compensation to individuals who do volunteer work, in light of the fact that under the FLSA ''employee'' may include certain volunteers. See 29 U.S.C. §203(e)(4)(A), which excludes from the definition of ''employee'' only certain volunteers who perform work for a State, political subdivision, or interstate governmental agency. Similarly, it is noted that, in enacting the CAA, Congress did make separate provision for excluding interns. Thus, the Board has concluded that, to the extent that volunteer activity would bring an individual under the coverage of the FLSA, similarly situated individuals would be treated in the same manner under the CAA.

2. Provisions derived from regulations of the Department of Labor:

Those regulations of the Department of Labor that are being adopted in substance include:

Part 531, which governs the manner in which an employee's wages are calculated taking into account the reasonable cost to

an employer of furnishing board, lodging, or other facilities. This Part is derived from Section 3(m) of the FLSA, which directs how the ''wage'' paid to an employee is determined. Section 3(m) must be treated as applicable under the CAA by virtue of Section 225(f)(1), which authorizes generally the inclusion of those definitions and exemptions that are consistent with definitions and exemptions of the CAA. However, it is noted that section 3(m) is inconsistent with the CAA insofar as the implementing regulations in Part 531, Title 29, C.F.R., provide procedures by which the Wage and Hour Administrator makes determinations in specific cases with respect to the furnishing of board, lodging, or other facilities. Because the Administrator has no role in the enforcement of the CAA by reason of Section 225(f)(3), and because the Board is not at this time authorizing the Office of Compliance to make such specific determinations, the Board proposes to delete the provisions setting forth those procedures. Similarly, the reference to ''tipped employees'' and the method by which their wages are determined are deleted because the applicable sections assign responsibility to the Administrator.

Part 541, which defines and delimits the bona fide executive, administrative, and professional employees who are exempt under Section 13(a) of the FLSA from the minimum wage and maximum hours requirements. The Board has determined that this exemption, commonly known as the ''white collar'' exemption, is applicable to employing offices of Congress by virtue of Section 225(f)(1) of the CAA.

In the ANPRM, the Board solicited public comment on whether and to what extent it should modify the Labor Department's regulations regarding this exemption. Generally, the commenters did not question the applicability of this exemption to covered employees under the CAA, and several commenters urged the adoption of all of the Department's regulations in Part 541, 29 C.F.R., including the interpretative bulletins, without any modification. Two commenters contended that the Board's regulations should grant a sweeping exemption for nearly all staff employees working in elected members' offices because they exercise independent judgment and discretion in performing their responsibilities.

Other commenters urged the Board to modify the Labor Department regulations to take into account the unique job responsibilities of staff working for an elected member either in a personal office, in a leadership office or on committee. Recognizing that job titles alone cannot be dispositive of who is an exempt employee, these commenters urged the Board to identify with particularity those job duties which, if performed by an employee, would render him or her an exempt executive, administrative, or professional employee.

The Board is proposing to adopt the Labor Department's substantive regulations contained in Subpart A of Part 541 of 29 C.F.R. that set forth the fundamental criteria for satisfying each of the three exemptions. But, for the reasons explained below, the Board is not formally adopting the interpretative bulletins contained in Subpart B of Part 541 of 29 C.F.R., which discuss and illustrate through examples the Department's understanding of the exemption criteria.

With respect to some commenters' request that the Board modify the white collar exemptions, upon reflection, the Board has reluctantly concluded that such a modification would not satisfy the ''good cause'' requirement of Section 203(c)(2) of the CAA. The Board recognizes that the Secretary's regulations and interpretations were promulgated in a different era, with different employment paradigms in mind. Thus, the Board appreciates the many difficulties that employing offices will have in interpreting and reconciling these regulations to present day realities. Moreover, the Board is mindful of the significant impact the application of the administrative, executive and professional exemption will have on the structuring, functioning and expense of the Members' and Senators' personal offices and committee offices. However, the Board notes that private sector and state and local government employers face the same difficulties. And the Board has not found any sound, principled basis for modifying the exemption regulation for Congress and its instrumentalities. That resolved, the Board nonetheless wishes to make clear its intent to provide, as time and resources permit, appropriate general guidance to the Congress and its instrumentalities on how to identify and justify which employees are exempt. Such efforts made through the Office's education and information programs, will attempt to assist employing offices in determining which job duties will be considered exempt under the executive, administration or professional criteria.

Part 547, which defines, pursuant to Section 7(e)(3)(b) the standard that bona fide thrift or savings plans must meet in order not to be included within an employee's regular rate of pay for purposes of calculating overtime obligations under Section 7 of the FLSA. This is included in light of Section 203(a)(1) of the CAA, which specifically applied the rights and protections of Section 7 of the FLSA.

Part 570, which sets forth the limitations on the use of child labor. This Part implements Section 12(c) of the FLSA, prohibiting oppressive child labor, as defined by Section 3(l) of the same Act. The former section is specifically referenced in Section 203(a)(1) of the CAA, while the latter must be referenced by reason of Section 225(f)(1) of the CAA. The inclusion of this Part in the separate regulations of the Senate is necessitated by the fact that the Senate allows for the appointment of congressional pages below the age of 16, unlike the House of Representatives, which by law sets a minimum age of 16 for such employees. For children under age 16, the FLSA regulations impose limitations on hours worked during the school year. Part 570 is also included in the separate regulations applicable to all other covered employees and employing offices. Given the hazardous nature of some of the activities of the support functions, such as maintenance and repair, Part 570 regulations are being proposed in the event that such instrumentalities employ children under 18 years of age. It is noted that the Board has not adopted regulations comparable to those set forth in the Labor Department's Subpart B (29 C.F.R. Sections 570.5–.27), authorizing the issuance of certificates of age. In addition, with respect to Section 570.52, governing the hazardous occupation of motor-vehicle driver and outside helper, the Board is not adopting the special exemption for school bus driving because by its terms no employing offices would satisfy the criteria of the regulation.

C. Secretary of Labor's Regulations That the Board Proposes Not to Adopt

In reviewing the remaining parts of the Labor Department's regulations, it is readily apparent that some have no application to the employing offices within the legislative branch. For this reason, the Board is not including them within its substantive regulations. Among the excluded regulations are: Part 510, which pertains to the application of the minimum wage provisions to Puerto Rico; Part 511, establishing a wage order procedure for American Samoa; Part 515, authorizing the utilization of State government agencies for investigations and inspections; Part 530, governing the employment of industrial homeworkers in certain industries; Part 549, defining the requirements of a ''bona fide profit-sharing plan or trust;'' Part 550, defining the term ''talent fees;'' Part 552, regulating the application of the FLSA to domestic service; Part 575, addressing child labor in certain agricultural employment; Parts 578, 579, and 580, implementing the civil money penalties provisions of the FLSA; and Part 679, dealing with industries in American Samoa. Unless public comments suggest otherwise, the Board intends including in the adopted regulations a provision stating that the Board has issued regulations on all matters for which the CAA requires a regulation. *See* Section 411 of the CAA.

Other substantive regulations could have application in the event that an employing office wished to avail itself of certain special wage rates, subminimum wage exemptions or overtime exemptions under the FLSA. These are found in: Parts 519–528, which authorize subminimum wages for full-time students, student-learners, apprentices, learners, messengers, workers with disabilities, and student workers; Part 548, which authorizes in the collective bargaining context the establishment of basic wage rates for overtime compensation purposes; and Part 551, which implements an overtime exemption for local delivery drivers and helpers. Unless public comments provide a sufficient justification to the contrary the Board is not proposing the adoption of regulations covering the foregoing subjects.

III. The interpretive bulletins and other relevant guidance

In addition to the substantive regulations found in Subchapter A, the Department of Labor has issued, under Subchapter B, ''Statements of General Policy or Interpretations Not Directly Related to Regulations.'' 29 C.F.R Parts 775–794. Usually called Interpretive Bulletins, these statements make available in one place the official interpretations which guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties. As the interpretations of an administering agency, such statements are usually given some deference by the courts. As the Supreme Court has observed:

''the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.''

Skidmore v. *Swift*, 323 U.S. 134, 140 (1944).

However, unlike ''substantive regulations,'' these interpretations are not issued by the agency pursuant to its statutory authority to implement the statute and, more significantly, do not have the force and effect of law. See *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). The Board's mandate is only to issue substantive regulations that are ''the same as the substantive regulations of the Secretary of Labor to implement the statutory provision [of the FLSA] applied'' by Section 204(a) of the CAA unless modified for good cause (CAA Section 203 (c)(2)). Therefore, the Board, does not propose to adopt the non-substantive interpretations of the DOL and its Wage and Hour Division as substantive regulations under the CAA.

Moreover, the Board is not proposing to issue the Department's interpretations as its own interpretations of the FLSA rights and protections made applicable under the CAA at this time. However, as discussed below, employing offices should be advised that, pursuant to the Portal to Portal Act, the Board will give due consideration the Secretary's interpretations of the FLSA.

Application of the Portal to Portal Act.—The Portal to Portal Act, 61 Stat. 84 (1947), codified generally at 29 U.S.C. Sections 216 and 251, et seq. (''PPA''), contains provisions which affect the rights and liabilities of employees and employers with regard to alleged underpayment of minimum or overtime wages under the FLSA. Section 4 of the PPA excludes from the definition of hours worked both activities preliminary to or postliminary to the worker's principal activities and travel time absent a contract, custom or practice to the contrary. 29 U.S.C. Section 254. Sections 9 and 10 of the PPA provide the employer with a defense against liability or punishment in any action or proceeding brought against it for failure to comply with the minimum wage and overtime provisions of the FLSA, where the employer pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of the Wage and Hour Administrator of the Department of Labor. 29 U.S.C. Sections 258-259. The PPA also contains provisions which restrict and limit employee suits under section 16(b) of the FLSA. For example, section 11 of the PPA provides that in any action brought under section 216 of the FLSA, the court may in its discretion, subject to prescribed conditions, award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16(b) of the FLSA. 29 U.S.C. Section 260.

The Board has determined that the above provisions of the PPA are incorporated into section 203 of the CAA, either as an amendment to section 16(b) of the FLSA (which is expressly applied to the legislative branch under section 203(b) of the CAA), or by virtue of section 225(f) of the CAA, which applies the definitions and exemptions of the FLSA to the extent not inconsistent with the CAA. To that end, the Board will give due consideration to the interpretations of the FLSA of the Secretary of Labor. Moreover, employing offices may utilize these interpretations in attempting to understand the rights and protections under the FLSA that have been made applicable by the CAA. Unless and until the Secretary's interpretive statements are superseded or interpretative guidance or decisions to the contrary are issued by the Board or the courts, they may be relied upon for purposes of defending against claims brought under the CAA to the same extent as private sector employers may properly rely upon them in actions brought under the FLSA.

Joint Employer Doctrine.—The Board solicited comments in the ANPRM on whether and to what extent the joint employment doctrine as developed under the FLSA is applicable under the CAA. The comments generally advocated adoption of the doctrine to employing offices of the Congress. However, since the issue of joint employment is addressed through a DOL interpretive bulletin set forth in Part 791, 29 C.F.R., rather than a substantive regulation, the Board is not adopting it as such nor issuing it as its own interpretive statement. See discussion at Section III.

Equal Pay Act.—With respect to the Equal Pay Act (EPA), which is included in Section 6(d) of the FLSA, 29 U.S.C. Section 206(d), the Secretary of Labor promulgated interpretative regulations that were originally included in 29 C.F.R. Part 800. Pursuant to the provisions of Reorganization Plan No. 1 of 1978, as confirmed by the Congress in Public Law 98-532, 98 Stat. 2705 (1984), enforcement and administration of the EPA was transferred from the Secretary of Labor to the Equal Employment Opportunity Commission (EEOC). The EEOC promulgated its own interpretations implementing the EPA at 29 C.F.R. Part 1620. Thereafter, the Secretary deleted its interpretations. 52 FR 2517 (Jan. 23, 1987). Thus, there are no substantive regulations implementing the EPA. Under the rationale previously stated regarding the Portal to Portal Act, the Board declines to incorporate the EEOC interpretations as substantive regulations under the CAA but will recognize them as is appropriate.

Opinion Letters.—Commenters asked that the Board consider establishing a process under which the Office or the Board would issue opinion letters and upon which employing offices could rely, similar to the procedure followed by the Wage and Hour Administrator in sometimes providing such opinions at the request of private sector employers. The Board understands employing offices' desire for guidance and clarity regarding their obligations under the CAA.

To the extent that the Board itself can address issues through regulations or interpretations, it will do so. Moreover, the Office intends to provide appropriate education and technical assistance as part of its education and information responsibilities. But for the reasons stated here, the Board and the Office's ability to do so is limited by legal, resource and policy considerations. As is the case in the private sector context, many issues under these statutes can only be definitively resolved through case-by-case adjudication on particular facts. Moreover, except in the context of statutes subject to the Portal to Portal Act, it is doubtful that the Board or the Office has the statutory authority to issue guidance with legal effect (outside of the adjudicatory or rulemaking contexts); we are not aware of any such legal authorization for Executive Branch agencies to do so in the context of applying these same laws to the private sector. Further, the resources of the Board and the Office are limited: the first year appropriation is for $2.5 million. These resources are substantially less than those available to analogous Executive Branch agencies that administer fewer laws. Finally, public comment has not provided the Board with the facts necessary for yet making any of these determinations—and a detailed evidentiary record is necessary for such judgment to be made. In short, particularly in light of the various statutory responsibilities of the Office and the Board, it is not possible to give answers with legal effect to each individual request for information and guidance. While the Board will structure education and information programs to assist employees and employing offices, it is forced to respond that, like private employers, employing offices will generally have to rely on their own counsel and human resource advisors in determining their compliance with the Congressional Accountability Act.

IV. 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 21st day of November, 1995.

GLEN D. NAGER,
Chair of the Board,
Office of Compliance.

SUBTITLE B—REGULATIONS RELATING TO THE HOUSE OF REPRESENTATIVES AND ITS EMPLOYING OFFICES—H SERIES

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART H501—GENERAL PROVISIONS

Sec.

§ H501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (CO) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

Part 531: Wage payments under the Fair Labor Standards Act of 1938—Part H531.

Part 541: Defining and delimiting the terms ''bona fide executive,'' ''administrative,'' and ''professional'' employees—Part H541.

Part 547 Requirements of a ''Bona fide thrift or savings plan''—Part H547.

SUBPART A—MATTERS OF GENERAL APPLICABILITY

§ H501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§ 206(a)(1) & (d), 207, 212(c)) shall apply to covered employees of the legislative branch of the Federal government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSA, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to Sections 203(c) and 304 of the CAA, which require that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of § 203 of the CAA] except insofar as the Board may determine, for good

cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

§ H501.102 Definitions.

For purposes of this chapter:

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

(b) FLSA or Act means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.).

(c) Covered employee means any employee of the House of Representatives, including an applicant for employment and a former employee.

(d) Employee of the House of Representatives includes any individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(e) Employing office and employer mean (1) the personal office of a Member of the House of Representatives; (2) a committee of the House of Representatives or a joint committee; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives.

(f) Board means the Board of Directors of the Office of Compliance.

(g) Office means the Office of Compliance.

§ H501.103 Coverage.

The coverage of Section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§ H501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of Section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of Sections 203(c) and 304 of the CAA.

(c) The Board may in its discretion from time to time issue interpretative statements providing guidance to employees and to employing offices on the rights and protections established under the FLSA that are made applicable by Sections 203(a) and 225 of the CAA.

§ H501.105 Effect of Interpretations of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutorily-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). See also 29 C.F.R. § 790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the FLSA. See 29 C.F.R. § 790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing Section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§ H501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with Section 225 of the CAA, the Portal to Portal Act (PPA), 29 U.S.C. §§ 216 and 251 et seq., is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. § 259, provides in pertinent part:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon:

(1) Any written administrative regulation, order, decision, ruling, approval or interpretation, or any administrative practice or enforcement policy, of the Board.

(2) Any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided*, that such regulation, order, ruling, approval or interpretation had not been superseded at the time of reliance by any regulation, order, decision, ruling, approval or interpretation, or any administrative practice or enforcement policy, of the Board or the courts.

PART H531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

SUBPART A—PRELIMINARY MATTERS

SUBPART A—PRELIMINARY MATTERS.

§ H531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

531.1 Definitions—H531.1.

531.2 Purpose and scope—H531.2.

531.3 General determinations of ''reasonable cost''—H531.3.

531.6 Effects of collective bargaining agreements—H531.6.

§ H531.1 Definitions.

(a) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

§ H531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term 'wage' to include the 'reasonable cost', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the 'fair value.' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of 'fair value.' Whenever so determined and when applicable and pertinent, the 'fair value' of the facilities involved shall be includable as part of 'wages' instead of the actual measure of the costs of

those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of 'wages' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the 'reasonable cost' and 'fair value' of board, lodging, or other facilities having general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§ H531.3 General determinations of 'reasonable cost.'

(a) The term *reasonable* cost as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term *good accounting practices* does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term *depreciation* includes obsolescence.

(d)(1) The cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ H531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be 'bona fide' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART H541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE,'' ''ADMINISTRATIVE,'' OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL).

SUBPART A—GENERAL REGULATIONS.

SUBPART A—GENERAL REGULATIONS.

§ H541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations

541.1 Executive—H541.1.
541.2 Administrative—H541.2.
541.3 Professional—H541.3.
541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees—H541.5b.

§ H541.01 Application of the exemptions of section 13 (a)(1) of the FLSA.

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of Section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c)and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections of covered employees.

§ H541.1 Executive.

The term employee employed in a bona fide executive * * * capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee: (a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: *Provided,* That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section

§ H541.2 Administrative.

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either: (1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or (2) The performance of functions in the administration of the Congressional Page School or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or (2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers of the Congressional Page School: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ H541.3 Professional.

The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of: (1) Work requiring knowledge of

an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the Congressional Page School , or (4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further,* That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer- related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2 times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ H541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work,'' the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

PART H547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN.''

Sec.

§ H547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

547.0 Scope and effect of part—H547.0.

547.1 Essential requirements of qualifications—H547.1.

547.2 Disqualifying provisions—H547.2.

§ H547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ H547.1 Essential requirements for qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § H547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however*, That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: *Provided, however,* That a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a 'bona fide thrift or savings plan' within the meaning of section 7(e)(3)(b) of the Act if: (1) The plan meets all the other standards of this section; (2) The plan contains none of the disqualifying factors enumerated in § H547.2; (3) The employer's contribution is based to a substantial degree upon retention of savings; and (4) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided,* That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ H547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PROPOSED REGULATIONS RELATING TO THE EMPLOYING OFFICES OTHER THAN THOSE OF THE SENATE AND THE HOUSE OF REPRESENTATIVES

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Extension of Rights and Protections Under the Fair Labor Standards Act of 1938 (Notices of Proposed Rulemaking with respect to Interns and Irregular Work Schedules were issued on October 11. The comment period closed on November 13. Final rules will be issued separately pursuant to Section 304 of the CAA.)

Notice of proposed rulemaking

Summary: The Board of Directors of the Office of Compliance is publishing proposed

rules to implement section 203(c) of the Congressional Accountability Act of 1995 (P.L. 104–1, Stat. 10) (''CAA''). The proposed regulations, which are to be applied to the House of Representatives and employees of the employing offices, and their employees, of the Congress other than the Senate and the House of Representatives, set forth the recommendations of the Executive Director for Office of Compliance, as approved by the Board of Directors, Office of Compliance.

Dates: Comments are due within 30 days after publication of this Notice in the Congressional Record.

Addresses: Submit written comments to the Chair of the Board of Directors, Office of Compliance, Room LA 200, Library of Congress, Washington, D.C. 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 (''FAX'') machine to (202) 252–3115. 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, D.C., Monday through Friday, between the hours of 9:30 a.m. and 4:00 p.m.

For further information contact: The Executive Director, Office of Compliance at (202) 252–3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this Notice in an alternative format should be made to Mr. Russell Jackson, Director, Service Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, (202) 224–2705.

Supplementary information:

I. Background

A. Introduction

The Congressional Accountability Act of 1995 (''CAA''), PL 104–1, was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 203(a) of the CAA applies the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (a)(1) and (d), 207, 212(c) (''FLSA'') to covered employees and employing offices. Section 203(c) of the CAA (2 U.S.C. Section 1313(c)) directs the Board of Directors of the Office of Compliance established under the CAA to issue regulations to implement the section. Section 203(c)(2) (2 U.S.C. Section 1313(c)(2)) further states that such regulations, with the exception of certain irregular work schedule regulations to be issued under section 203(a)(3), ''shall be the same as substantive regulations issued by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) except insofar as the Board may 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 this section.''

B. Advance notice of proposed rulemaking

On September 28, 1995, the Board of the Office of Compliance issued an Advance Notice of Proposed Rulemaking (''ANPRM'') soliciting comments from interested parties in order to obtain participation and information early in the rulemaking process. 141 Cong. R. S14542 (daily ed., Sept. 28, 1995). In addition to inviting comment on specific questions arising under five of the statutes made applicable by the CAA in the ANPRM, the Board and the statutory appointees of the Office sought consultation with the Chair of the Administrative Conference of the United States, the Secretary of Labor and the Director of the Office of Personnel Management with regard to the development of these regulations in accordance with section 304(g) of the CAA. The Office has also consulted with interested parties to further its understanding of the need for and content of appropriate regulations. Based on the information gleaned from these consultations and the comments on the ANPRM, the Board of Directors of the Office of Compliance is publishing these proposed rules, pursuant to Section 203(c)(1) of the CAA (2 U.S.C. Section 1313(c)(1)).

1. Modification of the regulations of the Department of Labor

In the ANPRM, the Board asked the question, ''Whether and to what extent should the Board modify the Secretary's Regulations?'' The Board received 15 comments on the ANPRM: two from Senators, four from House Members (one from the leadership of the Committee with primary jurisdiction for the CAA and one from three of the sponsors of the CAA), one from the Secretary of the Senate and three from House offices (two from institutional offices and one from a Member's Chief of Staff), four from business coalitions or associations representing an array of private employers, and one from a labor organization.

Those commenters who expressed views on the ANPRM cited both the statute and the legislative history in taking the position that the CAA presumes that the regulations of the Department of Labor should not be modified. Illustrative comments included the following:

''[Section 304 of the CAA] evidences clear legislative intent that the Board apply these rights and protections to Congressional employees in a manner comparable to and consistent with the rights and protections applicable to employees in the private sector under regulations adopted by the Secretary (DOL). . . . The [CAA] requires that the regulations issued by the Board be the same as those issued by DOL unless the Board determines that modification would more effectively implement the rights and protections of the laws made applicable under the [CAA].''

''[I]f a law is right for the private sector, it is right for Congress; . . . . Consistent with [this] principle, we would urge the Office not to deviate (except in those few areas where expressly authorized by the CAA) from applying the laws in the same manner in which they are applied to the private sector.

* * * * *

[W]e have not identified any situations in which modifications [of the DOL regulations] would be appropriate.''

''There are no circumstances that justify 'good cause' for adopting regulations that deviate from those currently applied to private sector employers.''

''[Section 203(c)(2)] confers on the Office of Compliance only very limited authority to deviate from the present DOL regulations. The legislative history to the 'good cause' exception likewise makes clear that this authority is to be used by the Office of Compliance sparingly.''

* * * * *

''The legislative history of the CAA demands that the Office of Compliance apply to Congress the same regulations as those imposed on the private sector.''

''[W]e urge the Board to refrain from modifying regulations promulgated by the Department of Labor and other Executive agencies. Use of established regulations will provide the Board, employees and employing offices with a body of instructive case law and interpretive documents.''

''While the Office serves an important implementation and enforcement role, it must not place itself in the position of shielding Congress from substantive requirements imposed on private businesses.''

Based on the comments and the Board's understanding of the law and the institutions to which it is being made applicable, the Board is issuing the Secretary's regulations with only these limited modifications: Technical changes in the nomenclature and deletion of those sections clearly inapplicable to the legislative branch.

2. Notice Posting and Recordkeeping

The ANPRM also invited comment on whether the recordkeeping and notice posting requirements of the various laws made applicable by the CAA are incorporated as statutory requirements of the CAA. The ANPRM inquired whether, if such requirements were not incorporated, could and should the Board develop its own requirements pursuant to its ''good cause'' authority. The ANPRM also invited comment on proposing guidelines and models for recordkeeping and notice posting.

Commenters were in agreement that recordkeeping and notice posting are important to the effective implementation of several of the statutes incorporated in the CAA. However, opinions as to whether the Board should require notice posting and recordkeeping were widely divergent. Several commenters expressed the view that the Board lacks the statutory authority to adopt notice posting and recordkeeping requirements and that the notice posting and recordkeeping requirements of the FLSA do not apply to Congress. Other commenters expressed the view that the Board has the authority to issue regulations to impose recordkeeping and notice posting requirements and that such regulations should be, in substance, the same as those with which the private sector must comply.

The Board agrees with those commenters who took the position that, if employing offices are to be treated the same as private sector employers are treated under FLSA, they should have to comply with the statute's notice posting and recordkeeping requirements. Moreover, the Board notes that notice posting and recordkeeping promote the full and effective enforcement of these incorporated rights and protections. In the Board's view, notice posting and recordkeeping may well be in employers' interests both as a sound personnel practice and in order to defend against subsequent litigation.

But while the CAA incorporates certain specific sections of the FLSA, the CAA explicitly did not incorporate the notice posting and recordkeeping requirements of Section 11, 29 U.S.C. §211 of the FLSA. Because the Board's authority to modify the Secretary's regulations for ''good cause'' does not authorize it to adopt regulatory requirements that are the equivalent of statutory requirements that Congress has omitted from the CAA, the Board has determined that it may not impose such requirements on employing offices. However, as various commenters suggest, the Board will provide guidance to employing offices concerning model recordkeeping practices as part of carrying out its program of education under section 301(h)of the CAA (2 U.S.C. 1381(h)).

The Board would also note that based upon their collective years of experience representing employers and employees with regard to various labor and employment laws, including the FLSA, the absence of recordkeeping and notice posting requirements may create a void which can only partially be filled by the program of education to be carried out by the Board pursuant to Section

301(h)(1) and the optional notice which will be distributed by the Board pursuant to Section 301(h)(2). The Board also would emphasize that employees will in many circumstances be able to establish a prima facie case simply by their own testimony estimating the hours worked by the employees where the employing office has failed to maintain adequate, accurate records. An employing office may find that its ability to respond to an employee's prima facie case is substantially burdened by its failure to keep accurate payroll and time-records. If Congress wishes to experience the same burdens as faced by the private sector and also to address these issues, it should enact recordkeeping requirements comparable to those of the FLSA. (Of course, like the regulations under those statutes, such recordkeeping requirements may leave to the discretion of each employing office the precise form and manner in which records will be kept.) But, in light of the text and structure of the CAA, the Board believes that it is up to Congress to decide whether to do so.

II. The proposed regulations

A. Background

Congress committed enforcement of the Fair Labor Standards Act of 1938 to the Department of Labor and its Wage and Hour Division, whose regulations and interpretations of that Act comprise almost one thousand pages of Chapter V, Title 29 of the Code of Federal Regulations. In enacting the CAA, however, Congress expressly refused to commit enforcement to the executive branch of the Federal government nor did Congress bring its employing offices under the FLSA itself. Instead, Congress carefully specified, through sectional references to the FLSA, the substantive rights and protections afforded to legislative employees, and precisely mandated procedures by which those rights and protections would be largely enforced by a new and independent office in the legislative branch, the Office of Compliance. Further, in granting the Board rulemaking authority with respect to the FLSA in Section 203(c)(1) of the CAA, Congress affirmatively commanded the Board to issue substantive regulations, with the important directive that they ''shall be the same as substantive regulations promulgated by the Secretary of Labor * * * except as the Board may determine, for good cause shown * * * that a modification of such regulations would be more effective for the implementation of rights and protections under'' the CAA.

In the Board's view, and notwithstanding what has been urged by some of the commenters, this unusual statutory framework neither mandates nor allows an uncritical, wholesale incorporation of all the regulations and interpretive statements issued by the Labor Department under the FLSA. Rather, this statutory framework requires the Board to cull from the vast body of FLSA material found in the Code of Regulations only those items that constitute ''substantive regulations'' as the term is understood under settled principles of administrative law. (See *Batterton* v. *Francis*, 422 U.S. 416, 425, n. 9 (1977)). Moreover, the statutory framework authorizes the Board to delete those substantive regulations that either have no application in the employing offices of the Congress or that are not likely to be invoked. For these reasons, the Board is not proposing their adoption, unless public comments establish a justification to the contrary. Finally, by limiting itself to substantive regulations, the Board is not adopting those portions of 29 C.F.R. chapter V that constitute the interpretative bulletins or statements of the Department of Labor and its Wage and Hour Division.

B. Proposed regulations

1. General provisions

The proposed regulations include an initial Part 501 which contains matters of general applicability including the purpose and scope of the regulations, definitions, coverage, and the administrative authority of the Board and the Office of Compliance. In addition, a section explains the effect of interpretative bulletins and statements of the Department of Labor, and another section provides for the application of the Portal to Portal Act. These latter sections are discussed below.

It is noted that the definition section incorporates the general provisions of section 101 of the CAA which defines ''employee,'' ''covered employee,'' ''employing office,'' and ''employee of the House of Representatives.'' Section 203 of the CAA, which applies the rights and protections of the FLSA, also contemplates the promulgation of a definitional regulation that excludes ''interns'' from the meaning of ''covered employee.'' The Board, in a separate NPRM issued on October 11, 1995, proposed such a regulation, together with a regulation governing irregular work schedules and the receipt of compensatory time in lieu of overtime compensation. The Board is reviewing the public comments received in response to that NPRM and will issue a separate final rule on those issues.

It should be noted that section 225(f)(1) of the CAA provides that, except where inconsistent with definitions of the CAA itself, the definitions in the laws made applicable by the CAA shall also apply under the CAA. Thus, attention must be paid to those definitions found in the FLSA that are consistent with the CAA even if they are not expressly incorporated in the proposed regulations. In this regard, one commenter expressed concern over whether employing offices would be obligated to pay minimum wages and overtime compensation to individuals who do volunteer work, in light of the fact that under the FLSA ''employee'' may include certain volunteers. See 29 U.S.C. §203(e)(4)(A), which excludes from the definition of ''employee'' only certain volunteers who perform work for a State, political subdivision, or interstate governmental agency. Similarly, it is noted that, in enacting the CAA, Congress did make separate provision for excluding interns. Thus, the Board has concluded that, to the extent that volunteer activity would bring an individual under the coverage of the FLSA, similarly situated individuals would be treated in the same manner under the CAA.

2. Provisions derived from regulations of the Department of Labor

Those regulations of the Department of Labor that are being adopted in substance include:

Part 531, which governs the manner in which an employee's wages are calculated taking into account the reasonable cost to an employer of furnishing board, lodging, or other facilities. This Part is derived from Section 3(m) of the FLSA, which directs how the ''wage'' paid to an employee is determined. Section 3(m) must be treated as applicable under the CAA by virtue of Section 225(f)(1), which authorizes generally the inclusion of those definitions and exemptions that are consistent with definitions and exemptions of the CAA. However, it is noted that section 3(m) is inconsistent with the CAA insofar as the implementing regulations in Part 531, Title 29, C.F.R., provide procedures by which the Wage and Hour Administrator makes determinations in specific cases with respect to the furnishing of board, lodging, or other facilities. Because the Administrator has no role in the enforcement of the CAA by reason of Section 225(f)(3), and because the Board is not at this time is not authorizing the Office of Compliance to make such specific determinations, the Board proposes to delete the provisions setting forth those procedures. Similarly, the reference to ''tipped employees'' and the method by which their wages are determined are deleted because the applicable sections assign responsibility to the Administrator.

Part 541, which defines and delimits the bona fide executive, administrative, and professional employees who are exempt under Section 13(a) of the FLSA from the minimum wage and maximum hours requirements. The Board has determined that this exemption, commonly known as the ''white collar'' exemption, is applicable to employing offices of Congress by virtue of Section 225(f)(1) of the CAA.

In the ANPRM, the Board solicited public comment on whether and to what extent it should modify the Labor Department's regulations regarding this exemption. Generally, the commenters did not question the applicability of this exemption to covered employees under the CAA, and several commenters urged the adoption of all of the Department's regulations in Part 541, 29 C.F.R., including the interpretative bulletins, without any modification. Two commenters contended that the Board's regulations should grant a sweeping exemption for nearly all staff employees working in elected members' offices because they exercise independent judgment and discretion in performing their responsibilities.

Other commenters urged the Board to modify the Labor Department regulations to take into account the unique job responsibilities of staff working for an elected member either in a personal office, in a leadership office or on committee. Recognizing that job titles alone cannot be dispositive of who is an exempt employee, these commenters urged the Board to identify with particularity those job duties which, if performed by an employee, would render him or her an exempt executive, administrative, or professional employee.

The Board is proposing to adopt the Labor Department's substantive regulations contained in Subpart A of Part 541 of 29 C.F.R. that set forth the fundamental criteria for satisfying each of the three exemptions. But, for the reasons explained below, the Board is not formally adopting the interpretative bulletins contained in Subpart B of Part 541 of 29 C.F.R., which discuss and illustrate through examples the Department's understanding of the exemption criteria.

With respect to some commenters' request that the Board modify the white collar exemptions, upon reflection, the Board has reluctantly concluded that such a modification would not satisfy the ''good cause'' requirement of Section 203(c)(2) of the CAA. The Board recognizes that the Secretary's regulations and interpretations were promulgated in a different era, with different employment paradigms in mind. Thus, the Board appreciates the many difficulties that employing offices will have in interpreting and reconciling these regulations to present day realities. Moreover, the Board is mindful of the significant impact the application of the administrative, executive and professional exemption will have on the structuring, functioning and expense of the Members' and Senators' personal offices and committee offices. However, the Board notes that private sector and state and local government employers face the same difficulties. And the Board has not found any sound, principled basis for modifying the exemption

regulation for Congress and its instrumentalities. That resolved, the Board nonetheless wishes to make clear its intent to provide, as time and resources permit, appropriate general guidance to the Congress and its instrumentalities on how to identify and justify which employees are exempt. Such efforts made through the Office's education and information programs, will attempt to assist employing offices in determining which job duties will be considered exempt under the executive, administration or professional criteria.

Part 547, which defines, pursuant to Section 7(e)(3)(b) the standard that bona fide thrift or savings plans must meet in order not to be included within an employee's regular rate of pay for purposes of calculating overtime obligations under Section 7 of the FLSA. This is included in light of Section 203(a)1) of the CAA, which specifically applied the rights and protections of Section 7 of the FLSA.

Part 570, which sets forth the limitations on the use of child labor. This Part implements Section 12(c) of the FLSA, prohibiting oppressive child labor, as defined by Section 3(l) of the same Act. The former section is specifically referenced in Section 203(a)(1) of the CAA, while the latter must be referenced by reason of Section 225(f)(1) of the CAA. The inclusion of this Part in the separate regulations of the Senate is necessitated by the fact that the Senate allows for the appointment of congressional pages below the age of 16, unlike the House of Representatives, which by law sets a minimum age of 16 for such employees. For children under age 16, the FLSA regulations impose limitations on hours worked during the school year. Part 570 is also included in the separate regulations applicable to all other covered employees and employing offices. Given the hazardous nature of some of the activities of the support functions, such as maintenance and repair, Part 570 regulations are being proposed in the event that such instrumentalities employ children under 18 years of age. It is noted that the Board has not adopted regulations comparable to those set forth in the Labor Department's Subpart B (29 C.F.R. Sections 570.5-.27), authorizing the issuance of certificates of age. In addition, with respect to Section 570.52, governing the hazardous occupation of motor-vehicle driver and outside helper, the Board is not adopting the special exemption for school bus driving because by its terms no employing offices would satisfy the criteria of the regulation.

C. Secretary of Labor's regulations that the Board proposes not to adopt

In reviewing the remaining parts of the Labor Department's regulations, it is readily apparent that some have no application to the employing offices within the legislative branch. For this reason, the Board is not including them within its substantive regulations. Among the excluded regulations are: Part 510, which pertains to the application of the minimum wage provisions to Puerto Rico; Part 511, establishing a wage order procedure for American Samoa; Part 515, authorizing the utilization of State government agencies for investigations and inspections; Part 530, governing the employment of industrial homeworkers in certain industries; Part 549, defining the requirements of a ''bona fide profit-sharing plan or trust;'' Part 550, defining the term ''talent fees;'' Part 552, regulating the application of the FLSA to domestic service; Part 575, addressing child labor in certain agricultural employment; Parts 578, 579, and 580, implementing the civil money penalties provisions of the FLSA; and Part 679, dealing with industries in American Samoa. Unless public comments suggest otherwise, the Board intends including in the adopted regulations a provision stating that the Board has issued regulations on all matters for which the CAA requires a regulation. See Section 411 of the CAA.

Other substantive regulations could have application in the event that an employing office wished to avail itself of certain special wage rates, subminimum wage exemptions or overtime exemptions under the FLSA. These are found in: Parts 519-528, which authorize subminimum wages for full-time students, student-learners, apprentices, learners, messengers, workers with disabilities, and student workers; Part 548, which authorizes in the collective bargaining context the establishment of basic wage rates for overtime compensation purposes; and Part 551, which implements an overtime exemption for local delivery drivers and helpers. Unless public comments provide a sufficient justification to the contrary the Board is not proposing the adoption of regulations covering the foregoing subjects.

III. The Interpretive Bulletins and other relevant guidance

In addition to the substantive regulations found in Subchapter A, the Department of Labor has issued, under Subchapter B, ''Statements of General Policy or Interpretations Not Directly Related to Regulations.'' 29 C.F.R Parts 775-794. Usually called Interpretive Bulletins, these statements make available in one place the official interpretations which guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties. As the interpretations of an administering agency, such statements are usually given some deference by the courts. As the Supreme Court has observed:

''the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944).

However, unlike ''substantive regulations,'' these interpretations are not issued by the agency pursuant to its statutory authority to implement the statute and, more significantly, do not have the force and effect of law. See *Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977). The Board's mandate is only to issue substantive regulations that are ''the same as the substantive regulations of the Secretary of Labor to implement the statutory provision [of the FLSA] applied'' by Section 204(a) of the CAA unless modified for good cause (CAA Section 203 (c)(2)). Therefore, the Board, does not propose to adopt the non-substantive interpretations of the DOL and its Wage and Hour Division as substantive regulations under the CAA. Moreover, the Board is not proposing to issue the Department's interpretations as its own interpretations of the FLSA rights and protections made applicable under the CAA at this time. However, as discussed below, employing offices should be advised that, pursuant to the Portal to Portal Act, the Board will give due consideration the Secretary's interpretations of the FLSA.

Application of the Portal to Portal Act.—The Portal to Portal Act, 61 Stat. 84 (1947), codified generally at 29 U.S.C. Sections 216 and 251, et seq. (''PPA''), contains provisions which affect the rights and liabilities of employees and employers with regard to alleged underpayment of minimum or overtime wages under the FLSA. Section 4 of the PPA excludes from the definition of hours worked both activities preliminary to or postliminary to the worker's principal activities and travel time absent a contract, custom or practice to the contrary. 29 U.S.C. Section 254. Sections 9 and 10 of the PPA provide the employer with a defense against liability or punishment in any action or proceeding brought against it for failure to comply with the minimum wage and overtime provisions of the FLSA, where the employer pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of the Wage and Hour Administrator of the Department of Labor. 29 U.S.C. Sections 258–259. The PPA also contains provisions which restrict and limit employee suits under section 16(b) of the FLSA. For example, section 11 of the PPA provides that in any action brought under section 216 of the FLSA, the court may in its discretion, subject to prescribed conditions, award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16(b) of the FLSA. 29 U.S.C. Section 260.

The Board has determined that the above provisions of the PPA are incorporated into section 203 of the CAA, either as an amendment to section 16(b) of the FLSA (which is expressly applied to the legislative branch under section 203(b) of the CAA), or by virtue of section 225(f) of the CAA, which applies the definitions and exemptions of the FLSA to the extent not inconsistent with the CAA. To that end, the Board will give due consideration to the interpretations of the FLSA of the Secretary of Labor. Moreover, employing offices may utilize these interpretations in attempting to understand the rights and protections under the FLSA that have been made applicable by the CAA. Unless and until the Secretary's interpretive statements are superseded or interpretative guidance or decisions to the contrary are issued by the Board or the courts, they may be relied upon for purposes of defending against claims brought under the CAA to the same extent as private sector employers may properly rely upon them in actions brought under the FLSA.

Joint employer doctrine.—The Board solicited comments in the ANPRM on whether and to what extent the joint employment doctrine as developed under the FLSA is applicable under the CAA. The comments generally advocated adoption of the doctrine to employing offices of the Congress. However, since the issue of joint employment is addressed through a DOL interpretive bulletin set forth in Part 791, 29 C.F.R., rather than a substantive regulation, the Board is not adopting it as such nor issuing it as its own interpretive statement. See discussion at Section III.

Equal Pay Act.—With respect to the Equal Pay Act (EPA), which is included in Section 6(d) of the FLSA, 29 U.S.C. Section 206(d), the Secretary of Labor promulgated interpretative regulations that were originally included in 29 C.F.R. Part 800. Pursuant to the provisions of Reorganization Plan No. 1 of 1978, as confirmed by the Congress in Public Law 98–532, 98 Stat. 2705 (1984), enforcement and administration of the EPA was transferred from the Secretary of Labor to the Equal Employment Opportunity Commission (EEOC). The EEOC promulgated its own interpretations implementing the EPA at 29 C.F.R. Part 1620. Thereafter, the Secretary deleted its interpretations. 52 FR 2517 (Jan.

23, 1987). Thus, there are no substantive regulations implementing the EPA. Under the rationale previously stated regarding the Portal to Portal Act, the Board declines to incorporate the EEOC interpretations as substantive regulations under the CAA but will recognize them as is appropriate.

Opinion Letters.—Commenters asked that the Board consider establishing a process under which the Office or the Board would issue opinion letters and upon which employing offices could rely, similar to the procedure followed by the Wage and Hour Administrator in sometimes providing such opinions at the request of private sector employers. The Board understands employing offices' desire for guidance and clarity regarding their obligations under the CAA.

To the extent that the Board itself can address issues through regulations or interpretations, it will do so. Moreover, the Office intends to provide appropriate education and technical assistance as part of its education and information responsibilities. But for the reasons stated here, the Board and the Office's ability to do so is limited by legal, resource and policy considerations. As is the case in the private sector context, many issues under these statutes can only be definitively resolved through case-by-case adjudication on particular facts. Moreover, except in the context of statutes subject to the Portal to Portal Act, it is doubtful that the Board or the Office has the statutory authority to issue guidance with legal effect (outside of the adjudicatory or rulemaking contexts); we are not aware of any such legal authorization for Executive Branch agencies to do so in the context of applying these same laws to the private sector. Further, the resources of the Board and the Office are limited: the first year appropriation is for $2.5 million. These resources are substantially less than those available to analogous Executive Branch agencies that administer fewer laws. Finally, public comment has not provided the Board with the facts necessary for yet making any of these determinations—and a detailed evidentiary record is necessary for such judgment to be made. In short, particularly in light of the various statutory responsibilities of the Office and the Board, it is not possible to give answers with legal effect to each individual request for information and guidance. While the Board will structure education and information programs to assist employees and employing offices, it is forced to respond that, like private employers, employing offices will generally have to rely on their own counsel and human resource advisors in determining their compliance with the Congressional Accountability Act.

IV. 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 21st day of November, 1995.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

SUBTITLE C—REGULATIONS RELATING TO THE EMPLOYING OFFICES OTHER THAN THOSE OF THE SENATE AND THE HOUSE OF REPRESENTATIVES—C SERIES

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART C501—GENERAL PROVISIONS

Sec.
C501.00 Coresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
C501.001 Purpose and scope.
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C501.003 Coverage.
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C501.006 Application of the Portal-to-Portal Act of 1947.

§ C501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (CO) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

Part 531 Wage payments under the Fair Labor Standards Act of 1938—Part C531.

Part 541 Defining and delimiting the terms ''bona fide executive,'' ''administrative,'' and ''professional'' employees—Part C541.

Part 547 Requirements of a ''Bona fide thrift or savings plan''—Part C547.

Part 570 Child labor—Part C570.

SUBPART A—MATTERS OF GENERAL APPLICABILITY

§ C501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§206(a)(1) & (d), 207.212(c)) shall apply to covered employees of the legislative branch of the Federal government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSE, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to Sections 203(c) and 304 of the CAA, which requires that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of §203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

§ C501.102 Definitions.

For purposes of this chapter.

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

(b) *FLSA* or *Act* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201 et seq.).

(c) *Covered employee* means any employee, including an applicant for employment and a former employee, of the (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(d) (1) *Employee of the Office of the Architect of the Capitol* includes any employee of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants;(2) *Employee of the Capitol Police* includes any member or officer of the Capitol Police.

(e) *Employing office* and *employer* mean (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

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

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

§ C501.103 Coverage.

The coverage of Section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§ C501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of Section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of Sections 203(c) and 304 of the CAA.

(c) The Board may in its discretion from time to time issue interpretative statements providing guidance to employees and to employing offices on the rights and protections established under the FLSA that are made applicable by Sections 203(a) and 225 of the CAA.

§ C501.105 Effect of interpretations of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutorily-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). See also 29 C.F.R. §790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the

FLSA. See 29 C.F.R. §790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No.8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing Section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§C501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with Section 225 of the CAA, the Portal to Portal Act (PPA), 29 U.S.C. §§216 and 251 et seq., is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. §259, provides in pertinent part:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon:

(1) Any written administrative regulation, order, decision, ruling, approval or interpretation, or any administrative practice or enforcement policy, of the Board.

(2) Any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided*, that such regulation, order, ruling approval or interpretation had not been superseded at the time of reliance by any regulation, order, decision, ruling, approval or interpretation, or any administrative practice or enforcement policy, of the Board or the courts.

PART H531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

SUBPART A—PRELIMINARY MATTERS

Sec.

SUBPART A—PRELIMINARY MATTERS.

§C531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

531.1 Definitions—C531.1.

531.2 Purpose and scope—C531.2.

531.3 General determinations of ''reasonable cost''—C531.3.

531.6 Effects of collective bargaining agreements—C531.6.

§C531.1 Definitions.

(a) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

§C531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term 'wage' to include the 'reasonable cost', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the 'fair value.' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of 'fair value.' Whenever so determined and when applicable and pertinent, the 'fair value' of the facilities involved shall be includable as part of 'wages' instead of the actual measure of the costs of those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of 'wages' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the 'reasonable cost' and 'fair value' of board, lodging, or other facilities having general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§C531.3 General determinations of 'reasonable cost.'

(a) The term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term good accounting practices does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term depreciation includes obsolescence.

(d)(1) The cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§C531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be 'bona fide' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART C541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE,'' ''ADMINISTRATIVE,'' OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL)

SUBPART A—GENERAL REGULATIONS

Sec.

SUBPART A—GENERAL REGULATIONS

§ C541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

541.1 Executive—C541.1.
541.2 Administrative—C541.2.
541.3 Professional—C541.3.
541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees—C541.5b.

§ C541.01 Application of the exemptions of section 13 (a)(1) of the FLSA.

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of Section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c)and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections of covered employees.

§ C541.1 Executive.

The term employee employed in a bona fide executive * * * capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ C541.2 Administrative.

The term employee employed in a bona fide * * * administrative ** * capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of the Congressional Page School or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or anemployee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers of the Congressional Page School: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ C541.3 Professional.

The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the Congressional Page School , or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further*, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2 times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ C541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work,'' the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

PART C547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN''

Sec.

§ C547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations—OC Regulations.

547.0 Scope and effect of part—C547.0

547.1 Essential requirements of qualifications—C547.1

547.2 Disqualifying provisions—C547.2.

§ C547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ C547.1 Essential requirements for qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § 547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however*, That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: *Provided, however*, That a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a ''bona fide thrift or savings plan'' within the meaning of section 7(e)(3)(b) of the Act if:

(1) The plan meets all the other standards of this section;

(2) The plan contains none of the disqualifying factors enumerated in § C547.2;

(3) The employer's contribution is based to a substantial degree upon retention of savings; and

(4) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: Provided, That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ C547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PART C570—CHILD LABOR REGULATIONS

SUBPART A—GENERAL

Sec.

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

SUBPART E—OCCUPATIONS PARTICULARLY HAZARDOUS FOR THE EMPLOYMENT OF MINORS BETWEEN 16 AND 18 YEARS OF AGE OR DETRIMENTAL TO THEIR HEALTH OR WELL-BEING

SUBPART A—GENERAL

§ C570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance Regulations under Section 202 of the CAA:

Secretary of Labor Regulations—OC Regulations.

570.1 Definitions—C570.1.

570.2 Minimum age standards—C570.2.

570.31 Determinations—C570.31.

570.32 Effect of this subpart—C570.32.

570.33 Occupations—C570.33.

570.35 Periods and conditions of employment—C570.35.

570.50 General—C570.50.

570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1)—C570.51.

570.52 Occupations of motor-vehicle driver and outside helper (Order 2)—C570.52.

570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5)—C570.55.

570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7)—C570.58.

570.59 Occupations involved in the operations of power-driven metal forming,

punching, and shearing machines (Order 8)—C570.59

570.62 Occupations involved in the operation of bakery machines (Order 11)—C570.62

570.63 Occupations involved in the operation of paper-products machines (Order 12)—C570.63.

570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14)—C570.65.

570.66 Occupations involved in wrecking and demolition operations (Order 15)—C570.66.

570.67 Occupations in roofing operations (Order 16)—C570.67.

570.68 Occupations in excavation operations (Order 17)—C570.68.

§ C570.1 Definitions.

As used in this part:

(a) *Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219).

(b) *Oppressive child labor* means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in Sec. 570.2 of this subpart.

(c) *Oppressive child labor age* means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) [Reserved]

(e) [Reserved]

(f) *Secretary* or *Secretary of Labor* means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(g) *Wage and Hour Division* means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative.

§ C570.2 Minimum age standards.

(a) All occupations except in agriculture. (1) The Act, in section 3(1), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions:

(i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see subpart C of this part); and

(ii) The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being.

(2) The Act exempts from its minimum age requirements the employment by a parent of his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

SUBPART B [RESERVED]

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

§ C570.31 Determination.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child in labor.

§ C570.32 Effect of this subpart.

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in §570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

§ C570.33 Occupations.

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(1) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair); except such office (including ticket office) work, or sales work, in connection with paragraphs (f)(1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

§ C570.35 Periods and conditions of employment.

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

SUBPART D [RESERVED]

SUBPART E—OCCUPATIONS PARTICULARLY HAZARDOUS FOR THE EMPLOYMENT OF MINORS BETWEEN 16 AND 18 YEARS OF AGE OR DETRIMENTAL TO THEIR HEALTH OR WELL-BEING

§ C570.50 General.

(a) Higher standards. Nothing in this subpart shall authorize non-compliance with any Federal law or regulation establishing a higher standard. If more than one standard within this subpart applies to a single activity the higher standard shall be applicable.

(b) Apprentices. Some sections in this subpart contain an exemption for the employment of apprentices. Such an exemption shall apply only when: (1) The apprentice is employed in a craft recognized as an apprenticeable trade; (2) the work of the apprentice in the occupations declared particularly hazardous is incidental to his training; (3) such work is intermittent and for short periods of time and is under the direct and close supervision of a journeyman as a necessary part of such apprentice training; and (4) the apprentice is registered by the Executive Director of the Office of Compliance as employed in accordance with the standards established by the Bureau of Apprenticeship and Training of the United States Department of Labor.

(c) Student-learners. Some sections in this subpart contain an exemption for the employment of student-learners. Such an exemption shall apply when:

(1) The student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized State or local educational authority or in a course of study in a substantially similar program conducted by a private school and;

(2) Such student-learner is employed under a written agreement which provides:

(i) That the work of the student-learner in the occupations declared particularly hazardous shall be incidental to his training;

(ii) That such work shall be intermittent and for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(iii) That safety instructions shall be given by the school and correlated by the employer with on-the-job training; and

(iv) That a schedule of organized and progressive work processes to be performed on the job shall have been prepared. Each such written agreement shall contain the name of student-learner, and shall be signed by the employer and the school coordinator or principal. Copies of each agreement shall be kept on file by both the school and the employer. This exemption for the employment of student-learners may be revoked in any individual situation where it is found that reasonable precautions have not been observed for the safety of minors employed thereunder. A high school graduate may be employed in an occupation in which he has completed training as provided in this paragraph as a student-learner, even though he is not yet 18 years of age.

§ C570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).

(a) Finding and declaration of fact. The following occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components are particularly hazardous for minors between 16 and 18 years of age or detrimental to their health or well-being:

(1) All occupations in or about any plant or establishment (other than retail establishments or plants or establishments of the type described in paragraph (a)(2) of this section) manufacturing or storing explosives or articles containing explosive components except where the occupation is performed in a ''nonexplosives area'' as defined in paragraph (b)(3) of this section.

(2) The following occupations in or about any plant or establishment manufacturing or storing small-arms ammunition not exceeding .60 caliber in size, shotgun shells, or blasting caps when manufactured or stored in conjunction with the manufacture of small-arms ammunition:

(i) All occupations involved in the manufacturing, mixing, transporting, or handling of explosive compounds in the manufacture of small-arms ammunition and all other occupations requiring the performance of any

duties in the explosives area in which explosive compounds are manufactured or mixed.

(ii) All occupations involved in the manufacturing, transporting, or handling of primers and all other occupations requiring the performance of any duties in the same building in which primers are manufactured.

(iii) All occupations involved in the priming of cartridges and all other occupations requiring the performance of any duties in the same workroom in which rim-fire cartridges are primed.

(iv) All occupations involved in the plate loading of cartridges and in the operation of automatic loading machines.

(v) All occupations involved in the loading, inspecting, packing, shipping and storage of blasting caps.

(b) Definitions. For the purpose of this section:

(1) The term plant or establishment manufacturing or storing explosives or articles containing explosive component means the land with all the buildings and other structures thereon used in connection with the manufacturing or processing or storing of explosives or articles containing explosive components.

(2) The terms explosives and articles containing explosive components mean and include ammunition, black powder, blasting caps, fireworks, high explosives, primers, smokeless powder, and all goods classified and defined as explosives by the Interstate Commerce Commission in regulations for the transportation of explosives and other dangerous substances by common carriers (49 CFR parts 71 to 78) issued pursuant to the Act of June 25, 1948 (62 Stat. 739; 18 U.S.C. 835).

(3) An area meeting all of the criteria in paragraphs (b)(3) (i) through (iv) of this section shall be deemed a ''nonexplosives area'':

(i) None of the work performed in the area involves the handling or use of explosives;

(ii) The area is separated from the explosives area by a distance not less than that prescribed in the American Table of Distances for the protection of inhabited buildings;

(iii) The area is separated from the explosives area by a fence or is otherwise located so that it constitutes a definite designated area; and

(iv) Satisfactory controls have been established to prevent employees under 18 years of age within the area from entering any area in or about the plant which does not meet criteria of paragraphs (b)(3) (i) through (iii) of this section.

§ C570.52 Occupations of motor-vehicle driver and outside helper (Order 2).

(a) Findings and declaration of fact. Except as provided in paragraph (b) of this section, the occupations of motor-vehicle driver and outside helper on any public road, highway, in or about any mine (including open pit mine or quarry), place where logging or sawmill operations are in progress, or in any excavation of the type identified in § C570.68(a) are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) Exemption—Incidental and occasional driving. The findings and declaration in paragraph (a) of this section shall not apply to the operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if such driving is restricted to daylight hours; *provided*, such operation is only occasional and incidental to the minor's employment; that the minor holds a State license valid for the type of driving involved in the job performed and has completed a State approved driver education course; and *provided further*, that the vehicle is equipped with a seat belt or similar restraining device for the driver and for each helper, and the employer has instructed each minor that such belts or other devices must be used. This paragraph shall not be applicable to any occupation of motor-vehicle driver which involves the towing of vehicles.

(c) Definitions. For the purpose of this section:

(1) The term *motor vehicle* shall mean any automobile, truck, truck-tractor, trailer, semitrailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation but shall not include any vehicle operated exclusively on rails.

(2) The term *driver* shall mean any individual who, in the course of employment, drives a motor vehicle at any time.

(3) The term *outside helper* shall mean any individual, other than a driver, whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivering goods.

(4) The term *gross vehicle weight* includes the truck chassis with lubricants, water and a full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload.

§ C570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven wood-working machines are particularly hazardous for minors between 16 and 18 years of age:

(1) The occupation of operating power-driven woodworking machines, including supervising or controlling the operation of such machines, feeding material into such machines, and helping the operator to feed material into such machines but not including the placing of material on a moving chain or in a hopper or slide for automatic feeding.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning power-driven woodworking machines.

(3) The occupations of off-bearing from circular saws and from guillotine-action veneer clippers.

(b) Definitions. As used in this section:

(1) The term power-driven woodworking machines shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer.

(2) The term off-bearing shall mean the removal of material or refuse directly from a saw table or from the point of operation. Operations not considered as off-bearing within the intent of this section include: (i) The removal of material or refuse from a circular saw or guillotine-action veneer clipper where the material or refuse has been conveyed away from the saw table or point of operation by a gravity chute or by some mechanical means such as a moving belt or expulsion roller, and (ii) the following operations when they do not involve the removal of material or refuse directly from a saw table or from the point of operation: The carrying, moving, or transporting of materials from one machine to another or from one part of a plant to another; the piling, stacking, or arranging of materials for feeding into a machine by another person; and the sorting, tying, bundling, or loading of materials.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in Sec. 570.50 (b) and (c).

§ C570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven hoisting apparatus are particularly hazardous for minors between 16 and 18 years of age:

(1) Work of operating an elevator, crane, derrick, hoist, or high-lift truck, except operating an unattended automatic operation passenger elevator or an electric or air-operated hoist not exceeding one ton capacity.

(2) Work which involves riding on a manlift or on a freight elevator, except a freight elevator operated by an assigned operator.

(3) Work of assisting in the operation of a crane, derrick, or hoist performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

(b) Definitions. As used in this section:

(1) The term elevator shall mean any power-driven hoisting or lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction. The term shall include both passenger and freight elevators (including portable elevators or tiering machines), but shall not include dumbwaiters.

(2) The term crane shall mean a power-driven machine for lifting and lowering a load and moving it horizontally, in which the hoisting mechanism is an integral part of the machine. The term shall include all types of cranes, such as cantilever gantry, crawler, gantry, hammerhead, ingot-pouring, jib, locomotive, motor-truck, overhead traveling, pillar jib, pintle, portal, semi-gantry, semi-portal, storage bridge, tower, walking jib, and wall cranes.

(3) The term derrick shall mean a power-driven apparatus consisting of a mast or equivalent members held at the top by guys or braces, with or without a boom, for use with an hoisting mechanism or operating ropes. The term shall include all types of derricks, such as A-frame, breast, Chicago boom, gin-pole, guy and stiff-leg derrick.

(4) The term hoist shall mean a power-driven apparatus for raising or lowering a load by the application of a pulling force that does not include a car or platform running in guides. The term shall include all types of hoists, such as base mounted electric, clevis suspension, hook suspension, monorail, overhead electric, simple drum and trolley suspension hoists.

(5) The term high-lift truck shall mean a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork or platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include highlift trucks known under such names as fork lifts, fork trucks, fork-lift trucks, tiering trucks, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of material.

(6) The term manlift shall mean a device intended for the conveyance of persons which consists of platforms or brackets mounted on, or attached to, an endless belt, cable, chain or similar method of suspension; such belt, cable or chain operating in a substantially vertical direction and being supported by and driven through pulleys, sheaves or sprockets at the top and bottom.

(c) Exception. (1) This section shall not prohibit the operation of an automatic elevator and an automatic signal operation elevator provided that the exposed portion of

the car interior (exclusive of vents and other necessary small openings), the car door, and the hoistway doors are constructed of solid surfaces without any opening through which a part of the body may extend; all hoistway openings at floor level have doors which are interlocked with the car door so as to prevent the car from starting until all such doors are closed and locked; the elevator (other than hydraulic elevators) is equipped with a device which will stop and hold the car in case of overspeed or if the cable slackens or breaks; and the elevator is equipped with upper and lower travel limit devices which will normally bring the car to rest at either terminal and a final limit switch which will prevent the movement in either direction and will open in case of excessive over travel by the car.

(2) For the purpose of this exception the term automatic elevator shall mean a passenger elevator, a freight elevator, or a combination passenger-freight elevator, the operation of which is controlled by pushbuttons in such a manner that the starting, going to the landing selected, leveling and holding, and the opening and closing of the car and hoistway doors are entirely automatic.

(3) For the purpose of this exception, the term automatic signal operation elevator shall mean an elevator which is started in response to the operation of a switch (such as a lever or pushbutton) in the car which when operated by the operator actuates a starting device that automatically closes the car and hoistway doors—from this point on, the movement of the car to the landing selected, leveling and holding when it gets there, and the opening of the car and hoistway doors are entirely automatic.

§ C570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).

(a) Finding and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven metal forming, punching, and shearing machines:

(i) All rolling machines, such as beading, straightening, corrugating, flanging, or bending rolls; and hot or cold rolling mills.

(ii) All pressing or punching machines, such as punch presses except those provided with full automatic feed and ejection and with a fixed barrier guard to prevent the hands or fingers of the operator from entering the area between the dies; power presses; and plate punches.

(iii) All bending machines, such as apron brakes and press brakes.

(iv) All hammering machines, such as drop hammers and power hammers.

(v) All shearing machines, such as guillotine or squaring shears; alligator shears; and rotary shears.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those with automatic feed and ejection.

(b) Definitions. (1) The term operator shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term helper shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term forming, punching, and shearing machines shall mean power-driven metal-working machines, other than machine tools, which change the shape of or cut metal by means of tools, such as dies, rolls, or knives which are mounted on rams, plungers, or other moving parts. Types of forming, punching, and shearing machines enumerated in this section are the machines to which the designation is by custom applied.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in Sec. 570.50 (b) and (c).

§ C570.62 Occupations involved in the operation of bakery machines (Order 11).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven bakery machines are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operating, assisting to operate, or setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer; batter mixer; bread dividing, rounding, or molding machine; dough brake; dough sheeter; combination bread slicing and wrapping machine; or cake cutting band saw.

(2) The occupation of setting up or adjusting a cooky or cracker machine.

§ C570.63 Occupations involved in the operation of paper-products machines (Order 12).

(a) Findings and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operation or assisting to operate any of the following power-driven paper products machines:

(i) Arm-type wire stitcher or stapler, circular or band saw, corner cutter or mitering machine, corrugating and single-or-double-facing machine, envelope die-cutting press, guillotine paper cutter or shear, horizontal bar scorer, laminating or combining machine, sheeting machine, scrap-paper baler, or vertical slotter.

(ii) Platen die-cutting press, platen printing press, or punch press which involves hand feeding of the machine.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those which do not involve hand feeding.

(b) Definitions. (1) The term operating or assisting to operate shall mean all work which involves starting or stopping a machine covered by this section, placing or removing materials into or from the machine, or any other work directly involved in operating the machine. The term does not include the stacking of materials by an employee in an area nearby or adjacent to the machine where such employee does not place the materials into the machine.

(2) The term paper products machine shall mean all power-driven machines used in:

(i) The remanufacture or conversion of paper or pulp into a finished product, including the preparation of such materials for recycling; or

(ii) The preparation of such materials for disposal. The term applies to such machines whether they are used in establishments that manufacture converted paper or pulp products, or in any other type of manufacturing or nonmanufacturing establishment.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in §570.50 (b) and (c).

§ C570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).

(a) Findings and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven fixed or portable machines except machines equipped with full automatic feed and ejection:

(i) Circular saws.

(ii) Band saws.

(iii) Guillotine shears.

(2) The occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears.

(b) Definitions. (1) The term operator shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term helper shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term machines equipped with full automatic feed and ejection shall mean machines covered by this Order which are equipped with devices for full automatic feeding and ejection and with a fixed barrier guard to prevent completely the operator or helper from placing any part of his body in the point-of-operation area.

(4) The term circular saw shall mean a machine equipped with a thin steel disc having a continuous series of notches or teeth on the periphery, mounted on shafting, and used for sawing materials.

(5) The term band saw shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.

(6) The term guillotine shear shall mean a machine equipped with a movable blade operated vertically and used to shear materials. The term shall not include other types of shearing machines, using a different form of shearing action, such as alligator shears or circular shears.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in §570.50 (b) and (c).

§ C570.66 Occupations involved in wrecking and demolition operations (Order 15).

(a) Finding and declaration of fact. All occupations in wrecking and demolition operations are particularly hazardous for the employment of minors between 16 and 18 years of age and detrimental to their health and well-being.

(b) Definition. The term wrecking and demolition operations shall mean all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, other structure.

§ C570.67 Occupations in roofing operations (Order 16).

(a) Finding and declaration of fact. All occupations in roofing operations are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health.

(b) Definition of roofing operations. The term roofing operations shall mean all work performed in connection with the application of weatherproofing materials and substances (such as tar or pitch, asphalt prepared paper, tile, slate, metal, translucent materials, and shingles of asbestos, asphalt or wood) to roofs of buildings or other structures. The term shall also include all work performed in connection with: (1) The installation of roofs, including related metal work such as flashing and (2) alterations, additions, maintenance, and repair, including

painting and coating, of existing roofs. The term shall not include gutter and downspout work; the construction of the sheathing or base of roofs; or the installation of television antennas, air conditioners, exhaust and ventilating equipment, or similar appliances attached to roofs.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in §570.50 (b) and (c).

§C570.68 Occupations in excavation operations (Order 17).

(a) Finding and declaration of fact. The following occupations in excavation operations are particularly hazardous for the employment of persons between 16 and 18 years of age: (1) Excavating, working in, or backfilling (refilling) trenches, except (i) manually excavating or manually backfilling trenches that do not exceed four feet in depth at any point, or (ii) working in trenches that do not exceed four feet in depth at any point.

(2) Excavating for buildings or other structures or working in such excavations, except: (i) Manually excavating to a depth not exceeding four feet below any ground surface adjoining the excavation, or (ii) working in an excavation not exceeding such depth, or (iii) working in an excavation where the side walls are shored or sloped to the angle of repose.

(3) Working within tunnels prior to the completion of all driving and shoring operations.

(4) Working within shafts prior to the completion of all sinking and shoring operations.

(b) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in Sec. C570.50 (b) and (c).

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Extension of Rights and Protections Under the Family and Medical Leave Act of 1993

Notice of proposed rulemaking

Summary: This notice contains proposed regulations to extend rights and protections under the Family and Medical Leave Act of 1993 (''FMLA'') to employees of the House of Representatives, the Senate, and certain Congressional instrumentalities listed below. These proposed regulations implement sections 202 (a) and (b) of the Congressional Accountability Act of 1995 (''CAA''), Public Law 104–1, 2 U.S.C. §§1312(a)–(b).

The CAA extends the rights and protections of eleven labor and employment laws to covered employees within the legislative branch. Section 202 governs the extension of the rights and protections of the FMLA to covered employees and employing offices of the House of Representatives, the Senate, and seven Congressional instrumentalities listed in paragraph (3) below. The purposes of the FMLA include entitling employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.

This notice proposes that substantially similar regulations be adopted for the Senate, the House of Representatives, and the seven Congressional instrumentalities; and their 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 recommended 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 Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment, and their employees; and this proposal regarding these seven Congressional instrumentalities is recommended by the Office of Compliance's Executive Director.

Dates: Comments are due on or before the date 30 days after the date of publication of this notice 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, D.C. 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 (''FAX'') machine to (202) 252–3115. 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, Library of Congress, James Madison Building, Washington, D.C., 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) 252–3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this notice in an alternative format should be made to Mr. Russell Jackson, Director, Service Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, at (202) 224–2507.

Supplementary information:

A. *Background.*

Statutory background. The Congressional Accountability Act of 1995 (''CAA''), 2 U.S.C. §§1301 et seq., was enacted into law on January 23, 1995. The CAA extends the application of eleven federal labor and employment laws to covered employees and employing offices within the legislative branch.

Sections 202 (a) and (b) of the CAA apply rights and protections of the Family and Medical Leave Act of 1993 (''FMLA'') to covered employees and employing offices. The FMLA generally requires employers to permit covered employees to take up to 12 weeks of unpaid, job-protected leave during a 12-month period for the birth of a child and to care for the newborn; placement of a child for adoption or foster care; care of a spouse, child, or parent with a serious health condition; or an employee's own serious health condition. The FMLA and the regulations of the Secretary of Labor (''Secretary'') implementing the FMLA contain provisions concerning the maintenance of health benefits during leave, job restoration after leave, notice and medical certifications of the need for FMLA leave, and the relationship of FMLA leave to the rights under other employment laws including the Americans With Disabilities Act, workers compensation, and Title VII of the Civil Rights Act of 1964.

Section 202(d) of the CAA directs the Board of Directors of the Office of Compliance established under the CAA to issue regulations to implement the rights and protections under section 202. Section 202(d)(2) further states that the regulations ''shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202] except insofar as the Board may 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 this section.''

Offices to which the proposed regulations apply. As noted above in the Summary, the regulations proposed in this notice are to be adopted in three separate bodies of regulations: (1) one applying to the Senate and its employees, (2) one applying to the House of Representatives and its employees, and (3) one applying to the seven Congressional instrumentalities listed above in the Summary, and their employees.[1] It is proposed that there will be only minor, non-substantive variations among the three versions of these regulations. These proposed variations are set forth in the proposed regulatory language included in this NPRM.

B. The Advance Notice of Proposed Rulemaking, and Response to Comments

On September 28, 1995, the Board of Directors of the Office of Compliance issued an Advance Notice of Proposed Rulemaking (''ANPRM'') soliciting comments from interested parties in order to obtain information and participation early in the rulemaking process. 141 Cong. Rec. S 14542 (daily ed., Sept. 28, 1995). In addition to inviting comment on specific questions arising under five of the statutes made applicable by the CAA, the Board and the Executive Director, and the Deputy Executive Directors of the Office of Compliance have consulted with the Chair of the Administrative Conference of the United States, the Secretary of Labor, and the Director of the Office of Personnel Management with regard to the development of these regulations in accordance with Section 304(g) of the CAA. Based on the information gleaned from these comments on the ANPRM and this consultation, the Board is publishing these proposed rules pursuant to section 202(d) of the CAA, 2 U.S.C. §1312(d).

In response to the ANPRM, the Board received comments from a variety of sources expressing a wide range of views. The following discussion describes issues raised by the ANPRM and by comments in response to the ANPRM, and explains how the Board has taken these comments into account in developing proposed regulations. The Board invites further comments on the regulations proposed in this notice.

The first two issues—on whether the Board should modify the Secretary of Labor's regulations, and on notice posting and recordkeeping—are generic issues that arise under several statutes made applicable by the CAA. The comments on these issues and the Board's conclusions are fully discussed in the Notice of Proposed Rulemaking (NPRM) regarding the application of the Fair Labor Standards Act (FLSA). The NPRM regarding the FLSA is being published today, in this issue of the Congressional Record. Therefore, the comments and analysis regarding these two issues are only briefly summarized in this notice, and the reader is directed to the

[1] This notice does not apply to the General Accounting Office (''GAO''), the Government Printing Office (''GPO''), or the Library of Congress (the ''Library''). Section 201 of the FMLA already applies to GAO, GPO, and the Library (5 U.S.C. §§6381 et seq.); section 230 of the CAA requires a study of the application of the FMLA to these three agencies; and section 202(c) of the CAA amends the FMLA provisions applicable to the GAO and the Library, effective one year after the study is transmitted to Congress.

NPRM regarding the FLSA for a fuller discussion.

1. Whether and to what extent the board should modify the labor department's regulations

The first question posed in the ANPRM was the general question of whether and to what extent the Board should modify the Department of Labor's regulations with respect to all of the statutes made applicable by the CAA.

Those commenters who expressed views on this issue cited both the statute and the legislative history for the position that the CAA presumes that the regulations of the Department of Labor should generally not be modified. As noted above, the comments received in response to this question are summarized and discussed in the NPRM regarding the application of the FLSA, which is being published today in the CONGRESSIONAL RECORD.

Based on the comments and the Board's understanding of the law and the institutions to which it is being made applicable, the Board has decided to issue the FMLA regulations with only limited and necessary modifications to the Secretary's regulations. In making the FMLA applicable, the CAA changed the key definition of ''eligible employee,'' and the Board therefore proposes to make a corresponding modification to the definition of ''eligible employee'' in the Secretary's regulations. Certain conforming amendments and technical changes in the nomenclature of the Secretary's regulations have also been proposed, and those sections that are clearly inapplicable have specifically not been proposed for adoption by the Board. These proposed modifications to the Secretary's regulations are discussed below.

2. Notice posting and recordkeeping

The ANPRM also invited comment on whether the notice posting and recordkeeping requirements of the various laws made applicable by the CAA are incorporated as statutory requirements of the CAA. The ANPRM inquired whether, if such requirements were not incorporated, could and should the Board develop its own requirements pursuant to its ''good cause'' authority. The ANPRM also invited comment on proposing guidelines and models for recordkeeping and notice posting. As noted above, the comments received in response to these questions are summarized and discussed in the NPRM regarding the application of the FLSA.

The Board agrees with those commenters who took the position that, if employing offices are to be treated the same as private sector employers are treated under the FMLA, they should have to comply with the statute's notice posting and recordkeeping requirements. Moreover, the Board notes that notice posting and recordkeeping promote the full and effective enforcement of incorporated rights and protections. In the Board's view, notice posting and recordkeeping may well be in employers' interests both as a sound personnel practice and in order to defend against subsequent litigation.

But, while the CAA incorporates certain specific sections of the FMLA, the CAA explicitly did not incorporate the notice posting and recordkeeping requirements of Sections 109 and 106(b), of the FMLA. For the reasons discussed with respect to the FLSA, as the CAA has not incorporated the notice posting and recordkeeping requirements of the FMLA, the Board will not do so. Accordingly, the Board proposes not to adopt sections 825.300 and 825.500 of the Secretary's FMLA regulations.

For similar reasons, the Board is proposing not to adopt a provision of section 825.110(c) of the Secretary's regulations. Section 825.110(c) addresses the question of how to determine whether the 1,250-hour leave-eligibility requirement has been satisfied. This section states that the principles established under the Fair Labor Standards Act (FLSA) will be used, and states further that, if an employer does not maintain an accurate record of hours worked, the employer has the burden of showing that the employee has not worked the requisite number of hours. Section 825.110(c) further provides that, in the event the employer is unable to meet this burden, the employee is deemed to have met the test. Section 101(2)(C) of the FMLA states that, for purposes of determining whether an employee worked the requisite 1,250 hours, the legal standards established under the FLSA shall apply. Although section 101(2)(C) of the FMLA incorporates the recordkeeping requirements of the FLSA, the Board has concluded that section 101(2)(C) does not make the FLSA recordkeeping requirements applicable under the CAA. This is because, by excluding the FLSA recordkeeping requirements from the FLSA provisions of the CAA, Congress indicated its intent that those recordkeeping requirements should not apply with respect to any CAA requirement. Accordingly, the Board has concluded that the legal authority supporting the Secretary's regulatory provision regarding burdens was not incorporated into the FMLA provisions of the CAA, and this regulatory provision is not included in the Board's proposed regulations.

The Board notes, however, that, as a practical matter, implementation of the FMLA, as made applicable by the CAA, requires an adequate system of keeping records. Such records will be needed, for example, for the employing office to know when employees have satisfied the 12-months and 1,250-hours of service for eligibility, and to keep track of how much FMLA leave each employee has taken during a leave year. As various commenters suggest, the Board will provide guidance to employing offices concerning model recordkeeping practices as part of carrying out its program of education under section 301(h)of the CAA (2 U.S.C. 1381(h)).

The Board would also note, as it did in the NPRM involving the application of the rights and protections of the FLSA, that the absence of recordkeeping and notice posting requirements may create a void which can only partially be filled by the program of education to be carried out by the Board. The Board also would emphasize that employees will in many circumstances be able to establish a prima facie case simply by their own testimony where the employing office has failed to maintain adequate, accurate records and an employing office may find that its ability to respond to an employee's prima facie case is substantially burdened by its failure to keep accurate records. If Congress wishes to experience the same burdens as faced by the private sector and also to address these issues, it should enact recordkeeping requirements comparable to those of the FMLA. (Of course, like the regulations under the FMLA, such recordkeeping requirements may leave to the discretion of each employing office the precise form and manner in which records will be kept.) But, in light of the text and structure of the CAA, the Board believes that it is up to Congress to decide whether to do so.

Finally, section 825.304(c) of the Secretary's regulations refers to the posting of notices without mandating such posting. Section 825.304 implements section 102(e) of the FMLA which requires that an employee give the employer at least 30 days'' advance notice of any foreseeable FMLA leave. The regulation provides that, if such notice is not provided, the employer may delay the taking of FMLA leave until at least 30 days after the date of actual notice from the employee. However, in order for the onset of leave to be delayed for lack of required notice, paragraph (c) requires that it must be clear that the employee had actual notice of the FMLA notice requirements. Finally, the paragraph offers that ''This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed.'' Because this regulation implements section 102(e) of the FMLA, the Board believes that it must be adopted, absent good cause to modify it. Only a minor modification is needed. Under section 301(h) of the CAA, the Office must distribute information to employing offices in a form suitable for posting, but there is no requirement that the information actually be posted. Accordingly, the Board proposes to refer not to the ''required notice'', but to the ''information distributed by the Office suitable for posting''.

3. May an employee aggregate months and hours worked at more than one employing office to satisfy the 12-months and 1,250-hours of work conditions for eligibility?

Both the FMLA and the CAA include definitions of ''eligible employee'' which require that, to be eligible for FMLA leave, an employee must first have been employed for 12 months and for at least 1,250 hours during the previous 12-month period. However, the wording of the two definitions is significantly different.

The FMLA definition of ''eligible employee'' requires employment for at least 12 months ''by the employer with respect to whom leave is requested'' and for at least 1,250 hours of service during the previous 12 months with ''such employer''. In contrast, under section 202(a)(2)(B) of the CAA, an ''eligible employee'' is defined as a covered employee who has been employed in ''any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months''. It is clear that the FMLA definition requires that the 12 months and 1,250 hours must have been worked for the same employer from which the employee requests leave. However, the CAA is ambiguous as to whether an employee who worked for more than one employing office can aggregate the months and hours of employment from more than one employing offices to satisfy the 12-month and 1,250-hour requirements.

Accordingly, the ANPRM asked: Whether and, if so, how the 12 months and 1,250 hours of work should be calculated for employees who worked for more than one employing office.

Commenters expressed opposing views on this question:

One commenter argued that each employing office, in practice and under the CAA, is a separate, independent employer. Therefore, ''employing offices'' under the CAA should be treated the same as ''employers'' under the FMLA. Under this view, except in unusual circumstances, an employee must have worked for 12 months, and for 1,250 hours within the previous 12 months, for the particular employing office from which leave is requested.

Another commenter argued that employing offices under the CAA should be treated the same as part of a single institutional ''employer'' under the FMLA. The Board should treat employing offices as part of a single employer. In this view, employing offices would be analogous to the separate ''establishments'' or ''divisions'' of a single corporate employer.

A third view, with respect to the 1,250-hour requirement, was presented by another commenter. For employees who are employed by more than one employing office, the Board

should make clear that hours of employment in each employing office will be considered when determining whether or not the 1,250 hour threshold has been met.

The Board believes that the language of the CAA is ambiguous. According to the dictionary, among several possible meanings, the term ''any'' may mean ''one (no matter which one) of more than two'', or it may mean ''every''. Webster's New Universal Unabridged Dictionary (deluxe 2d ed., 1983). If the first meaning were applied, the 12 months and 1,250 hours would have to be accrued in one single employing office; if the second meaning were applied, the months and hours could be aggregated from every employment office where the employee worked.

The Board has concluded that the better understanding of the CAA language is the latter one. The FMLA definition is explicit that the 12 months must have been served with ''the employer with respect to whom leave is requested'', and the 1,250 hours of service must also have been with ''such employer''. However, in the CAA, Congress substituted the phrase ''any employing office'' in place of the FMLA's precise reference to the particular employer from whom leave is requested. It therefore appears that eligibility should be determined on the basis of months and hours worked for employing offices other than just the one from which the leave is requested.[2]

Based on the Board's understanding of the meaning of the CAA, the Board proposes to modify the regulations as promulgated by the Secretary—(1) to incorporate the definition of ''eligible employee'' as set forth in section 202 of the CAA, and (2) to include language clarifying that, where an employee works for two or more employing offices, the months and hours worked will be aggregated for purposes of determining eligibility. (See §§825.110, 825.800 of the proposed regulations.)

4. Should the Board's regulations retain the House of Representatives rule under which employees are eligible for FMLA leave immediately upon employment?

Title V of the FMLA has applied certain rights and protections to the House and Senate since August 1993. Section 502, which applies to the House of Representatives, and rules adopted in the House to implement section 502, provide that House employees become eligible for FMLA leave immediately, without any minimum months or hours of employment.

In response to the ANPRM, some commenters questioned whether the Board should retain this approach for the House. Certain commenters argued that making FMLA leave immediately applicable in the House is based on the maximum two-year employment period in the House, which comes to a discrete end in the House at the conclusion of each Congress. Immediate eligibility allegedly diminishes many of the anticipated problems and issues regarding the administration of the leave year, treatment of joint employer status, and inconsistency of application. Accordingly, they urged the Board to retain current immediate eligibility for the House. Other commenters urged the opposite—i.e., that the Board should retain the private-sector eligibility requirements of 12 months and 1,250 hours.

The Board recognizes that the two-year employment cycle of the House of Representatives creates terms and conditions of employment which differ from the private sector. The Board also recognizes that at least some within the House of Representatives believe that immediate FMLA eligibility is an important element of an appropriate FMLA program for the House. However, for the Board's regulations to make House employees immediately eligible for FMLA leave would go beyond the express terms of the CAA.

Of course, neither the FMLA, as applied by the CAA, nor the regulations being proposed by the Board, would forbid the House from establishing a more generous leave program under its own authority. See §403 of the FMLA (applied by §225(f)(1) of the CAA); §825.700 of the proposed regulations. These provisions state that employing offices are not intended to be discouraged from adopting or retaining leave policies more generous than any policies that comply with FMLA requirements. Therefore, individual employing offices remain free to grant leave to employees immediately upon employment, and nothing in the FMLA, as applied by the CAA, should affect any ability of the House to mandate immediate leave-eligibility for all House employing offices under its own authority. This should enable the House to retain much of the value of its current FMLA program, if the House determines that it wishes to retain immediate eligibility for leave.

The Board recognizes that, if the House decides to grant leave to employees who do not satisfy the CAA definition of an ''eligible employee,'' attention must be paid to the question of how such leave would be treated under both FMLA and FLSA, as made applicable by the CAA. For example, an employing office may wish to ''dock'' an employee's pay for leave taken for partial-day absences. However, §825.206(c) of the Board's proposed regulations provide: ''Hourly or other deductions which are not in accordance with [applicable requirements under FLSA regulations] may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption [from FLSA requirements].'' Furthermore, in preamble language to the Secretary's FMLA regulations, the Secretary stated: ''Leave granted under circumstances that do not meet FMLA's coverage, eligibility, or specified reasons for FMLA-qualifying leave may not be counted against FMLA's 12-week entitlement.'' 60 Fed. Reg. 2230, col. 1 (Jan. 6, 1995).

In light of all of these factors, the Board does not believe that good cause exists for the Board's regulations to make House employees immediately eligible for FMLA leave.

5. Should the Board designate a uniform leave year?

As noted above, title V of the FMLA made certain rights and protections under the FMLA available to employees of the House and Senate. On August 5, 1993, the House Committee on House Administration adopted regulations and forms to implement the FMLA in the House. Among other things, these rules designated the period from January 3 of one year through January 2 of the following year as the FMLA ''leave year'' for all employers of the House. (The term ''leave year'' is used here to refer to the 12-month period within which the 12 weeks of leave may be taken.) This regulation has been retained by the Committee on House Oversight. However, section 502 of the FMLA, upon which the House regulations were based, is repealed by the CAA effective January 23, 1996.

With this as background, the ANPRM posed the following question: whether there is ''good cause'' to believe that designating a uniform FMLA leave year would be ''more effective'' for implementation of the rights and protections of the CAA than the regulations promulgated by the Secretary. The Secretary's regulations provide considerable freedom to employers to designate the 12-month period appropriate to their office.

Several commenters supported the use of a uniform leave year, and urged the Board to retain a uniform year in its rules, at least for the House. Other commenters disagreed.

Favoring the uniform leave year:

Certain commenters argued that the January 3 through January 2 period is based on the maximum two year employment period in the House, which comes to a discrete end at the conclusion of each Congress. Because this two-year employment cycle is unique to the House, the Board's regulations should ''retain'' the current, uniform manner in which FMLA is applied to the House, as a more effective way to implement the FMLA than the various options for defining leave years available under the Secretary's regulations. Furthermore, the uniform leave year is much easier to implement and understand, so that employees are less likely to lose their rights.

Another commenter pointed out that joint employment is very common in Congress, and argued that applying different leave years will cause administration to be problematic.

Opposing a uniform leave year:

Other commenters were doubtful of the need for the Board to establish a uniform leave year for the House, and saw no reason why employing offices should be denied flexibility.

Another commenter clearly took a position opposed to establishing a uniform leave year for the Senate. Each employing office should be allowed to choose any method allowed by the Secretary's regulations, and there is no ''good cause'' to restrict employers' choice.

The Board recognizes that the use of a uniform leave year may have advantages. However, there is also value in allowing employing offices the flexibility to apply a leave year that is appropriate to the office's circumstances.

Much of the advantage of a uniform leave year, as described by the commenters, involves making the FMLA program easier for the employing offices and for the House payroll and administrative offices to administer. However, nothing in the FMLA, as applied by the CAA, or in the regulations being proposed by the Board thereunder, would forbid the House from retaining these benefits by retaining its uniform leave year under the House's own authority. Under the FMLA and the Secretary's regulations, each employer is free to select a leave year. The Board is unaware of anything in the FMLA or the Secretary's regulations that would forbid House employing offices from establishing a uniform leave year for themselves, either by voluntary agreement among employing offices, or by establishing a uniform year under the House's authority of self-regulation. (Senate employing offices would, of course, also be free to consider a uniform leave year for some or all Senate employing offices, if they so desire.)

The Board also recognizes that use of a uniform leave year may provide some benefits and protections for eligible employees. When employees transfer from one employing office to another, or when they work simultaneously for more than one employing office, the application of different leave years by different employing offices could cause confusion and, in some circumstances, could limit flexibility by forcing an employee to fit leave within the constraints of differently defined years. This concern is discussed below, under the topic of whether the

[2] This interpretation is consistent with the section-by-section analysis placed in the Congressional Record by Senator Grassley on behalf of himself and Senator Lieberman. Congressional Record, page S 623, col. 3 (Jan. 9, 1995).

use of different leave years would affect FMLA leave rights. As noted, when an employee works jointly for two or more employing offices that apply inconsistent leave years, the employing offices will have to apply a single leave year for the employee.

For these reasons, the Board does not believe that there is good cause to mandate a uniform leave year.

6. Should the definitions of ''joint employer'', ''integrated employer'', or ''successor employer'' be retained or modified?

In the ANPRM, the Board explained that, under certain circumstances under the Secretary's FMLA regulations, two or more employers of the same employee may be treated as a single employer. The concepts under which this may be done are set forth within the provisions applicable to ''joint employers'', ''integrated employers'', and ''successor employers.''

Accordingly, the ANPRM asked for comment regarding: Whether and, if so, how the definitions of ''joint employer'', ''integrated employer'', or ''successor employer'' set forth in the regulations promulgated by the Secretary should be applied and/or modified.

Commenters offered several varying proposals on how these definitions should be modified.

One commenter suggested that, where an employee works concurrently for more than one employing office, the employing offices might jointly decide which of the employing offices will be designated the ''primary'' employer for purposes of FMLA compliance.

Another commenter suggested that ''joint employment'' will occur in the House where an employee is under the actual direction and control of a Member, even if another employing authority, such as a committee, performs a ministerial function with respect to payroll administration.

A commenter stated that no two employing offices in the Senate are ever ''under common control''. A ''joint employer'' relationship was said to exist in the Senate in only three situations: (a) an employee supplied by a temporary or leasing agency or supplied by another agency on detail, (b) working in two Senators' joint home office, or (c) working on common issues or other matters for more than one employing office. Where there is no ''primary'' employer, all must designate a single leave year for all of their joint employees. The commenter also stated that the concepts of integrated employer and successors in interest are not applicable to the Senate.

Another commenter suggested that, in the case of joint employment, reinstatement rights should apply with respect to both joint employers.

Finally, a commenter suggested that the Board should adopt the Department of Labor's regulations and allow each employing office to interpret them.

Integrated employer. The Secretary's regulations use the term ''integrated employers'' to refer to employers that are so closely connected that they are deemed a single entity. Under these regulations, whether employers are an ''integrated employer'' is determined by review of the entire relationship, and the factors to be considered ''include': (i) common management, (ii) interrelation between operations, (iii) centralized control of labor relations, and (iv) common ownership/financial control.

If two employing offices were to be considered an ''integrated employer'' under the FMLA as applied by the CAA, employee eligibility and employer coverage would not be affected because employing offices are covered regardless of size, and employees'' months and hours worked for any employing offices are aggregated for determining eligibility. However, being deemed an ''integrated employer'' may have implications for the determining employing offices'' compliance obligations, so the concept of ''integrated employer'' should not be discarded as irrelevant.

The first three criteria listed in the Secretary's regulation—i.e., common management, interrelated operations, and centralized control of labor relations—appear to be clearly relevant and appropriate to determining whether two or more offices should be considered a single employing office. One commenter argued that the fourth criterion—common ownership/financial control—is foreign to the Senate. The Board agrees that ''common ownership'' is inapplicable to employing offices and their employees, and proposes not to adopt it. ''Financial control'' would probably not be applicable to employing offices in ordinary circumstances, but, in light of the fact that this criterion might prove to be useful in dealing with some unanticipated circumstance, the Board sees no need to omit this criterion.

For these reasons, the Board does not believe that there is good cause to omit the regulation on ''integrated employer,'' and the Board proposes only to delete the reference to ''common ownership'' from the regulation.

Successor in interest. Like the ''integrated employer'' provision, the ''successor in interest'' concept has no implications for whether employees are eligible or employing offices are covered. However, some situations may arise where the concept of successorship will be relevant. For example, if committee jurisdictions are restructured, it may be necessary to determine which, if any, of the surviving committees is the ''successor in interest'' to the former committee. Thus, determining the successor may be important in determining whether a remaining committee must grant leave for an eligible employee who provided adequate notice to the former committee, or must continue leave begun while an employee was employed by the former committee.

The concept of ''successor in interest'' is developed in section 825.107 of the Secretary's regulations. The regulations state that a determination of whether a ''successor in interest'' exists is determined by the ''entire circumstances * * * viewed in their totality''. The regulation also states: ''The factors to be considered include: (1) Substantial continuity of the same business operations; (2) Use of the same plant; (3) Continuity of the work force; (4) Similarity of jobs and working conditions; (5) Similarity of supervisory personnel; (6) Similarity of machinery, equipment, and production methods; (7) Similarity of products or services; and (8) The ability of the predecessor to provide relief.''

The Board is concerned that several of the factors listed in 29 C.F.R. §825.107 are largely inapplicable. Except for a few shops, employing offices do not have ''business operations''. Few employing offices have a ''plant'', ''machinery, equipment, and production methods'' or ''products or services''. Accordingly, the Board proposes not to adopt §825.107 of the Secretary's regulations. Although the Board would wish to provide guidance on how the concept of ''successor employer'' would be applied under the CAA, it is impossible at this point to foresee how successorship will arise in the unique context of employing offices covered under the CAA. Accordingly, the determinations as to successorship may be addressed in future rulemaking or in case-by-case adjudication. In the latter situation, litigants may raise the question of successorship, and the Board would expect that common-law or other recognized principles of successorship might be considered or applied by the hearing officer, the Board, or a court.

Joint employers. The ''joint employer'' definition also would not affect employee eligibility, because hours of work are aggregated for eligibility purposes. However, the concept of joint employment is important for determining which employing office or employing offices have responsibility for FMLA compliance. The Board proposes that the regulatory section on joint employment can be adopted with relatively little revision. Examples of joint employment described in comments could be appropriately evaluated with reference to the criteria set forth in the regulation. For example, where an employee on a committee payroll is under the actual direction and control of a Member of the House of Representatives or a Senator, it may be relevant to consider whether the committee is acting ''in the interest of'' the Member's or Senator's personal office in relation to the employee, or whether the committee and the personal office are under ''common control'' with respect to the employee's employment. (See §§825.106(a)(2)–(3) of these proposed regulations.) The Board therefore proposes to add to the regulation a reference to examples of joint employment proposed in comments.

Finally, the Board acknowledges the view expressed by some commenters, that there may not be a primary employer in every instance of joint employment, and that joint employers should, by agreement, designate which single employing office will be responsible for compliance with FMLA obligations with respect to the joint employee. However, any such agreement cannot relieve the other joint employing offices of any FMLA responsibilities that are not fulfilled.

7. Whether the use of different leave years by different employing offices would affect the FMLA leave rights of ''eligible employees'' who are employed by more than one employing office?

Finally, the Board in the ANPRM recognized that a uniform leave year might not be required under Board regulations, and therefore asked for comment whether the lack of uniformity could jeopardize employees' leave rights. The Board suggested that this question be considered in light of the definition of ''joint employer'', ''integrated employer'', and ''successor employer''.

A commenter distinguished the situation of joint employment from the situation of independent employment. In the case of joint employment, if there is no primary employer, all of the employers must jointly designate a leave year for the joint employees. If an employee works at separate times for separate, independent employers, the employers may designate different leave years without depriving the employee of any FMLA rights. If an employee moves from joint employment to become employed by only one of the employers, or moves from being employed by one employer to being employed by that and another employer jointly, and if the applicable leave year therefore changes, the procedure under §825.200(d)(1) would apply. (Under this section, when an employer chooses to shift from one leave year to another, the employee is authorized to take advantage of whichever leave year is more beneficial.)

A commenter suggested that the regulations should authorize joint House employing offices to designate which one will be the ''primary'' employer responsible for fulfilling FMLA responsibilities.

Furthermore, as noted above, commenters argued that a uniform leave year is easier to understand, so that employees are less likely

to lose their FMLA rights through inadvertence or otherwise, and that, if employing offices adopt different leave years, administration of the FMLA requirements would be problematic.

The Board recognizes that the use of inconsistent leave years may make implementation of FMLA provisions of the CAA more complicated, and might have some impact on employees who transfer from one employing office to another or who work independently for more than one employing office. However, where an employee is employed jointly by employing offices that ordinarily use different leave years, commenters suggested that the joint employers either (1) designate one employer whose leave year will apply, or (2) jointly designate an applicable leave year. Another commenter suggested that, where an employee transfers between being jointly employed and being employed by only one of the employing offices, the procedures under §825.200(d)(1) could apply. These approaches would not appear to raise difficulties, provided the employee's FMLA entitlement is not compromised.

In light of these considerations, the Board does not believe that there is good cause to modify the Secretary's regulations with respect to the possibility that different employing offices will apply different leave years.

C. Other drafting issues

Finally, in developing the regulations proposed in this notice, in addition to the policy issues discussed above, the Board considered the following drafting issues:

1. *Worksite eligibility*. Section 101(2)(B)(ii) of the FMLA denies eligibility to any employee at a worksite where the employer employs less than 50 employees if the total number of employees employed within a 75-mile radius is less than 50. This criterion is a ''size limitation'' that, under section 225(f)(2) of the CAA, does not apply under the CAA. Accordingly, a number of regulatory provisions relating to this worksite eligibility criterion are not included in the regulations proposed by the Board. These omitted provisions include some or all of 29 C.F.R. §§825.105, 825.106(d), 825.110(a)(3), 825.110(f), 825.111, 825.206(c), 825.220(b)(1).

2. *State and local law*. The Department of Labor's regulations contain numerous provisions that address or touch upon the relationship between the FMLA and State or local law addressing leave or related matters. Since State and local law do not govern the employment relationship of covered employees and employing offices, these references to State and local law are omitted from the regulations being proposed by the Board. These omitted provisions include some or all of 29 C.F.R. §§825.200(d)(2), 825.201, 825.202(c), 825.204(b), 825.206(c), 825.701, and other sections.

3. *Consideration of periods before the CAA effective date*. The CAA takes effect on January 23, 1996. Under the Secretary's regulations implementing FMLA, employment with a covered employer before the effective date of the FMLA (August 5, 1993) is to be counted in determining whether an employee is ''eligible'' for FMLA leave. 29 C.F.R. §825.102. Similarly, the Secretary's regulations provide that leave starting on and after the FMLA effective date is considered FMLA leave which can be counted against an employee's 12-week entitlement. Such leave is qualifying under the FMLA even if the event occasioning the need for leave (e.g., the birth of a child) occurred before the effective date. 29 C.F.R. §825.103. See also 29 C.F.R. §825.200(b)(4).

The proposed regulations adopt the Secretary's general approach regarding the effective date; however, the applicable effective dates for application of the rights and protections of the FMLA in the Congress are somewhat more complicated. The CAA, and its application of the rights and protections of the FMLA, takes effect on January 23, 1996. Section 202(e)(1) of the CAA. However, certain rights and protections of the FMLA applied to employees of the House of Representatives, the Senate, and certain employees of congressional instrumentalities under Title V of the FMLA, effective August 5, 1993. The proposed regulations harmonize these preexisting applications of FMLA rights and protections with application of those rights and protections under the CAA.

The proposed regulations state that an employing office must consider periods of employment before January 23, 1996 when determining if its employees are eligible for leave. Similarly, a covered employee is entitled to FMLA leave if the reason for the leave is qualifying under the FMLA as made applicable by the CAA, even if the event occasioning the leave (such as the birth of a child) occurred before January 23, 1996. However, leave taken before January 23, 1996, if it was FMLA-qualifying leave taken from an employing office subject to Title V of the FMLA, may be counted against the employee's leave entitlement after January 23, 1996. See §§825.102(b), 825.103, 825.200(b)(4).

The Board is cognizant of the principle that agencies may not promulgate regulations which have a retroactive effect unless expressly authorized by the enabling statute. *Landgraf* v. *USI Film Products*, 114 S.Ct. 1483, 1496 (1994). However, the Board concludes that consideration of periods of employment and events prior to the effective date of the CAA under the sections of the proposed regulations cited above does not constitute a retroactive application of the CAA. Unlike retroactive regulations, which ''impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,'' 114 S.Ct. 1505, these regulations simply ''alter the future legal effect of past transactions—so-called secondary retroactivity,'' which does not violate the presumption against retroactivity. 114 S.Ct. at 1526 n.3 (Scalia, J. concurring). The regulations do not penalize an employing office for a refusal to grant an FMLA leave prior to the effective date of the CAA. They only state that employment and events occurring prior to the effective date of the CAA may be considered in determining the employer's obligation to honor a leave request on or after the effective date.

4. *Minimally paid leave in the Senate*. A commenter explained that the Senate currently provides minimally paid leave rather than unpaid leave under title V of the FMLA. The Secretary's regulations authorize providing greater benefits or pay than is required under the FMLA, and providing greater benefits and pay does not prevent the leave from being considered FMLA-qualifying leave. See section 825.700. Accordingly, the Board does not believe that the situation of minimally paid leave by the Senate needs to be addressed in the proposed regulations.

5. *Local educational agencies and private elementary and secondary schools*. Section 108 of the FMLA provides special rules for local educational agencies and for private elementary and secondary schools. Section 108 was not expressly referenced in section 202 of the CAA. However, the Board believes that section 108 establishes exemptions from certain requirements of those FMLA sections that are referenced in section 202. The provisions of section 108 therefore apply pursuant to section 225(f)(1) of the CAA. Accordingly, regulations implementing section 108 are included in the regulations being proposed by the Board.

6. *Notices other than by posting of notices*. As discussed above, the Board is not proposing regulations on the posting of notices because the statutory authority in the FMLA requiring notice posting was not incorporated into the CAA. However, the Board is proposing to adopt several regulations, based on the Secretary's regulations, that require both employing office and employees to provide notices to each other. The Board is proposing to adopt these notification requirements because they are based on regulations that the Secretary promulgated to implement section 101 through 105 of the FMLA, which are incorporated into the CAA.

For example, section 103(a) of the FMLA authorizes the employer to require that a request for leave be supported by a medical certification. This requirement is implemented by section 825.305 of the Secretary's regulations, which provides for the employer to give notice of any such requirement. Another example is FMLA section 104(a)(4), which authorizes an employer to have a uniformly applied ''practice or policy'' that requires employees to provide certification of fitness for duty upon returning from leave. The Secretary's regulations at section 825.310(e) require that, as part of a notice given to each employee who advises the employer of need for FMLA leave, the employer must advise the employee if a fitness-for-duty certification will be required. Furthermore, this section requires that, if the employer has an employee handbook, the employer must include in the handbook an explanation of the employer's general policy regarding any requirement for fitness-for-duty certification.

Section 825.301 of the Secretary's regulations requires the employer to provide a number of these notices in two consolidated formats. Under paragraph (b), the employer must provide a notice to each employee who informs the employer of need to take FMLA leave. This notice must inform the employee of whether the employee designates the leave as qualifying for FMLA leave, whether the employer requires certification of a health care provider, and numerous other matters. Paragraph (a) requires the employer to provide information on FMLA rights and responsibilities, together with a statement of the employer's policies regarding FMLA, as part of the employee handbook, if any. If there is no such handbook, the employer must include this information with the notice provided to employees who give notice that they need FMLA leave.

A Senate commenter suggested that paragraph (b) should not be adopted by the Board because there is no requirement in the FMLA, as incorporated in the CAA, for the employer to provide such notice. However, the Board believes that these notification requirements implement the general rights and protections of sections 101 through 105, which are incorporated in the CAA. The Board is not aware of good cause why these requirements should be excluded from the regulations under the CAA.

7. *Medical and other benefits*. In §825.209(a), in the definition of group health plans, the proposed regulations include an added reference to the Federal Employee Health Benefits Program, which applies to many covered employees. The Secretary's regulations identified certain laws governing benefits that may impose requirements above and beyond those of FMLA. However, other benefit requirements apply to covered employees and employing offices under federal statute and under rules and practices of the House, Senate, and Congressional instrumentalities. The Board sees no need to conform the FMLA regulations to the various laws and rules that govern employee benefits. Instead, the Board proposes to add to the regulations

an explicit recognition that there may be other applicable laws. E.g., proposed §§825.209(f), 825.309(b). However, covered employees and employing offices must understand that these regulations do not set forth all applicable requirements regarding benefits for covered employees on leave. Other sources must be consulted to determine applicable laws and rules other than those applied by the CAA. The Board is not aware of any way in which laws or rules applicable to covered employees may interfere with the power of employing offices to fully comply with the requirements of the FMLA.

Furthermore, a commenter suggested that certain regulatory provisions regarding payment and reimbursement of insurance premiums should refer to the Senate as well as, or instead of, to the employing office. The Board understands that such financial transactions are not undertaken by Senate employing offices directly. This reality is briefly acknowledged in an introductory explanatory provision, at §825.100(b). However, the CAA makes the employing office responsible for assuring that all requirements of the FMLA, as applied by the CAA, are complied with. For this reason, the disbursing or other administrative office of the Senate may be viewed as functioning as an agent for the employing office, and the Board does not believe that the regulatory requirements need to be modified to refer to the Senate directly.

Regarding another of the Secretary's regulations, the commenter suggested that a reference to ''the insurer'' should be deleted and replaced with a reference to the Senate. The Board recognizes that, in some situations, the Senate may serve as the intermediary between the employee and the insurer. In such circumstances, the employee would make arrangements with the insurer by means of making arrangements with the Senate. Accordingly, the Board does not believe that this suggested change is necessary.

The proposed regulations also omit, as inapplicable, a section on multi-employer health plans (§825.211) and a reference to the Employee Retirement Income Security Act of 1974 (ERISA) (in §825.215(d)).

8. *Charging leave taken from a prior employing office against the employee's FMLA entitlement.* A commenter urged that the Board's regulations should make it clear that, even when an employee transfers from one employing office to another, the employee does not become entitled to more than 12 weeks of leave in the applicable 12-month period.

To clarify this point, the Board proposes to amend the regulation that allows an employer to count an employee's FMLA leave against the employee's remaining 12-week FMLA entitlement. The existing Labor Department regulations implicitly assume that an employer may designate leave as FMLA leave and then count it against the employee's remaining entitlement. However, the regulations do not address the situation where FMLA leave taken from one employing office is counted by a subsequent employing office against the employee's total FMLA leave entitlement. This situation is not addressed in the Department of Labor regulations, because, in the private sector, no leave taken from a prior employer is of any relevance to a subsequent employer. The employee loses FMLA eligibility for at least 12 months after changing jobs, so leave taken from the former employer will be over 12 months old by the time the employee is eligible for any leave from the new employer.

Under the CAA, however, the employee remains eligible notwithstanding the transfer to a new employing office. Therefore, if the new employing office were not able to count any FMLA leave taken in the preceding months against the employee's entitlement, a covered employee could gain multiple FMLA leave periods, in excess of the entitlement under the FMLA, simply by repeatedly transferring from one employing office to another. Accordingly, the Board believes that good cause exists to clarify section 825.208 so that leave designated as FMLA leave by one employing office may be counted against the leave entitlement by other employing offices.

9. *Definition of ''employer''.* The definition of ''employer'' under the FMLA is different and far more varied than the definition of ''employer'' that applies under section 202 of the CAA. Therefore, several provisions in 29 C.F.R. part 825 that define who is an ''employer'' have been omitted. These include §825.104(a)–(b) (persons engaged in or affecting commerce), §825.104.(c)(1) and (d) (regarding corporations and persons acting for employers), §825.108 (regarding ''public agencies''), §825.109 (regarding Federal agencies). References to ''public agencies'', e.g., in section §825.209(a), and first part of §825.207(i) (which addresses compensatory time off for State and local employees), were also omitted.

10. *Business/financial terms.* Part 825 of the Secretary's regulations contain a number of references to business-related concepts—e.g., ''profit sharing'', ''business'', ''firm'', ''plant'', ''company,'' ''stock option'', ''profit sharing'', etc. These terms were omitted and, if the context so required, were sometimes replaced with appropriate corresponding terms such as ''employing office''.

11. *Persons other than covered employees and employing offices.* Section 202(a) of the CAA extends rights and protections only to covered employees. Therefore, certain provisions of the Secretary's regulations that would extend beyond these categories, have been omitted. For example, provisions that protect employees of contractors (§825.216(b)) and employees of temporary agencies and leasing agencies (§825.106) have been omitted because such employees cannot be ''covered employees'' as that term is defined in the CAA.

Furthermore, section 105 of the FMLA, which prohibits interference with FMLA rights and interference with FMLA proceedings and inquiries, extends rights to persons who are not employees and extends prohibitions to persons who are not employers. The Secretary's regulations, at §825.220, do likewise. To be consistent with the CAA, however, the proposed regulations have been modified to extend rights and protections only to covered employees, and to extend prohibitions only to employing offices.

12. *Pre-existing collective bargaining agreements.* Two provisions of the Secretary's regulations refer to collective bargaining agreements existing before the effective date of the FMLA. Sections 825.102(b), 825.700(c). Because collective bargaining agreements do not now exist within employing offices that are subject to these proposed regulations, these provisions have been omitted.

13. *Determinations as to who is a health care provider.* Section 101(6) of the FMLA defines ''health care provider'' as including, in addition to certain authorized doctors, ''Any other person determined by the Secretary to be capable of providing health care services.'' This same requirement is incorporated into the Secretary's regulations as section 825.118(a). The Board does not believe that this provision for determinations by the Secretary should be adopted under the CAA, because this provision would authorize enforcement by the executive branch, which is not authorized under section 225(f)(3) of the CAA. The Board therefore proposes to modify this regulation to authorize the Office of Compliance to certify health care professionals. However, the regulation would require the Office to follow any decisions by the Secretary granted to persons other than covered employees, absent good cause for the Office to conclude otherwise.

14. *Enforcement procedures.* Subpart D of the Secretary's regulations describes the enforcement mechanisms available under the FMLA. This has been replaced with a brief summary and cross-reference to the claims procedures available under the CAA.

15. *Effect on other applicable law.* Section 825.702 provides the Secretary's views about the interaction between FMLA and other applicable law. Because the nature of these laws' application, if any, under the CAA is not the same as their application discussed by the Secretary, certain language has been omitted from the section.

16. *Definitions.* In section 825.800, consistent with the changes discussed above, several definitions were omitted as inapplicable—e.g., Administrator, COBRA, Commerce, Person, Public Agency, State. Two were added—CAA and covered employee. And several were modified, including: eligible employee, employee, and employer.

D. Topics and organization of proposed regulations

The regulations being proposed in this notice are organized into subparts and sections that correspond to the subparts and sections promulgated by the Secretary at 29 C.F.R. Part 825. These regulations are divided into eight subparts:

Subpart A describes what the FMLA is and sets forth to whom it applies under the CAA.

Subpart B states what leave an employee is entitled to take under the FMLA as made applicable by the CAA.

Subpart C sets forth notice requirements, and states what information an employing office may require of an employee.

Subpart D refers to applicable enforcement mechanisms.

Subpart E is reserved.

Subpart F establishes special rules that apply to employees of schools.

Subpart G sets forth how other laws, employing office practices, and collective bargaining agreements affect employee rights under FMLA as made applicable by the CAA.

Subpart H sets forth applicable definitions.

Appendices included in the proposed regulations also provide certain forms and prototype notices.

E. 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 21st day of November, 1995.

GLEN D. NAGER,
Chair of the Board,
Office of Compliance.

§825.1 Purpose and scope

(a) Section 202 of the Congressional Accountability Act (CAA), 2 U.S.C. §1312, applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2611–2615, to certain employees of the legislative branch.

(b) This part 825 contains substantive regulations that the Board of Directors of the Office of Compliance has adopted pursuant to

section 202 of the CAA. Section 202 provides that these substantive regulations should generally be the same as the substantive regulations promulgated by the Secretary of Labor to implement sections 101 through 105 of the FMLA. (The CAA allows these regulations to differ from the regulations promulgated by the Secretary only insofar as the Board may determine, for good cause shown, that a modification of such regulations would be more effective for the implementation of the rights and protections under section 202 of the CAA.) The regulations promulgated by the Secretary to implement the FMLA are found at 29 C.F.R. Part 825.

(c) Under the CAA, the Board issues three separate bodies of regulations to implement the FMLA as made applicable by the CAA—one applying to the Senate and its employees, one applying to the House of Representatives and its employees, and one applying to other covered employees and employing offices. This part 825 applies to [[1] the Senate and employees of the Senate/the House of Representatives and employees of the House of Representatives/the following employing offices and their employees: (1) the Capitol Guide Service, (2) the Capitol Police, (3) the Congressional Budget Office, (4) the Office of the Architect of the Capitol, (5) the Office of the Attending Physician, (6) the Office of Compliance, and (7) the Office of Technology Assessment].

SUBPART A—WHAT IS THE FAMILY AND MEDICAL LEAVE ACT, AND TO WHOM DOES IT APPLY UNDER THE CONGRESSIONAL ACCOUNTABILITY ACT?

§ 825.100 What is the Family and Medical Leave Act?

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows ''eligible'' employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (see §825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employing office or a disbursing or other financial office of the House of Representatives or the Senate may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employing office has a right to 30 days advance notice from the employee where practicable. In addition, the employing office may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (see §825.311(c)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 What is the purpose of the FMLA?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 When are the FMLA and the CAA effective for the Senate and its employees?

(a) The rights and protection of sections 101 through 105 of the FMLA have applied to certain Senate employees and certain employing offices of the Senate since August 5, 1993 (*see* section 501 of FMLA). The provisions of the CAA that apply the rights and protections of the FMLA will become effective on January 23, 1996.

§ 825.102 When are the FMLA and the CAA effective for the House of Representatives and its employees?

(a) The rights and protection of sections 101 through 105 of the FMLA have applied to any employee in an employment position and any employment authority of the House of Representatives since August 5, 1993 (*see* section 502 of FMLA). The provisions of the CAA that apply the rights and protections of the FMLA will become effective for the House of Representatives and its employees on January 23, 1996.

§ 825.102 When are the FMLA and the CAA effective for the employing offices covered by these regulations and their employees?

(a) The rights and protections of sections 101 through 105 of the FMLA already apply to certain employing offices covered by these regulations and certain employees of these employing offices (*see, e.g.*, Title V of the FMLA, sections 501 and 502). The provisions of the CAA that apply the rights and protections of the FMLA to the employing offices covered by these regulations and their employees will become effective on January 23, 1996.]

(b) The period prior to the effective date of the application of FMLA rights and protections under the CAA must be considered in determining employee eligibility.

§ 825.103 How does the FMLA, as made applicable by the CAA, affect leave in progress on, or taken before, the effective date of the CAA?

(a) An eligible employee's right to take FMLA leave began on the date that the rights and protections of the FMLA first went into effect for the employing office and employee (*see* §825.102(a)). Any leave taken prior to the date on which the rights and protections of the FMLA first became effective for the employing office from which the leave was taken may not be counted for purposes of the FMLA as made applicable by the CAA. If leave qualifying as FMLA leave was underway prior to the effective date of the FMLA for the employing office from which the leave was taken and continued after the FMLA's effective date for that office, only that portion of leave taken on or after the FMLA's effective date may be counted against the employee's leave entitlement under the FMLA, as made applicable by the CAA.

(b) If an employing office-approved leave is underway when the application of the FMLA by the CAA takes effect, no further notice would be required of the employee unless the employee requests an extension of the leave. For leave which commenced on the effective date or shortly thereafter, such notice must have been given which was practicable, considering the foreseeability of the need for leave and the effective date.

(c) Starting on January 23, 1996, an employee is entitled to FMLA leave under these regulations if the reason for the leave is qualifying under the FMLA, as made applicable by the CAA, even if the event occasioning the need for leave (*e.g.*, the birth of a child) occurred before such date (so long as any other requirements are satisfied).

§ 825.104 What employing offices are covered by these regulations?

(a) As used in the CAA, the term ''employing office'' means—

(1) the personal office of a Member of the House of Representatives or of a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

[1] This bracketed language contains three versions of regulatory language separated by slashes: the version for the Senate and its employees, the version for the House of Representatives and its employees, and the version for Congressional instrumentalities and their employees, respectively.

(4) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

(b) The employing offices covered by the regulations in this part are:

[(1) the personal office of any Senator,

(2) any committee of the Senate, and

(3) any joint committee that employs any employee of the Senate.

(1) the personal office of any Member of the House of Representatives,

(2) any committee of the House of Representatives, and

(3) any joint committee that employs any employee of the House of Representatives.

the offices listed in paragraph (a)(4) of this section.]

(c) Separate entities will be deemed to be parts of a single employer for purposes of the FMLA, as made applicable by the CAA, if they meet the ''integrated employer'' test. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include: (i) Common management; (ii) Interrelation between operations; (iii) Centralized control of labor relations; and (iv) Degree of common financial control.

§ 825.105 [Reserved.]

§ 825.106 How is "joint employment" treated under the FMLA as made applicable by the CAA?

(a) Where two or more employing offices exercise some control over the work or working conditions of the employee, the employing offices may be joint employers under FMLA, as made applicable by the CAA. Where the employee performs work which simultaneously benefits two or more employing offices, or works for two or more employing offices at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employing offices to share an employee's services or to interchange employees;

(2) Where one employing office acts directly or indirectly in the interest of the other employing office in relation to the employee; or

(3) Where the employing offices are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employing office controls, is controlled by, or is under common control with the other employing office.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when:

(1) an employee, who is employed by an employing office other than the personal office of a Member of the House of Representatives or of a Senator, is under the actual direction and control of the Member of the House of Representatives or Senator;

(2) two or more employing offices employ an individual to work on common issues or other matters for both or all of them; or

(3) an employing office supplies an employee on detail to another employing office.

(c)(1) In joint employment relationships, only the employing office that is the primary employer, if any, is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which employing office is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits.

(2) When an employee is jointly employed by more than one employing office, the employing offices may fulfill their responsibilities under the FMLA, as made applicable by the CAA, by arranging for these responsibilities to be performed by any one employing office or by a centralized payroll office. However, any such arrangement does not reduce any responsibilities of any of the employing offices if any of their responsibilities under the FMLA as made applicable by the CAA is not fulfilled.

(d) [Reserved.]

(e) Job restoration is the primary responsibility of the employing office that is the primary employer. The employing office that is the secondary employer is, however, responsible for accepting the employee returning from FMLA leave. An employing office that is the secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its employees. The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the FMLA as made applicable by the CAA, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. An employing office that is the secondary employer will be responsible for compliance with *all* of the provisions of the FMLA, as made applicable by the CAA, with respect to its regular, permanent workforce.

§ 825.107 [Reserved.]

§ 825.108 [Reserved.]

§ 825.109 [Reserved.]

§ 825.110 Which employees are "eligible" to take FMLA leave under these regulations?

(a) An employee [of the Senate / of the House of Representatives / described in § 825.1(c)] is an ''eligible employee'' under these regulations if the employee has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.

(b) The 12 months an employee must have been employed by any employing office need not be consecutive months. If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(c) If an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached. Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (*see* 29 C.F.R. Part 785). The determining factor is the number of hours an employee has worked for one or more employing offices. The determination is not limited by methods of record-keeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked may be used. For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employing office must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not ''eligible'' for FMLA leave.

(d) The determinations of whether an employee has worked for any employing office for at least 1,250 hours in the past 12 months and has been employed by any employing office for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employing office of need for FMLA leave before the employee meets these eligibility criteria, the employing office must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employing office confirms eligibility at the time the notice for leave is received, the employing office may not subsequently challenge the employee's eligibility. In the latter case, if the employing office does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employing office does advise. If the employing office fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employing office may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employing office fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the effective date of the application of FMLA rights and protections under the CAA must be considered in determining employee's eligibility.

(f) [Reserved.]

§ 825.111 [Reserved.]

§ 825.112 Under what kinds of circumstances are employing offices required to grant family or medical leave?

(a) Employing offices are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;

(2) For placement with the employee of a son or daughter for adoption or foster care;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

(b) The right to take leave under FMLA as made applicable by the CAA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to paragraph (a)(4) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employing offices are required to grant FMLA leave pursuant to paragraph (a)(2) of

this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(e) Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

(f) In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of §825.114 are met. However, treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

§825.113 What do "spouse," "parent," and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?

(a) Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) Parent means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter as defined in (c) below. This term does not include parents ''in law''.

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis,* who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability.''

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 C.F.R. §1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*. define these terms.

(3) Persons who are *''in loco parentis''* include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employing office is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

§825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) *Inpatient care* (*i.e.,* an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity* (*i.e.,* inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.,* asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.,* an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.,* oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.,* are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's

health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee"?

An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the regulations at 29 C.F.R. §1630.2(n)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§ 825.116 What does it mean that an employee is "needed to care for" a family member?

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

§ 825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by "the medical necessity for" such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (*see* §825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employing office's operations. In addition, an employing office may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§ 825.118 What is a "health care provider"?

(a)(1) The term ''health care provider'' means:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Office of Compliance to be capable of providing health care services.

(2) In making a determination referred to in subparagraph (1)(ii), and absent good cause shown to do otherwise, the Office of Compliance will follow any determination made by the Secretary of Labor (under section 101(6)(B) of the FMLA) that a person is capable of providing health care services, provided the Secretary's determination was not made at the request of a person who was then a covered employee.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

SUBPART B—WHAT LEAVE IS AN EMPLOYEE ENTITLED TO TAKE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT?

§ 825.200 How much leave may an employee take?

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and,

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employing office is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1997, four weeks beginning June 1, 1997, and four weeks beginning December 1, 1997, the employee would not be entitled to any additional leave until February 1, 1998. However, beginning on February 1, 1998, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, *etc.*

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved.]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employing office's activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing

two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in §825.205.

§825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless the employing office permits leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period.

§825.202 How much leave may a husband and wife take if they are employed by the same employing office?

(a) A husband and wife who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

(1) for birth of the employee's son or daughter or to care for the child after birth;

(2) for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or

(3) to care for the employee's parent with a serious health condition.

(b) This limitation on the total weeks of leave applies to leave taken for the reasons specified in paragraph (a) of this section as long as a husband and wife are employed by the ''same employing office.'' It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

(c) Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes in paragraph (a) of this section, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those contained in paragraph (a) of this section. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

§825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employing office may limit leave increments to the shortest period of time that the employing office's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§825.601 and 825.602.

§825.204 May an employing office transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See §825.601 for special rules applicable to instructional employees of schools.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, and federal law (such as the Americans with Disabilities Act). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited-acts provisions of the FMLA, as made applicable by the CAA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA

leave), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§ 825.206 May an employing office deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, as made applicable by the CAA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?

(a) Leave taken under FMLA as made applicable by the CAA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, or professional employee under regulations issued by the Board at [CAA regulations based on 29 CFR Part 541], providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employing office provides FMLA leave, whether paid or unpaid, will not be relevant to the determination whether an employee is exempt within the meaning of [CAA regulations based on 29 CFR Part 541].

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employing office, *during the period* in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employing offices who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with [CAA regulations based on 29 CFR Part 541] or 29 CFR §778.114 may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by [CAA regulations based on 29 CFR Part 541] or 29 CFR §778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA as made applicable by the CAA, such as leave in excess of 12 weeks in a year. The employing office may comply with the employing office's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term ''family leave'' as used in FMLA refers to paid leave provided by the employing office covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employing office's leave plan allows use of family leave to care for a child but not for a parent, the employing office is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employing office's usual requirements for the use of sick/medical leave. An employing office is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave ''in any situation'' where the employing office's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employing office's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employing office's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA as made applicable by the CAA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employing office may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employing office's temporary disability plan are more stringent than those of FMLA as made applicable by the CAA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The FMLA as made applicable by the CAA provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employing office designates the leave as FMLA leave in accordance with §825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a ''light duty job''. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. See also §§825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702 (d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing ''paid time off,'' may be substituted, at either the employee's or the employing office's option, for any qualified FMLA leave. No limitations may be placed by the employing office on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employing office elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employing office's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA as made applicable by the CAA (e.g., notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employing office's less

stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA as made applicable by the CAA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employing office's sick leave program. See §§825.302(g), 825.305(e) and 825.306(c).

(i) Compensatory time off, if any is authorized under applicable law, is not a form of accrued paid leave that an employing office may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employing office permits the accrual to be used in compliance with regulations, if any [CAA regulations on compensatory time off, if any], the absence which is paid from the employee's accrued compensatory time ''account'' may not be counted against the employee's FMLA leave entitlement.

§825.208 Under what circumstances may an employing office designate leave, paid or unpaid, as FMLA leave and, as a result, enable leave to be counted against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employing office's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employing office's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of paid leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine that the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in §825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the FMLA as made applicable by the CAA or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employing office of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employing office's established policy or practice—and the employing office denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employing office is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employing office has acquired knowledge that the leave is being taken for an FMLA required reason, the employing office must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employing office and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(2) The employing office's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employing office requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employing office within two business days of the time the employee gives notice of the need for leave, or, where the employing office does not initially have sufficient information to make a determination, when the employing office determines that the leave qualifies as FMLA leave if this happens later. The employing office's designation must be made before the leave starts, unless the employing office does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employing office has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employing office may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the FMLA, as made applicable by the CAA, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employing office learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employing office for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employing office may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employing offices may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employing office did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employing office may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employing office was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employing office within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employing office knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employing office has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employing office should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employing office must withdraw the designation (with written notice to the employee).

(f) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, except that, if the FMLA leave began after the effective date of these regulations (or if the FMLA leave was subject to other applicable requirement under which the employing office was to have designated the leave as FMLA leave), the prior employing office must have properly designated the leave as FMLA under these regulations or other applicable requirement.

§825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, the employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided

if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of ''group health plan'' is set forth in §825.800. For purposes of FMLA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) no contributions are made by the employing office;

(2) participation in the program is completely voluntary for employees;

(3) the sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employing office provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employing office changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employing office.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. See §825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), or by other applicable law, and for ''key'' employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (see §825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§825.210 How may employees on FMLA leave pay their share of group health benefit premiums?

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in §825.209(a)(1), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employing office has a number of options for obtaining payment from the employee. The employing office may require that payment be made to the employing office or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employing office may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employing office's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (See §825.301.)

(e) An employing office may not require more of an employee using FMLA leave than the employing office requires of other employees on ''leave without pay''.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. See paragraph (c) of this section and §825.207(d)(2).

§825.211 [Reserved.]

§825.212 What are the consequences of an employee's failure to make timely health plan premium payments?

(a)(1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan.'' See §825.209(a).

(3) All other obligations of an employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employing office maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. See §825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to

pass a medical examination to obtain reinstatement of coverage.

§ 825.213 May an employing office recover costs it incurred for maintaining "group health plan" or other non-health benefits coverage during FMLA leave?

(a) In addition to the circumstances discussed in §825.212(b), an employing office may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee'' who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employing office. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional form developed for this purpose (see §825.306(a) and Appendix B of this part). If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, etc.), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

§ 825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also §825.106(e) for the obligations of employing offices that are joint employing offices.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employing office's obligations may be governed by the Americans with Disabilities Act (ADA). See §825.702.

§ 825.215 What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay.*—(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employing office's policy or practice to do so with respect to other employees on ''leave without pay.'' In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employing offices pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. See §825.220 (b) and (c). A monthly production bonus, on the other hand, does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). See paragraph (d)(2) of this section.

(d) *Equivalent Benefits.*—''Benefits'' include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See §825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, §825.209 addresses health benefits.)

(e) *Equivalent Terms and Conditions of Employment.*—An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

§825.216 Are there any limitations on an employing office's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example;

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee.

(c) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (''key employees,'' as defined in paragraph (c) of §825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in §825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

§825.217 What is a "key employee"?

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in [CAA regulation based on 29 CFR 541.118]. This is the regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, and professional employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employing office within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be ''key employees.''

§825.218 What does "substantial and grievous economic injury" mean?

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the employing office, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (see, also §825.702).

§825.219 What are the rights of a key employee?

(a) An employing office who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial

and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employing office's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employing office may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employing office actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA as made applicable by the CAA. ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by an employing office to avoid responsibilities under FMLA, for example:

(1) [Reserved];

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employing office is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employing office. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ''light duty.''

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA or regulations.

SUBPART C—HOW DO EMPLOYEES LEARN OF THEIR RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA, AND WHAT CAN AN EMPLOYING OFFICE REQUIRE OF AN EMPLOYEE?

§ 825.300 [Reserved.]

§ 825.301 What notices to employees are required of employing offices under the FMLA as made applicable by the CAA?

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA as made applicable by the CAA are available from the Office of Compliance and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Compliance to provide such guidance.

(b)(1) The employing office shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employing office will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The specific notice may include other information—e.g., whether the employing office will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part [reserved], or may be obtained from the Office of Compliance, which employing offices may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two

business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employing office shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employing office is requiring medical certification or a ''fitness-for-duty'' report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-month period and the employing office handbook or other written documents (if any) describing the employing office's leave policies, clearly provided that certification or a ''fitness-for-duty'' report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a ''fitness-for-duty'' report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See §825.305(a).)

(d) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA as made applicable under the CAA.

(e) Employing offices furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under law.

(f) If an employing office fails to provide notice in accordance with the provisions of this section, the employing office may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

§825.302 What notice does an employee have to give an employing office when the need for FMLA leave is foreseeable?

(a) An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) ''As soon as practicable'' means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, ''as soon as practicable'' ordinarily would mean at least verbal notification to the employing office within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA as made applicable by the CAA, or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see §825.305).

(d) An employing office may also require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave. For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employing office procedures will not permit an employing office to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the leave so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. In addition, an employing office may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement or applicable leave plan allow less advance notice to the employing office. For example, if an employee (or employing office) elects to substitute paid vacation leave for unpaid FMLA leave (see §825.207), and the employing office's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employing office imposes lesser notice requirements on employees taking leave without pay.

§825.303 What are the requirements for an employee to furnish notice to an employing office where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employing office of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employing office within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employing office's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employing office either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA, but may only state that leave is needed. The employing office will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§825.304 What recourse do employing offices have if employees fail to provide the required notice?

(a) An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employing office may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employing office of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA) by the Office of Compliance to the employing office in a manner suitable for posting. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employing office may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employing office must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employing office's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employing office should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employing office shall advise an employee whenever the employing office finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employing office's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employing office elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employing office's less stringent sick leave certification requirements may be imposed.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

(a) The Office of Compliance has made available an optional form (''Certification of Physician or Practitioner'') for employees' (or their family members) use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) The Certification of Physician or Practitioner form is modeled closely on Form WH–380, as revised, which was developed by the Department of Labor (see 29 C.F.R. Part 825, Appendix B). The employing office may use the Office of Compliance's form, or Form WH–380, as revised, or another form containing the same basic information; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of serious health condition'' (see § 825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e., part-time) as a result of the serious health condition (see § 825.117 and § 825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of § 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (see § 825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(i) is unable to perform work of any kind;

(ii) is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see § 825.115), based on either information provided on a statement from the employing office of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (i.e., part-time), the probable duration of the need.

(c) If the employing office's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employing office elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employing office's lesser sick leave certification requirements may be imposed.

§ 825.307 What may an employing office do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employing office may not request additional information from the employee's health care provider. However, a health care provider representing the employing office may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers'' compensation absence, and the provisions of the workers'' compensation statute permit the employing office or the employing office's representative to have direct contact with the employee's workers'' compensation health care provider, the employing office may follow the workers'' compensation provisions.

(2) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. See also paragraphs (e) and (f) of this section.

(b) The employing office may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and

whom the employee has not previously consulted may be failing to act in good faith.

(d) The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

§ 825.308 Under what circumstances may an employing office request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a) (2)(ii), (iii) or (iv)), an employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or

(2) The employing office receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employing office may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employing office may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employing office may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employing office receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 What notice may an employing office require regarding an employee's intent to return to work?

(a) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employing office's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to applicable requirements of law) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Under what circumstances may an employing office require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA), as made applicable by the CAA, that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employing office may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employing office may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The notice that employing offices are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations as made applicable by the CAA (see § 825.301) shall advise the employee if the employing office will require fitness-for-duty certification to return to work. If the employing office has a handbook explaining employment policies and benefits, the handbook should explain the employing office's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employing office is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employing office's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notices required in paragraph (e) of this section.

(g) An employing office is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health condition, thereby preventing the employing office from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition. (See § 825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

§ 825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employing office may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employing office to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employing office (which must

allow at least 15 days after the employing office's request) or as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employing office may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see §825.310(a)) if the employing office has provided the required notice (see §825.301(c); the employing office may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also §825.213(a)(3).

§825.312 Under what circumstances may an employing office refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employing office may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employing office of the need for FMLA leave. (See §825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employing office may delay continuation of FMLA leave until an employee submits the certificate. (See §§825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employing office may delay restoration until the employee submits the certificate. (See §§825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA, as made applicable by the CAA, if and when the employment relationship terminates (e.g., layoff), unless that relationship continues, for example, by the employee remaining on paid FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employing office must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See §825.216.)

(e) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See §825.309.) If an employee unequivocally advises the employing office either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employing office two business days notice where feasible; the employing office is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employing office may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the key employee'' exemption. Denial of reinstatement must be necessary to prevent substantial and grievous economic injury'' to the employing office's operations. The employing office must notify the employee of the employee's status as a key employee'' and of the employing office's intent to deny reinstatement on that basis when the employing office makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See §825.219.)

(g) An employee who fraudulently obtains FMLA leave from an employing office is not protected by job restoration or maintenance of health benefits provisions of the FMLA as made applicable by the CAA.

(h) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA as made applicable by the CAA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

SUBPART D—WHAT ENFORCEMENT MECHANISMS DOES THE CAA PROVIDE?

§825.400 What can employees do who believe that their rights under the FMLA as made applicable by the CAA have been violated?

(a) To commence a proceeding, a covered employee alleging a violation of the rights and protections of the FMLA made applicable by the CAA must request counseling by the Office of Compliance not later than 180 days after the date of the alleged violation. If a covered employee misses this deadline, the covered employee will be unable to obtain a remedy under the CAA.

(b) The following procedures are available under title IV of the CAA for covered employees who believe that their rights under FMLA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either—

(A) a formal complaint, filed with the Office of Compliance, and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(c) Regulations of the Office of Compliance describing and governing these procedures are found at [proposed rules can be found at 141 Cong. Rec. S17012 (November 14, 1995)].

§825.401 [Reserved.]
§825.402 [Reserved.]
§825.403 [Reserved.]
§825.404 [Reserved.]

SUBPART E—[RESERVED.]

SUBPART F—WHAT SPECIAL RULES APPLY TO EMPLOYEES OF SCHOOLS?

§825.600 To whom do the special rules apply?

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA as made applicable by the CAA (and these special rules). The usual requirements for employees to be ''eligible'' do apply, however.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave

per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see §825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met. See §825.207(h).

§825.602 What limitations apply to the taking of leave near the end of an academic term?

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employing office may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

§825.603 Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§825.604 What special rules apply to restoration to "an equivalent position?"

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. See §825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—HOW DO OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS AFFECT EMPLOYEE RIGHTS UNDER THE FMLA AS MADE APPLICABLE BY THE CAA?

§825.700 What if an employing office provides more generous benefits than required by FMLA as Made Applicable by the CAA?

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than as may be otherwise required by law), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employing office does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

(c) [Reserved.]

§825.701 [Reserved.]

§825.702 How does FMLA affect anti-discrimination laws as applied by section 201 of the CAA?

(a) Nothing in FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act), as made applicable by the CAA. FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employing offices covered under the [ADA] * * * or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employing offices within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees.

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employing office must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees'' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which

the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. See §825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employing office offers such a position, the employee is permitted but not required to accept the position (see §825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See §825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employing office requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employing office (and, therefore, not an ''eligible'' employee under FMLA) may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) For further information on Federal anti-discrimination laws applied by section 201 of the CAA, including Title VII and the ADA, individuals are encouraged to contact the Office of Compliance.

SUBPART H—DEFINITIONS

§825.800 Definitions.

For purposes of this part:

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 et seq.).

CAA means the Congressional Accountability Act of 1995, Pub. Law 104–1, 101 Stat. 3, 2 U.S.C. §1301.

Continuing treatment means: A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(1) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) Any period of incapacity due to pregnancy, or for prenatal care.

(3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Covered employee means any employee of—(1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Compliance; or (9) the Office of Technology Assessment.

Employee of the Office of the Architect of the Capitol.—The term ''employee of the Office of the Architect of the Capitol includes any employee of the Office of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants.

Employee of the Capitol Police.—The term ''employee of the Capitol Police'' includes any member or officer of the Capitol Police.

Employee of the House of Representatives—The term ''employee of the House of Representatives'' includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under ''covered employee'' above.

Employee of the Senate.—The term ''employee of the Senate'' includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under ''covered employee'' above.

Eligible employee means a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.

Employee means an employee as defined under the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity. See Teacher.

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

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (See § 825.209(a)).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

FMLA means the Family and Medical Leave Act of 1993, Public Law 103-3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 et seq.).

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA as made applicable by the CAA the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that: (1) no contributions are made by the employing office; (2) participation in the program is completely voluntary for employees; (3) the sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer; (4) the employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and, (5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means: (1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or (2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; and (3) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; and (4) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. (5) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits. (6) A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.

''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See Teacher.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See Physical or mental disability.

Office of Compliance means the independent office established in the legislative branch under section 301 of the Congressional Accountability Act of 1995.

Parent means the biological parent of an employee or an individual who stands or stood in loco parentis to an employee when the employee was a child.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 C.F.R. Part 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., define these terms.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition entitling an employee to FMLA leave means: (1) an illness, injury, impairment, or physical or mental condition that involves: (i) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or (ii) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:

(A) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves: (1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(B) Any period of incapacity due to pregnancy, or for prenatal care.

(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which: (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(D) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(E) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(2) Treatment for purposes of paragraph (1) of this definition includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (1)(ii)(A)(2) of this definition, a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(4) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(5) Absences attributable to incapacity under paragraphs (1)(ii) (B) or (C) of this definition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the

employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

APPENDIX A TO PART 825—[RESERVED.]

APPENDIX B TO PART 825—CERTIFICATION OF PHYSICIAN OR PRACTITIONER

CERTIFICATION OF HEALTH CARE PROVIDER (FAMILY AND MEDICAL LEAVE ACT OF 1993 AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995)

1. Employee's Name:

2. Patient's Name (if different from employee):

3. The attached sheet describes what is meant by a ''serious health condition'' under the Family and Medical Leave Act as made applicable by the Congressional Accountability Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1)____ (2) ____ (3) ____ (4) ____ (5) ____ (6) ____, or None of the above ____

4. Describe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5.a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present incapacity[2] if different):

b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)?_____

c. If the condition is a chronic condition (condition #4) or pregnancy, state whether the patient is presently incapacitated[2] and the likely duration and frequency of episodes of incapacity: [2]

6.a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments:

c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind?_____

b. If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment? _____

8.a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation? _____

b. If no, would the employee's presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery?_____

c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:_____

(Signature of Health Care Provider)_____

(Type of Practice)_____

(Address)_____

(Telephone number)

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:_____

(Employee signature)_____

(Date)

A ''Serious Health Condition'' means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. *Hospital care.*—Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity[2] or subsequent treatment in connection with or consequent to such inpatient care.

2. *Absence plus treatment.*—(a) A period of incapacity[2] of more than three consecutive calendar days (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves: (1) Treatment[3] two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment[4] under the supervision of the health care provider.

3. *Pregnancy.*—Any period of incapacity due to pregnancy, or for prenatal care.

4. *Chronic conditions requiring treatments.*—A chronic condition which: (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and (3) May cause episodic rather than a continuing period of incapacity[2] (e.g., asthma, diabetes, epilepsy, etc.)

5. *Permanent/long-term conditions requiring supervision.*—A period of incapacity[2] which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. *Multiple treatments (non-chronic conditions).*—Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity[2] of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

APPENDIX C TO PART 825—[RESERVED]

APPENDIX D TO PART 825—PROTOTYPE NOTICE: EMPLOYING OFFICE RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE

EMPLOYING OFFICE RESPONSE TO EMPLOYEE REQUEST FOR FAMILY OR MEDICAL LEAVE

(Optional use form—see § 825.301(c) of the regulations of the Office of Compliance)

(Family and Medical Leave Act of 1993, as made applicable by the Congressional Accountability Act of 1995)

(Date)

To: _____

(Employee's name)

From: _____

(Name of appropriate employing office representative)

Subject: Request for family/medical leave

On _____ (date), you notified us of your need to take family/medical leave due to:

☐ the birth of your child, or the placement of a child with you for adoption or foster care; or

☐ a serious health condition that makes you unable to perform the essential functions of your job; or

☐ a serious health condition affecting your ☐ spouse, ☐ child, ☐ parent, for which you are needed to provide care.

You notified us that you need this leave beginning on _____ (date) and that you

[1] Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

[2] ''Incapacity,'' for purposes of FMLA as made applicable by the CAA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

[3] Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[4] A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

expect leave to continue until on or about _____ (date).

Except as explained below, you have a right under the FMLA, as made applicable by the CAA, for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check appropriate boxes; explain where indicated)

1. You are ☐ eligible ☐ not eligible for leave under the FMLA as made applicable by the CAA.

2. The requested leave ☐ will ☐ will not be counted against your annual FMLA leave entitlement.

3. You ☐ will ☐ will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by _____ (insert date) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We ☐ will ☐ will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (Explain)

5(a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.)

(b). You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, *provided* we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We ☐ will ☐ will not pay your share of health insurance premiums while you are on leave.

(c). We ☐ will ☐ will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you ☐ will ☐ will not be expected to reimburse us for the payments made on your behalf.

6. You ☐ will ☐ will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7(a). You ☐ are ☐ are not a ''key employee'' as described in §825.218 of the Office of Compliance's FMLA regulations. If you are a ''key employee,'' restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (Explain (a) and/or (b) below. See §825.219 of the Office of Compliance's FMLA regulations.)

8. While on leave, you ☐ will ☐ will not be required to furnish us with periodic reports every _____ (indicate interval of periodic reports, as appropriate for the particular leave situation) of your status and intent to return to work (see §825.309 of the Office of Compliance's FMLA regulations). If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you ☐ will ☐ will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You ☐ will ☐ will not be required to furnish recertification relating to a serious health condition. (Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the Office of Compliance's FMLA regulations.)

APPENDIX E TO PART 825—[RESERVED.]

OFFICE OF COMPLIANCE

THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT OF 1988

Notice of proposed rulemaking

Summary: The Board of Directors of the Office of Compliance is publishing proposed regulations to implement section 205 of the Congressional Accountability Act of 1995 (''CAA''), P.L. 104–1, 2 U.S.C. §1315, to employees of the House of Representatives, the Senate, and certain Congressional instrumentalities listed below.

The CAA applies the rights and protections of eleven labor and employment statutes to covered employees within the legislative branch. Section 205 provides that no employing office (meeting the size thresholds for coverage as an employer) shall be closed or a mass layoff ordered within the meaning of section 3 of the Worker Adjustment and Retraining Notification Act, 29 U.S.C §2102 (''WARN''), until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to representatives of covered employees or, if there are no representatives, to covered employees. 2 U.S.C. §1315(a). The provisions of section 205 are effective January 23, 1996, one year after the enactment date of the CAA, for all employing offices except the General Accounting Office and the Library of Congress. Accordingly, this notice does not include rules applicable to the General Accounting Office of the Library of Congress.

This notice proposes that substantially similar regulations be adopted for the Senate, the House of Representatives, and the seven Congressional instrumentalities; and their 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 recommended 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 Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment, and their employees; and this proposal regarding these seven Congressional instrumentalities is recommended by the Office of Compliance's Executive Director.

Dates: Comments are due within 30 days after the date of publication of this notice in the Congressional Record.

Addresses: Submit written comments to the Chair of the Board of Directors, Office of Compliance, Room LA 200, Library of Congress, 110 Second Street, S.E., Washington, D.C. 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 (''FAX'') machine to (202) 252–3115. 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 Building, 101 Independence Avenue, S.E., Washington, D.C., 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) 252–3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this notice in an alternative format should be made to Mr. Russell Jackson, Director, Service Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, at (202) 224–2705.

Supplementary information:

Background and summary: The Congressional Accountability Act of 1995 (''CAA''), P.L. 104–1, was enacted into law on January 23, 1995. 2 U.S.C. §§1301 et seq. In general, the CAA applies the rights and protections of eleven federal labor and employment statutes to covered employees and employing offices within the legislative branch. Section 205 of the CAA provides that no employing office shall be closed or a mass layoff ordered within the meaning of section 3 of the Worker Adjustment Retraining and Notification Act of 1988, 29 U.S.C. §2102 (''WARN'') until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to representatives of covered employees or, if there are no representatives, to covered employees. 2 U.S.C. §1315(a). Section 225(f) of the CAA provides that ''[e]xcept where inconsistent with definitions and exemptions provided in this Act, the definitions and exemptions of [WARN] shall apply under this Act.'' 2 U.S.C. §1361(f). Sections 304(a) and 205(c) of the CAA directs the Board of Directors of the Office of Compliance established under the CAA to issue regulations implementing the section. 2 U.S.C. §§1384(a), 1315(c). Section 205(c) further states that such regulations ''shall be the same as substantive regulations issued by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) except insofar as the Board may 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 this section.'' 2 U.S.C. §1315(c).

The Board has published in the Congressional Record for comment an Advance Notice of Proposed Rulemaking. See 141 Cong. Rec. S14542 (daily ed., Sept. 28, 1995). After consideration of the public comments relating to rulemaking under section 205 of the

CAA, the Board is publishing this proposed regulation.

With the exception of technical and nomenclature changes, the Board does not propose substantial departure from otherwise applicable Secretary's regulations. See Secretary of Labor's regulations at 20 C.F.R. Part 639; Final rule published at 54 Federal Register 16042 (April 20, 1989).

In developing these proposed regulations, a number of issues have been identified and explored. The Board proposes to resolve these issues as described below, and it particularly invites comments on the following issues:

1. Employer coverage.—WARN contains size thresholds for coverage as an employer and specifies which workers are counted in making coverage determinations. Section 225(f)(2) of the CAA makes clear that the provisions of WARN determining coverage based on size shall apply in determining coverage of employing offices under the CAA. 2 U.S.C. §1361(f)(2). Thus, the Secretary's regulations implementing WARN's coverage requirements (20 C.F.R. §639.3(a)) are included in these regulations.

2. Notification of State dislocated worker assistance programs and coordination with job placement and retraining programs.—In contrast to section 3 of WARN, section 205 of the CAA does not require an employing office to give notice of the office closing or layoff to the ''State dislocated worker unit'' or to the ''chief elected official of the unit of local government'' within which such closing or layoff is to occur. See 29 U.S.C. §2102(a)(2). Therefore, the proposed regulations do not require notice to be given to State and local entities and do not include the Secretary's regulations regarding such notice.

3. Exemption for strikes and lockouts.—The proposed regulations do not include the Secretary's regulations regarding WARN's exemption for strikes and lockouts (20 C.F.R. §639.5). Strikes are prohibited in federal employment. 18 U.S.C. §1918. Similarly, the Federal Labor Relations Act, which applies to covered employees and employing offices under section 220 of the CAA, prohibits picketing that interferes with agency operations, as well as slowdowns, stoppages and strikes under any circumstances. 5 U.S.C. §7116(b)(7). Therefore, these regulations are inapplicable to legislative branch employees.

4. ''Faltering company'' exemption.—Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days. Under the ''faltering company'' exemption, an employer must be in the process of seeking capital or business during the time that the 60-day notice would have been required. This section is inapplicable to employment within the legislative branch and the Secretary's regulation implementing this section (20 C.F.R. §639.9(a)) is not included in the proposed regulations. The ''unforeseen business circumstances'' and ''natural disaster'' exceptions in sections 3(b)(2)(A) and (B) of WARN, appear to be applicable and thus the Secretary's regulations (29 C.F.R. §639.9(b) and (c)) have been included in the proposed regulations, with appropriate modifications.

5. Extension of short-term layoff.—The Secretary's regulations address the Notice requirement where an employer extends short-term layoffs (6 months or less) beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time the initial layoff is required. 20 C.F.R. §639.4(b). There may be circumstances where an employing office may be required to extend short-term layoffs due to unforeseen events (such as unforeseen budget or funding reductions or eliminations). Therefore, the Board includes this provision (with appropriate modification as part of its proposed regulations.

6. Sale of business.—The Board includes the Secretary's regulations regarding Notice in the case of a sale of all or parts of a business (20 C.F.R. §639.4(c)).

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 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 20th day of November, 1995.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

APPLICATION OF RIGHTS AND PROTECTIONS OF THE WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT OF 1988

Section

§639.1 Purpose and scope.

(a) Purpose of WARN as applied by the CAA.—Section 205 of the Congressional Accountability Act, P.L. 104–1 (''CAA''), provides protection to covered employees and their families by requiring employing offices to provide notification 60 calendar days in advance of office closings and mass layoffs within the meaning of section 3 of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §2102. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. As used in these regulations, WARN shall refer to the provisions of WARN applied to covered employing offices by section 205 of the CAA.

(b) Scope of these regulations.—These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The objective of these regulations is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, it is recognized that rulemaking cannot address the multitude of employing office-specific situations in which advance notice will be given.

(c) Notice encouraged where not required.—An employing office that is not required to comply with the notice requirements of section 205 of the CAA is encouraged, to the extent possible, to provide notice to its employees about a proposal to close an office or permanently reduce its workforce.

(d) Notice in ambiguous situations.—It is civically desirable and it would appear to be good business practice for an employing office to provide advance notice to its workers or unions when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN that cannot be addressed in these regulations. It is therefore prudent for employing offices to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Office encourages employing offices to give notice in all circumstances.

(e) WARN not to supersede other laws and contracts.—The provisions of WARN do not supersede any otherwise applicable laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§639.2 What does WARN require?

WARN requires employing offices that are planning an office closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employing offices from voluntarily providing longer periods of advance notice. Not all office closings and layoffs are subject to WARN, and certain employment thresholds must be reached before WARN applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Remedies authorized under section 205 of the CAA may be assessed against employing offices that violate WARN requirements.

§639.3 Definitions.

(a) Employing office.—(1) The term ''employing office'' means any business enterprise that employs—

(i) 100 or more employees, excluding part-time employees; or

(ii) employs 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a ''reasonable expectation of recall'' when he/she understands, through notification or through common practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN, are nonetheless counted as employees for purposes of determining coverage as an employer.

(3) An employing office may have one or more sites of employment under common ownership or control.

(b) Office closing.—The term ''office closing'' means the permanent or temporary shutdown of a ''single site of employment'', or one or more ''facilities or operating units'' within a single site of employment, if the shutdown results in an ''employment loss'' during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees. An employment action that results in the effective cessation of the work performed by a unit, even if a few employees remain, is a shutdown. A ''temporary shutdown'' triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of ''employment loss.''

(c) Mass layoff.—(1) The term ''mass layoff'' means a reduction in force which first, is not the result of an office closing, and second, results in an employment loss at the

single site of employment during any 30-day period for:

(i) At least 33 percent of the active employees, excluding part-time employees, and

(ii) At least 50 employees, excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Office closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an office closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered office closing has occurred although only 10 workers are entitled to notice.

(d) Representative.—The term ''representative'' means an exclusive representative of employees within the meaning of 5 U.S.C. §§7101 et seq., as applied to covered employees and employing offices by section 220 of the CAA, 2 U.S.C. §1351.

(e) Affected employees.—The term ''affected employees'' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term ''affected employees'' includes managerial and supervisory employees. Consultant or contract employees who have a separate employment relationship with another employing office or employer and are paid by that other employing office or employer, or who are self-employed, are not ''affected employees'' of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) Employment loss.—(1) The term ''employment loss'' means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employing office-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employing office's operations and, prior to the closing or layoff—

(i) The employing office offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employing office offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A ''relocation or consolidation'' of part or all of an employing office's operations, for purposes of paragraph §639.3(f)(3), means that some definable operations are transferred to a different site of employment and that transfer results in an office closing or mass layoff.

(g) Part-time employee.—The term ''part-time'' employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as ''seasonal'' employees. The period to be used for calculating whether a worker has worked ''an average of fewer than 20 hours per week'' is the shorter of the actual time the worker has been employed or the most recent 90 days.

(h) Single site of employment.—(1) A single site of employment can refer to either a single location or a group of contiguous locations. Separate facilities across the street from one another may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employing offices conduct activities within such a building. For example, an office building housing 50 different employing offices will contain 50 single sites of employment. The offices of each employing office will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site.

(5) Contiguous buildings operated by the same employing office which have separate management and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employing office's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employing office is covered as an employer under §639.3(a).

(8) The term ''single site of employment'' may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of WARN to provide notice is not acceptable.

(i) Facility or operating unit.—The term ''facility'' refers to a building or buildings. The term ''operating unit'' refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

§639.4 Who must give notice?

Section 205(a)(1) of the CAA states that ''[n]o employing office shall be closed or a mass layoff ordered within the meaning of section 3 of [WARN] until the end of a 60-day period after the employer serves written notice of such prospective closing or layoff * * *.'' Therefore, an employing office that is anticipating carrying out an office closing or mass layoff is required to give notice to affected employees or their representative(s). (See definitions in §639.3 of this part.).

(a) It is the responsibility of the employing office to decide the most appropriate person within the employing office's organization to prepare and deliver the notice to affected employees or their representative(s). In most instances, this may be the local site office manager, the local personnel director or a labor relations officer.

(b) An employing office that has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN, as applied by the CAA, defines who the ''employer'' is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any office closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out an office closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or office closing is planned.

§639.5 When must notice be given?

(a) General rule.—(1) With certain exceptions discussed in paragraphs (b), (c) and (d) of this section and in §639.9 of this part, notice must be given at least 60 calendar days prior to any planned office closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should—

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for an office closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions

both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for an office closings or a mass layoff and thus trigger the notice requirement. An employing office is not, however, required under section 3(d) to give notice if the employing office demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this ''snapshot'' of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) Transfers.—(1) Notice is not required in certain cases involving transfers, as described under the definition of ''employment loss'' at §639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a ''transfer'' if the new job constitutes a constructive discharge.

(3) The meaning of the term ''reasonable commuting distance'' will vary with local conditions. In determining what is a ''reasonable commuting distance,'' consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employing office may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employing office, the normal 60-day notice period may have expired and the office closing or mass layoff may have occurred. An employing office is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) Temporary employment.—(1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employing office to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

§639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee.

(a) Representative(s) of affected employees.—Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) Affected employees.—Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employing office cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employing office must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether office closing or mass layoff thresholds are reached, such workers are due notice.

§639.7 What must the notice contain?

(a) Notice must be specific.—(1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed in §639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered office closing or mass layoff less than 60 days after the event. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employing office at the time the notice is served. It is not the intent of the regulations that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term ''date'' refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the office closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire office is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire office is to be closed, a statement to that effect;

(2) The expected date when the office closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of a company official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

§639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under §639.6 of this part which is designed to ensure receipt of notice of at least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

§639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN, applied by section 205 of the CAA, sets forth two conditions under which the notification period may be reduced to less than 60 days. The employing office bears the burden of proof that conditions for the exception have been met. If one of the exceptions is applicable, the employing office must give as much notice as is practicable to the union and non-represented employees and this may, in some circumstances, be notice after the fact. The employing office must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in §639.7.

(a) The ''unforeseeable business circumstances'' exception under section 3(b)(2)(A) of WARN, as applied under the CAA, applies to office closings and mass layoffs caused by circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employing office's control.

(2) The test for determining when circumstances are not reasonably foreseeable focuses on an employing office's business judgment. The employing office must exercise such reasonable business judgment as would a similarly situated employing office in predicting the demands of its operations. The employing office is not required, however, to accurately predict general economic conditions that also may affect its operations.

(b) The ''natural disaster'' exception in section 3(b)(2)(B) of WARN applies to office

closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employing office must be able to demonstrate that its office closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in §639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where an office closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the ''unforeseeable business circumstance'' exception described in paragraph (a) of this section may be applicable.

§639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned office closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in §639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§639.5, 639.6, and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not an office closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Extension of Rights and Protections Under the Employee Polygraph Protection Act of 1988

Notice of proposed rulemaking

Summary: The Board of Directors of the Office of Compliance is publishing proposed regulations to implement Sections 204 (a) and (b) of the Congressional Accountability Act of 1995 (''CAA'') to employees of the House of Representatives, the Senate, and certain Congressional instrumentalities listed below.

The CAA applies the rights and protections of eleven labor and employment and statutes to covered employees within the legislative branch. Section 204(a) provides that no employing may require any covered employee (including a covered employee who does not work in that employing office) to take a lie detector test where such test would be prohibited if required by an employer under paragraphs (1), (2) or (3) of section 3 of the Employee Polygraph Protection Act of 1988 (''EPPA''), 29 U.S.C. §2002 (1), (2) or (3). 2 U.S.C. §1314(a). Section 204(a) of the CAA also applies the waiver provision of section 6(d) of the EPPA (29 U.S.C. §2005(d)) to covered employees. Id. The provisions of section 204 are effective January 23, 1996, one year after the enactment date of the CAA, for all employing offices except the General Accounting Office and the Library of Congress. 2 U.S.C. §1314(d). Accordingly, this notice does not include rules applicable to the General Accounting Office or the Library of Congress.

The purpose of these regulations is to implement section 204 of the CAA, which provides protection for most covered employees from lie detector testing, either pre-employment or during the course of employment, with certain limited exceptions. This notice proposes that substantially similar regulations be adopted for the Senate, the House of Representatives, and the seven Congressional instrumentalities; and their 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 recommended 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 Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment, and their employees; and this proposal regarding these seven Congressional instrumentalities is recommended by the Office of Compliance's Executive Director.

Dates: Comments are due within 30 days after the date of publication of this notice in the Congressional Record.

Addresses: Submit written comments to the Chair of the Board of Directors, Office of Compliance, Room LA 200, Library of Congress, 110 Second Street, S.E., Washington, D.C. 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 (''FAX'') machine to (202) 252–3115. 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 Building, 101 Independence Avenue, S.E., Washington, D.C., 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) 252–3100. This notice is also available in the following formats: large print, braille, audio tape, and electronic file on computer disk. Requests for this notice in an alternative format should be made to Mr. Russell Jackson, Director, Services Department, Office of the Sergeant at Arms and Doorkeeper of the Senate, at (202) 244–2705.

Supplementary information:

Background and summary

The Congressional Accountability Act of 1995 (''CAA''), P.L. 104–1, 109 Stat. 3, was enacted on January 23, 1995. 2 U.S.C. §§1301–1438. In general, the CAA applies the rights and protections of eleven federal labor and employment and public access statutes to covered employees and employing offices within the legislative branch. Section 204(a) of the CAA provides that no employing office may require any covered employee (including a covered employee who does not work in that employing office) to take a lie detector test where such test would be prohibited if required by an employer under paragraphs (1), (2) or (3) of section 3 of the Employee Polygraph Protection Act of 1988, 29 U.S.C. §2002 (1), (2) or (3) (''EPPA''). 2 U.S.C. §1314(a). Section 204(a) of the EPPA also applies the waiver provisions of section 6(d) of the EPPA (29 U.S.C. §2005(d)) to covered employees. Id. Section 225(f) of the CAA provides that, ''[e]xcept where inconsistent with definitions and exemptions provided in this Act, the definitions and exemptions of the [EPPA] shall apply under this Act.'' 2 U.S.C. §1361(f)(1). Section 204(c) of the CAA requires the Board of Directors of the Office of Compliance established under the CAA to issue regulations implementing the section. 2 U.S.C. §1314(c). Section 204(c) further states that such regulations ''shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) except insofar as the Board may 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 this section.'' Id.

The regulations in this Part are divided into three subparts. Subpart A contains the provisions generally applicable to covered employing offices, including the requirements relating to the prohibitions on lie detector use. Subpart B sets forth rules regarding the statutory exemptions from application of the rights and protections of the EPPA. Subpart C sets forth the restrictions on lie detector usage under such exemptions. Subpart D sets forth the rules on recordkeeping and the disclosure of polygraph test information.

In preparing the proposed regulations, the Board has considered the comments submitted in response to the Board's general Advance Notice of Proposed Rulemaking published at 141 Cong. Rec. S14542 (daily ed. Sept. 28, 1995), regarding regulations that the Board should issue in this area. In developing these proposed Regulations, a number of issues have been identified and explored. The Board proposes to resolve these issues as described below, and it particularly invites comments on the following issues:

(1) Notice posting and recordkeeping requirements. The CAA incorporates only the prohibitions on the use of lie detector tests contained in paragraphs (1), (2) and (3) of section 3 of the EPPA (prohibiting use of lie detectors subject to limited exceptions), the waiver provisions of section 6(d) of the EPPA, the civil action remedies provision of section 6(c)(1) of the EPPA, and the exemptions and definitions of the EPPA (to the extent appropriate and not inconsistent with exemptions and definitions in the CAA). See sections 204(a), (b) and 225(f) of the CAA, 2 U.S.C. §§1314(a), (b) and 1361(f)(1). As a result, the provisions of sections 4 (directing the Secretary to prepare a notice of the provisions of the EPPA and requiring employers to post such notices), and 5 (authorizing the Secretary to issue regulations, make investigations and require recordkeeping) of the EPPA, 29 U.S.C. §§2003, 2004, are not incorporated into the CAA.

On September 28, 1995, the Board issued an Advance Notice of Proposed Rulemaking (''ANPR'') for publication in the Congressional Record which invited comments regarding whether and to what extent the Board should impose notice posting and recordkeeping requirements on employing offices. After considering the comments received, the Board has concluded that the CAA does not incorporate the notice and recordkeeping requirements of the EPPA and that, as a consequence, such requirements

may not be imposed at this time under the ''good cause'' provision under section 204(c). See Notice of Proposed Rulemaking on the Fair Labor Standards Act submitted concurrently with this notice.

The EPPA does contain specific recordkeeping requirements which are included in sections of the EPPA applied by the CAA. Section 8 of the EPPA, 29 U.S.C. §2007, which sets forth the restrictions on the use of exemptions under the EPPA, requires any employer conducting a polygraph test under the ongoing investigations exemption (which is incorporated into the CAA under section 225(f)(1)) to provide a signed a statement to the examinee setting forth the factual basis for testing the particular employees, a copy of which is retained by the employer for at least 3 years. 29 U.S.C. §2006(d)(4)(C). The portions of the Secretary's regulations requiring such recordkeeping (29 C.F.R. §§801.12, 801.26, and 801.30) have been included in the proposed regulations (Sections 1.12, 1.26, and 1.30), but only to the extent that such regulatory provisions are derived from section 8 of the EPPA.

(2) Administrative enforcement. The CAA does not incorporate Section 6(a) and (b) of the EPPA (providing for civil penalties in an administrative enforcement scheme and an administrative civil penalty remedy), 29 U.S.C. §2005. A civil action in federal court or an administrative claim before the Board (following counseling and mediation) is the exclusive means by which covered employees may enforce their EPPA rights and protections. See sections 401–416 of the CAA, 2 U.S.C. §§1401–1416. Therefore, the proposed regulations, consistent with the terms of Section 204 of the CAA, exclude any reference to the Secretary's authority to make investigations and initiate enforcement actions. Consistent with section 204(c)(1) of the CAA, 2 U.S.C. §1314(c)(1), the proposed regulations state that the Board has authority to issue regulations under this section.

(3) Exemptions. Section 225(f) of the CAA, 2 U.S.C. §1361(f), provides that ''[e]xcept where inconsistent with definitions and exemptions provided in this Act, the definitions and exemptions in the laws made applicable by this Act shall apply under this Act.''

(a) Exemption for security services and drug security, drug theft, or drug diversion investigations. Section 7(e) of the EPPA, 29 U.S.C. §2006(e), provides an exemption authorizing the use of polygraph tests, but no other types of lie detector tests, by certain armored car, security alarm, and security guard employers. Section 7(e) is limited by its terms to private employers and the Board is not aware of any employing office whose functions would meet the requirements of the section 7(e) exemption. Therefore, the Board has not included the Secretary's regulations implementing section 7(e) (29 C.F.R. §801.14) as part of its proposed regulations.

Section 7(f) of the EPPA allows certain employers authorized to manufacture, distribute, or dispense controlled substances to use polygraph tests, but no other types of lie detector tests, under certain circumstances. There may be entities within the legislative branch, such as the Office of the Attending Physician, that might have employees whose duties meet the drug security, drug theft or drug diversion investigations exemption. Therefore, the Board's proposed regulation (at section 1.13, infra) includes a modified version of the Secretary's regulations under the drug security, drug theft or drug diversion investigations exemption (29 C.F.R. §801.13) as part of its proposed regulations.

(b) Exemption for national defense and security. Section 7(b) of the EPPA, 29 U.S.C. §2006(b), provides, among other things, that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence functions, to certain employees whose duties involve access to information classified at the level of top secret or designated as being within a special access program under 4.2(a) of Executive Order 12356 (or a successor Executive Order). There may be some employing offices within the legislative branch, such as intelligence committees, that have employees whose duties meet the exemption under section 7(b) of the EPPA. Therefore, the Board proposes a modified version of the Secretary's regulations implementing such exemption (29 C.F.R. §801.11) in its proposed regulations.

(c) FBI contractor exemption. Section 7(c) of the EPPA, 29 U.S.C. §2006(c), exempts Federal Bureau of Investigation contractors from the requirements of the EPPA under certain circumstances. This provision has no apparent applicability to employing offices. Therefore, the Board does not include the Secretary's regulations implementing this provision (29 C.F.R. §801.11(e)) as part of its proposed regulations.

(d) Limited exemption for ongoing investigations. Section 7(d) of the EPPA, 29 U.S.C. §2006(d), provides a limited exemption permitting polygraph tests, but no other types of lie detector tests, in the context of employer investigations involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage. The Board believes that there may be situations where an employing office may be able to meet the exemption under section 7(d). Accordingly, the Board includes the Secretary's regulations implementing this exemption (29 C.F.R. §801.12) as part of its proposed regulations.

(e) Exemption for employees of the Capitol Police. By Notice of Proposed Rulemaking published September 28, 1995 in the Congressional Record, the Board recommended regulations authorizing the Capitol Police to use lie detector tests in certain circumstances. After both appropriate consideration of comments received and further deliberation about the matter, the Board has determined to incorporate such regulations into these proposed regulations. However, this proposed rule adds new section 1.4(e) to make clear it that the regulation excluding the Capitol Police from section 204 of the CAA with respect to its own employees is not a total exemption of the Capitol Police from the prohibitions on the employment-related use of lie detector tests by the Capitol Police. Specifically, section 1.4(e) provides that the Capitol Police may not require covered employees other than Capitol Police employees to take a lie detector test except in circumstances where the Capitol Police administers a lie detector test during the course of an ''ongoing investigation'' by the Capitol Police. This additional language makes clear the Board's intent to prohibit employing offices other than the Capitol Police from administering lie detector tests on their covered employees indirectly through the Capitol Police.

(4) Restrictions on use of exemptions. Section 204(a) provides that no employing office may require a covered employee to take a lie detector test where an employer would be prohibited from requiring such a test under paragraphs (1), (2) or (3) of section 3 of the EPPA, 29 U.S.C. §2002(1), (2) or (3). Section 3 of the EPPA provides that, except as provided in sections 7 and 8 of the EPPA (29 U.S.C. §§2006 and 2007), it shall be unlawful for an employer to require a lie detector test under paragraphs (1), (2) or (3). Thus, the restrictions on the use of exemptions under 29 U.S.C. §2007 are incorporated into section 204 and the Secretary's regulations implementing this section (29 C.F.R. Subpart C) are included in the Board's proposed regulations.

(5) Confidentiality provisions and notice to examinees. Section 204 of the CAA incorporates the restrictions on disclosure set forth in section 9 of the EPPA, 29 U.S.C. §2008, since such restrictions are the conditions on which polygraphs are allowed under the exemptions of section 7 of the EPPA. Accordingly, the Board includes in its proposed regulations (with appropriate modifications) the Secretary of Labor's regulations regarding restrictions on disclosure of polygraph information (29 C.F.R. §801.35). See section 225(f)(1) of the CAA (except where inconsistent with definitions and exemptions provided in the CAA, the definitions and exemptions under the laws made applicable by the CAA apply under the CAA). For the same reasons, the Board includes in its proposed regulations the requirement of the Secretary's regulations that employing offices authorized to conduct polygraph tests under the exemptions established in these regulations to give written notice to the examinee of the confidentiality and other requirements.

(6) Technical and nomenclature changes. The proposed regulations make technical and nomenclature changes, where appropriate, to conform to the provisions of the CAA. See, e.g., 29 C.F.R. §§801.1 (Purpose and scope), 801.2 (Definitions), 801.3 (Coverage).

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 20th day of November, 1995

GLEN D. NAGER,
Chair of the Board
Office of Compliance.

COMPARISON TABLE

This table lists sections of the Secretary of Labor's Regulations under the EPPA with the corresponding section (if any) of the Office of Compliance's proposed Regulations under Section 204 of the CAA.

Secretary of Labor Regulations Code of Federal Regulation Section	Office of Compliance Regulations Section [Modified As Appropriate]
Subpart A—General	
801.1 Purpose and scope	1.1.
801.2 Definitions	1.2.
801.3 Coverage	1.3.
801.4 Prohibitions on lie detector use.	1.4.
801.5 Effect on other laws and agreements.	1.5.
801.6 Notice of protection	1.6.
801.7 Authority of the Secretary.	1.7.
801.8 Employment relationship.	1.8.
Subpart B—Exemptions	
801.10 Exclusion for public sector employees.	1.10 [Exclusion for Capitol Police; public sector employee exclusion not adopted].

Secretary of Labor Regulations Code of Federal Regulation Section	Office of Compliance Regulations Section [Modified As Appropriate]
801.11 Exemption for national defense and security.	1.11.
801.12 Exemption for employers conducting investigations of economic loss or injury.	1.12.
801.13 Exemption for employers authorized to manufacture, distribute, or dispense controlled substances.	1.13.
801.14 Exemption for employers providing security services.	Not Adopted.
Subpart C—Restrictions on Polygraph Usage Under Exemptions	
801.20 Adverse employment action under ongoing investigation exemption.	1.20.
801.21 Adverse employment action under security service and controlled substance exemptions.	1.21 [controlled substance exemption only].
801.22 Rights of examinee—general.	1.22.
801.23 Rights of examinee—pretest phase.	1.23.
801.24 Rights of examinee—actual test phase.	1.24.
801.25 Rights of examinee—post-test phase.	1.25.
801.26 Qualifications of and requirements for examiners.	1.26.
Subpart D—Recordkeeping and Disclosure Requirements	
801.30 Records to be preserved for 3 years.	1.30.
801.35 Disclosure of test information.	1.35.
Subpart E—Enforcement	
801.40–801.75	Not Adopted.
Appendix A to Part 801—Notice to Examinee.	Appendix A—Notice to Examinee.

APPLICATION OF RIGHTS AND PROTECTIONS OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

SUBPART A—GENERAL

Section
1.1 Purpose and scope.
1.2 Definitions.
1.3 Coverage.
1.4 Prohibitions on lie detector use.
1.5 Effect on other laws or agreements.
1.6 Notice of protection.
1.7 Authority of the Board.
1.8 Employment relationship.

SUBPART B—EXEMPTIONS

1.10 Exclusion for employees of the Capitol Police. [Reserved]
1.11 Exemption for national defense and security.
1.12 Exemption for employing offices conducting investigations of economic loss or injury.
1.13 Exemption for employing offices authorized to manufacture, distribute, or dispense controlled substances.

SUBPART C—RESTRICTIONS ON POLYGRAPH USAGE UNDER EXEMPTIONS

1.20 Adverse employment action under ongoing investigation exemption.
1.21 Adverse employment action under controlled substance exemption.
1.22 Rights of examinee—general.
1.23 Rights of examinee—pretest phase.
1.24 Rights of examinee—actual testing phase.
1.25 Rights of examinee—post-test phase.
1.26 Qualifications of and requirements for examiners.

SUBPART D—RECORDKEEPING AND DISCLOSURE REQUIREMENTS

1.30 Records to be preserved for 3 years.
1.35 Disclosure of test information.
Appendix A—Notice to Examinee
Authority: Pub. L. 104–1, 109 Stat. 3, 2 U.S.C. 1314(c)

SUBPART A—GENERAL

Sec. 1.1 Purpose and scope

Enacted into law on January 23, 1995, the Congressional Accountability Act (''CAA'') directly applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 204(a) of the CAA, 2 U.S.C. §1314(a) provides that no employing office may require any covered employee (including a covered employee who does not work in that employing office) to take a lie detector test where such test would be prohibited if required by an employer under paragraphs (1), (2) or (3) of section 3 of the Employee Polygraph Protection Act of 1988 (EPPA) 29 U.S.C. §2002(1), (2) or (3). The purpose of this part is to set forth the regulations to carry out the provisions of Section 204 of the CAA.

Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use. Subpart B sets forth rules regarding the statutory exemptions from application of section 204 of the CAA. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the rules on recordkeeping and the disclosure of polygraph test information.

Sec. 1.2 Definitions

For purposes of this part:

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

(b) EPPA means the Employee Polygraph Protection Act of 1988 (Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. §§2001–2009) as applied to covered employees and employing offices by Section 204 of the CAA.

(c) The term covered employee means any employee of (1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Congressional Budget Office; (5) the Office of the Architect of the Capitol; (6) the Office of the Attending Physician; (7) the Office of Compliance; or (8) the Office of Technology Assessment.

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

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

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

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

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

(i) The term employing office means (1) the personal office of a Member of the House of Representatives or of a Senator; (2) a committee of the House of Representatives or the Senate or a joint committee; (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (4) the Capitol Guide Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. The term employing office includes any person acting directly or indirectly in the interest of an employing office in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an employing office with respect to the examinees. Any reference to ''employer'' in these regulations includes employing offices.

(j)(1) The term lie detector means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual. Voice stress analyzers, or psychological stress evaluators, include any systems that utilize voice stress analysis, whether or not an opinion on honesty or dishonesty is specifically rendered.

(2) The term lie detector does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of lie detector are written or oral tests commonly referred to as ''honesty'' or ''paper and pencil'' tests, machine-scored or otherwise; and graphology tests commonly referred to as handwriting tests.

(k) The term polygraph means an instrument that—

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(l) Board means the Board of Directors of the Office of Compliance.

(m) Office means the Office of Compliance.

Sec. 1.3 Coverage

The coverage of Section 204 of the Act extends to any ''covered employee'' or ''covered employing office'' without regard to the number of employees or the employing office's effect on interstate commerce.

Sec. 1.4 Prohibitions on lie detector use

(a) Section 204 of the CAA provides that, subject to the exemptions of the EPPA incorporated into the CAA under section 225(f) of the CAA, as set forth in Sec. 1.10 through 1.12 of this Part, employing offices are prohibited from: (1) Requiring, requesting, suggesting or causing, directly or indirectly, any covered employee or prospective employee to take or submit to a lie detector test; (2) Using, accepting, or inquiring about the results of a lie detector test of any covered employee or prospective employee; and (3) Discharging, disciplining, discriminating

against, denying employment or promotion, or threatening any covered employee or prospective employee to take such action for refusal or failure to take or submit to such test, or on the basis of the results of a test. The above prohibitions apply irrespective of whether the covered employee referred to in paragraphs (1), (2) or (3), above, works in that employing office.

(b) An employing office that reports a theft or other incident involving economic loss to police or other law enforcement authorities is not engaged in conduct subject to the prohibitions under paragraph (a) of this section if, during the normal course of a subsequent investigation, such authorities deem it necessary to administer a polygraph test to a covered employee(s) suspected of involvement in the reported incident. Employing offices that cooperate with police authorities during the course of their investigations into criminal misconduct are likewise not deemed engaged in prohibitive conduct provided that such cooperation is passive in nature. For example, it is not uncommon for police authorities to request employees suspected of theft or criminal activity to submit to a polygraph test during the employee's tour of duty since, as a general rule, suspect employees are often difficult to locate away from their place of employment. Allowing a test on the employing office's premises, releasing a covered employee during working hours to take a test at police headquarters, and other similar types of cooperation at the request of the police authorities would not be construed as ''requiring, requesting, suggesting, or causing, directly or indirectly, any covered employee * * * to take or submit to a lie detector test.'' Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing, either through the administration of a test by the employing office at the request or direction of police authorities, or through reimbursement by the employing office of tests administered by police authorities to employees. In some communities, it may be a practice of police authorities to request testing by employing offices of employees before a police investigation is initiated on a reported incident. In other communities, police examiners are available to covered employing offices, on a cost reimbursement basis, to conduct tests on employees suspected by an employing office of wrongdoing. All such conduct on the part of employing offices is deemed within the prohibitions of section 204 of the CAA.

(c) The receipt by an employing office of information from a polygraph test administered by police authorities pursuant to an investigation is prohibited by section 3(2) of the EPPA. (See paragraph (a)(2) of this section.)

(d) The simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed (e.g., to elicit confessions or admissions of guilt) constitutes conduct prohibited by paragraph (a) of this section. Such use includes the connection of a covered employee or prospective employee to the instrument without any intention of a diagnostic purpose, the placement of the instrument in a room used for interrogation unconnected to the covered employee or prospective employee, or the mere suggestion that the instrument may be used during the course of the interview.

(e) The Capitol Police may not require a covered employee not employed by the Capitol Police to take a lie detector test (on its own initiative or at the request of another employing office) except where the Capitol Police administers such lie detector test as part of an ''ongoing investigation'' by the Capitol Police. For the purpose of this subsection, the definition of ''ongoing investigation'' contained section 1.12(b) shall apply.

Sec. 1.5 Effect on other laws or agreements

(a) Section 204 of the CAA does not preempt any otherwise applicable provision of federal law or any rule or regulation of the House or Senate or any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b)(1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employing offices. (2) For example, a collective bargaining agreement that provides greater protection to an examinee would apply in addition to the protection provided in section 204 of the CAA.

Sec. 1.6 Notice of protection

Pursuant to section 301(h) of the CAA, the Office shall prepare, in a manner suitable for posting, a notice explaining the provisions of section 204 of the CAA. Copies of such notice may be obtained from the Office of Compliance.

Sec. 1.7 Authority of the Board

Pursuant to sections 204 and 304 of the CAA, the Board is authorized to issue regulations to implement the rights and protections of the EPPA.

Sec. 1.8 Employment relationship

Subject to the exemptions incorporated into the CAA by section 225(f), section 204 applies the prohibitions on the use of lie detectors by employing offices with respect to covered employees irrespective of whether a covered employee works in that employing office. Sections 101 (3), (4) and 204 of the CAA also apply EPPA prohibitions against discrimination to applicants for employment and former employees of a covered employing office. For example, an employee may quit rather than take a lie detector test. The employing office cannot discriminate or threaten to discriminate in any manner against that person (such as by providing bad references in the future) because of that person's refusal to be tested. Similarly, an employing office cannot discriminate or threaten to discriminate in any manner against that person because that person files a complaint, institutes a proceeding, testifies in a proceeding, or exercises any right under section 204 of the CAA. (*See* section 207 of the CAA.)

SUBPART B—EXEMPTIONS

Sec. 1.10 Exclusion for employees of the Capitol Police

[Reserved]

Sec. 1.11 Exemption for national defense and security

(a) The exemptions allowing for the administration of lie detector tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow covered employing offices to administer such tests. For the purposes of this section, the term ''Federal Government'' means any agency or entity within the Federal Government authorized to administer polygraph examinations which is otherwise exempt from coverage under section 7(a) of the EPPA, 29 U.S.C. §2006(a).

(b) Section 7(b)(2)(B) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any covered employee whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2 (a) of Executive Order 12356 (or a successor Executive Order).

(c) Counterintelligence for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(d) Lie detector tests of persons described in the above paragraphs will be administered in accordance with applicable Department of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

Sec. 1.12 Exemption for employing offices conducting investigations of economic loss or injury

(a) Section 7(d) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides a limited exemption from the general prohibition on lie detector use for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employing office may request an employee, subject to the conditions set forth in sections 8 and 10 of the EPPA and Secs. 1.20, 1.22, 1.23, 1.24, 1.25, 1.26 and 1.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employing office's business, such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage;

(2) The employee had access to the property that is the subject of the investigation;

(3) The employing office has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employing office provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the business of the employing office;

(ii) A description of the employee's access to the property that is the subject of the investigation;

(iii) A description in detail of the basis of the employing office's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employing office; and

(5) The employing office retains a copy of the statement and proof of service described in paragraph (a)(4) of this section for at least 3 years.

(b) For the exemption to apply, the condition of an ''ongoing investigation'' must be met. As used in section 7(d) of the EPPA, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employing office may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employing office is precluded by the EPPA. Further, because the exemption is limited to a specific incident or activity, an employing office is precluded from using the exemption in situations where the so-called ''ongoing investigation'' is continuous. For example, the fact that

items in inventory are frequently missing from a warehouse would not be a sufficient basis, standing alone, for administering a polygraph test. Even if the employing office can establish that unusually high amounts of inventory are missing from the warehouse in a given month, this, in and of itself, would not be a sufficient basis to meet the specific incident requirement. On the other hand, polygraph testing in response to inventory shortages would be permitted where additional evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a reasonable suspicion that the employee to be polygraphed was involved in the incident under investigation. Administering a polygraph test in circumstances where the missing inventory is merely unspecified, statistical shortages, without identification of a specific incident or activity that produced the inventory shortages and a ''reasonable suspicion that the employee was involved,'' would amount to little more than a fishing expedition and is prohibited by the EPPA as applied to covered employees and employing offices by the CAA.

(c)(1)(i) The terms economic loss or injury to the employer's business include both direct and indirect economic loss or injury.

(ii) Direct loss or injury includes losses or injuries resulting from theft, embezzlement, misappropriation, industrial espionage or sabotage. These examples, cited in the EPPA, are intended to be illustrative and not exhaustive. Another specific incident which would constitute direct economic loss or injury is the misappropriation of confidential or trade secret information.

(iii) Indirect loss or injury includes the use of an employer's business to commit a crime, such as check-kiting or money laundering. In such cases, the ongoing investigation must be limited to criminal activity that has already occurred, and to use of the employing office's business operations (and not simply the use of the premises) for such activity. For example, the use of an employing office's vehicles, warehouses, computers or equipment to smuggle or facilitate the importing of illegal substances constitutes an indirect loss or injury to the employing office's business operations. Conversely, the mere fact that an illegal act occurs on the employing office's premises (such as a drug transaction that takes place in the employer's parking lot or rest room) does not constitute an indirect economic loss or injury to the employing office.

(iv) Indirect loss or injury also includes theft or injury to property of another for which the employing office exercises fiduciary, managerial or security responsibility, or where the office has custody of the property (but not property of other offices to which the employees have access by virtue of the business relationship). For example, if a maintenance employee of the manager of an apartment building steals jewelry from a tenant's apartment, the theft results in an indirect economic loss or injury to the employer because of the manager's management responsibility with respect to the tenant's apartment. A messenger on a delivery of confidential business reports for a client firm who steals the reports causes an indirect economic loss or injury to the messenger service because the messenger service is custodian of the client firm's reports, and therefore is responsible for their security. Similarly, the theft of property protected by a security service employer is considered an economic loss or injury to that employer.

(v) A theft or injury to a client firm does not constitute an indirect loss or injury to an employer unless that employer has custody of, or management, or security responsibility for, the property of the client that was lost or stolen or injured. For example, a cleaning contractor has no responsibility for the money at a client bank. If money is stolen from the bank by one of the cleaning contractor's employees, the cleaning contractor does not suffer an indirect loss or injury.

(vi) Indirect loss or injury does not include loss or injury which is merely threatened or potential, e.g., a threatened or potential loss of an advantageous business relationship.

(2) Economic losses or injuries which are the result of unintentional or lawful conduct would not serve as a basis for the administration of a polygraph test. Thus, apparently unintentional losses or injuries stemming from truck, car, workplace, or other similar type accidents or routine inventory or cash register shortages would not meet the economic loss or injury requirement. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement.

(3) It is the business of the employer which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employer would not satisfy the requirement.

(d) While nothing in the EPPA as applied by the CAA prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 7(d) exemption of the EPPA does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employer (e.g., an accident involving a company vehicle).

(e) Section 7(d)(2) of the EPPA provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word access, as used in section 7(d)(2), refers to the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation. The term ''access'', thus, includes more than direct or physical contact during the course of employment. For example, as a general matter, all employees working in or with authority to enter a warehouse storage area have ''access'' to unsecured property in the warehouse. All employees with the combination to a safe have ''access'' to the property in a locked safe. Employees also have ''access'' who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employer's inventory records. In such a situation, it is clear that the bookkeeper effectively has ''access'' to the property that is the subject of the investigation.

(2) As used in section 7(d)(2), property refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary, financial or technical information, such as trade secrets, which by its availability to competitors or others would cause economic harm to the employer.

(f)(1) As used in section 7(d)(3), the term reasonable suspicion refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for ''reasonable suspicion.'' Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature or the fact that access was limited to a single individual) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employer asked the employee to bring the piece of jewelry to his or her office at 7:30 a.m., and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident unless access to the safe was limited solely to the employee. If no one other than the employee possessed the combination to the safe, and all other possible explanations for the loss are ruled out, such as a break-in, the employer may formulate a basis for reasonable suspicion based on sole access by one employee.

(3) The employer has the burden of establishing that the specific individual or individuals to be tested are ''reasonably suspected'' of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) of the EPPA to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the EPPA sets forth what information, at a minimum, must be provided to an employee if the employer wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours, excluding weekend days and holidays, prior to the time of the examination. The statement must set forth the time and date of receipt by the employee and be verified by the employee's signature. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. Section 7(d)(4)(A) of the EPPA requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employer's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the ''with particularity'' criterion. If the basis for an employer's requesting an employee (or employees) to take a polygraph test is not articulated with particularity, and reduced to writing, then the standard is not met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by the employer, or an employee or other representative of the employer with authority to legally bind the employer. The person

signing the statement must not be a polygraph examiner unless the examiner is acting solely in the capacity of an employer with respect to his or her own employees and does not conduct the examination. The standard would not be met, and the exemption would not apply if the person signing the statement is not authorized to legally bind the employer.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the EPPA, as discussed in Secs. 1.20, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employing office to remedial actions, as provided for in section 6(c) of the EPPA.

Sec. 1.13 Exemption of employers authorized to manufacture, distribute, or dispense controlled substances

(a) Section 7(f) of the EPPA, incorporated into the CAA by section 225(f) of the CAA, provides an exemption from the EPPA's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. §812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the EPPA and Sec. 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) A current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms manufacture, distribute, distribution, dispense, storage, and sale, for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. §812 et seq.), as administered by the Drug Enforcement Administration (DEA), U.S. Department of Justice.

(2) The exemption in section 7(f) of the EPPA applies only to employers who are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 202 of the Controlled Substances Act (21 U.S.C. §812) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their business or employment are not required to register. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have ''direct access'' to the controlled substance(s) manufactured, dispensed, or distributed by the employer. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have ''access'' to the person or property that is the subject of the investigation.

(1) A prospective employee would have ''direct access'' if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have ''direct access'' if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have ''access'' within the meaning of section 7(f) if the employee had access to the specific person or property which is the subject of the on-going investigation, as discussed in Sec. 1.12(e) of this part. Thus, to test a current employee, the employee need not have had ''direct'' access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. For example, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have ''access'', but normally not ''direct access'', to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have ''direct access'' to such controlled substances. A pharmacy department in a supermarket is another common situation which is useful in illustrating the distinction between ''direct access'' and ''access.'' Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have ''direct access'' to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have ''access.'' Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have ''access.'' However, any current employee, regardless of described job duties, may be polygraphed if the employer's investigation of criminal or other misconduct discloses that such employee in fact took action to obtain ''access'' to the person or property that is the subject of the investigation—e.g., by actually entering the drug storage area in violation of company rules. In the case of ''direct access'', the prospective employee's access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee's ''access'' to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term prospective employee, for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption's provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a ''prospective employee'' for the purposes of this exemption, and thus could be subject to preemployment polygraph screening, prior to such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is considered a ''prospective employee'' for purposes of this section may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(e) Section 7(f) of the EPPA makes no specific reference to a requirement that employers provide current employees with a written statement prior to polygraph testing. Thus, employers to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the EPPA and Sec. 1.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer.

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation of criminal or other misconduct, relating to a specific incident or activity, or potential incident or activity. Thus, an employer is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring. However, unlike the exemption in section 7(d) of the EPPA for employers conducting ongoing investigations of economic loss or injury, the section 7(f) exemption includes ongoing investigations of misconduct involving potential drug losses. Nor does the latter exemption include the requirement for ''reasonable suspicion'' contained in the section 7(d) exemption. Thus, a drug store employer is permitted to polygraph all current employees who have access to a controlled substance stolen from the inventory, or where there is evidence that such a theft is planned. Polygraph testing based on an inventory shortage of the drug during a particular accounting period would not be permitted unless there is extrinsic evidence of misconduct.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The non-controlled products usually constitute the majority of such firms' sales volumes. An economic loss or injury related to such

noncontrolled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning products other than controlled substances might be initiated under section 7(d) of the EPPA and Sec. 1.12 of this part. However, the exemption in section 7(f) of the EPPA and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the EPPA, as discussed in Secs. 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the remedial actions authorized in section 204 of the CAA. The administration of such tests is also subject to collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

SUBPART C—RESTRICTIONS ON POLYGRAPH USAGE UNDER EXEMPTIONS

Sec. 1.20 Adverse employment action under ongoing investigation exemption

(a) Section 8(a) (1) of the EPPA provides that the limited exemption in section 7(d) of the EPPA and Sec. 1.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) ''Additional supporting evidence'', for purposes of section 8(a) of the EPPA, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employer observes all the requirements of sections 7(d) and 8(b) of the EPPA, as described in Secs. 1.12, 1.22, 1.23, 1.24 and 1.25 of this part.

Sec. 1.21 Adverse employment action under controlled substance exemption

(a) Section 8(a)(2) of the EPPA provides that the controlled substance exemption in section 7(f) of the EPPA and section 1.13 of this part shall not apply if an employing office discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, provided that the adverse action was also based on another bona fide reason, with supporting evidence therefor. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employing office observes all the requirements of section 7(f) of the EPPA, as appropriate, and section 8(b) of the EPPA, as described in sections 1.13, 1.22, 1.23, 1.24 and 1.25 of this part.

Sec. 1.22 Rights of examinee—general

(a) Pursuant to section 8(b) of the EPPA, the limited exemption in section 7(d) of the EPPA for ongoing investigations (described in Sec. 1.12 of this part) shall not apply unless all of the requirements set forth in this section and Secs. 1.23 through 1.25 of this part are met.

(b) During all phases of the polygraph testing the person being examined has the following rights:

(1) The examinee may terminate the test at any time.

(2) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner.

(3) The examinee may not be asked any questions dealing with:

(i) Religious beliefs or affiliations;

(ii) Beliefs or opinions regarding racial matters;

(iii) Political beliefs or affiliations;

(iv) Sexual preferences or behavior; or

(v) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations.

(4) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. ''Sufficient written evidence'' shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(5) An employee or prospective employee who exercises the right to terminate the test, or who for medical reasons with sufficient supporting evidence is not administered the test, shall be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test, as described in Secs. 1.20 and 1.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test phases, which must be conducted in accordance with the rights of examinees described in Secs. 1.23 through 1.25 of this part.

Sec. 1.23 Rights of examinee—pretest phase

(a) The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument. During the initial pretest phase, the examinee must be:

(1) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be received by the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination, except that a prospective employee may, at the employee's option, give written consent to administration of a test anytime within 48 hours but no earlier than 24 hours after receipt of the written notice. The written notice or proof of service must set forth the time and date of receipt by the employee or prospective employee and be verified by his or her signature. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. Provision shall also be made for a convenient place on the premises where the examination will take place at which the examinee may consult privately with an attorney or an employee representative before each phase of the test. The attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(2) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(3) Provided with a written notice prior to the testing phase, in a language understood by the examinee, which shall be read to and signed by the examinee. Use of Appendix A to this part, if properly completed, will constitute compliance with the contents of the notice requirement of this paragraph. If a format other than in Appendix A is used, it must contain at least the following information:

(i) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(ii) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(iii) That both the examinee and the employing office have the right, with the other's knowledge, to make a recording of the entire examination;

(iv) That the examinee has the right to terminate the test at any time;

(v) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(vi) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(vii) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(viii) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(ix) That the test is not and cannot be required as a condition of employment;

(x) That the employing office may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(xi)(A) In connection with an ongoing investigation, that the additional evidence required for the employing office to take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with

evidence supporting the employer's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(B) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (a)(3)(x) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;

(xii) That information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:

(A) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(B) To the employing office that requested the test;

(C) To a court, governmental agency, arbitrator, or mediator pursuant to a court order;

(D) By the employing office, to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(xiii) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to take action against the employing office under sections 401–404 of the CAA. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees;

(xiv) That the examinee has the right to obtain and consult with legal counsel or other representative before each phase of the test, although the legal counsel or representative may be excluded from the room where the test is administered during the actual testing phase.

(xv) That the employee's rights under the EPPA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the EPPA, agreed to and signed by the parties.

(b) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase. Such questions may be presented at any point in time prior to the testing phase.

Sec. 1.24 Rights of examinee—actual testing phase

(a) The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the testing phase. An examiner may, however, recess the testing phase and return to the pre-test phase to review additional relevant questions with the examinee. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions (as distinguished from technical baseline questions) pertain to the investigation.

(b) No testing period subject to the provisions of the Act shall be less than ninety minutes in length. Such ''test period'' begins at the time that the examiner begins informing the examinee of the nature and characteristics of the examination and the instruments involved, as prescribed in section 8(b)(2)(B) of the EPPA and Sec. 1.23(a)(2) of this part, and ends when the examiner completes the review of the test results with the examinee as provided in Sec. 1.25 of this part. The ninety-minute minimum duration shall not apply if the examinee voluntarily acts to terminate the test before the completion thereof, in which event the examiner may not render an opinion regarding the employee's truthfulness.

Sec. 1.25 Rights of examinee—post-test phase

(a) The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employing office must:

(1) Further interview the examinee on the basis of the test results; and

(2) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses. The term ''corresponding charted responses'' refers to copies of the entire examination charts recording the employee's physiological responses, and not just the examiner's written report which describes the examinee's responses to the questions as ''charted'' by the instrument.

Sec. 1.26 Qualifications of and requirements for examiners

(a) Section 8 (b) and (c) of the EPPA provides that the limited exemption in section 7(d) of the EPPA for ongoing investigations shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employing office pursuant to Sec. 1.30(c) of this part:

(1) Observe all rights of examinees, as set out in Secs. 1.22, 1.23, 1.24, and 1.25 of this part;

(2) Administer no more than five polygraph examinations in any one calendar day on which a test or tests subject to the provisions of EPPA are administered, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase;

(3) Administer no polygraph examination subject to the provisions of the EPPA which is less than ninety minutes in duration, as described in Sec. 1.24(b) of this part; and

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee.

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including, statements signed by examinees advising them of rights under the CAA (as described in section 1.23(a)(3) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See section 1.30 of this part for recordkeeping requirements.)

SUBPART D—RECORDKEEPING AND DISCLOSURE REQUIREMENTS

Sec. 1.30 Records to be preserved for 3 years

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employing office that requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular covered employee, as required by section 7(d)(4) of the EPPA and described in 1.12(a)(4) of this part.

(2) Each examiner retained to administer examinations pursuant to any of the exemptions under section 7(d), (e) or (f) of the EPPA (described in sections 1.12, 1.13, and 1.14 of this part) shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons.

Sec. 1.35 Disclosure of test information

This section prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employing office (other than an employing office exempt under section 7 (a), (b), or (c) of the EPPA (described in Secs. 1.10 and 1.11 of this part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employing office that requested the polygraph test pursuant to the provisions of the EPPA (including management personnel of the employing office where the disclosure is relevant to the carrying out of their job responsibilities);

(3) Any court, governmental agency, arbitrator, or mediator pursuant to an order from a court of competent jurisdiction requiring the production of such information;

(b) An employing office may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records), to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this part provided that the other examiner has no direct or indirect interest in the matter.

APPENDIX A TO PART 801—NOTICE TO EXAMINEE

Section 204 of the Congressional Accountability Act, which extends the rights and protections of section 8(b) of the Employee Polygraph Protection Act, and the regulations of the Board of Directors of the Office of Compliance (Sections 1.22, 1.23, 1.24, and 1.25), require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employing office have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

(f) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded from the room where the test is administered during the actual testing phase.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employing office to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employing office's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employing office that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(b) Information acquired from a polygraph test may be disclosed by the employing office to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to take action against the employing office by filing a request for counseling with the Office of Compliance under section 402 of the Congressional Accountability Act. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees.

6. Your rights under the EPPA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the EPPA, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me. _____

(Date) _____

(Signature)

MESSAGES FROM THE PRESIDENT RECEIVED DURING ADJOURNMENT

Under the authority of the order of the Senate of January 4, 1995, the Secretary of the Senate on November 27, 1995, received a message from the President of the United States submitting sundry nominations, which were referred to the Committee on the Judiciary.

The nominations received on November 27, 1995, are shown in today's RECORD at the end of the Senate proceedings.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Thomas, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were offered to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

REPORT OF THE RAILROAD RETIREMENT BOARD FOR FISCAL YEAR 1994—MESSAGE FROM THE PRESIDENT—PM 97

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Labor and Human Resources:

To the Congress of the United States:

I transmit herewith the Annual Report of the Railroad Retirement Board for Fiscal Year 1994, pursuant to the provisions of section 7(b)(6) of the Railroad Retirement Act and section 12(1) of the Railroad Unemployment Insurance Act.

WILLIAM J. CLINTON.

THE WHITE HOUSE, *November 28, 1995*.

REPORT ON THE NATIONAL EMERGENCY WITH IRAN—MESSAGE FROM THE PRESIDENT—PM 98

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs:

To the Congress of the United States:

I hereby report to the Congress on developments since the last Presidential report of May 18, 1995, concerning the national emergency with respect to Iran that was declared in Executive Order No. 12170 of November 14, 1979. This report is submitted pursuant to section 204(c) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(c) and section 505(c) of the International Security and Development Cooperation Act of 1985, 22 U.S.C. 2349aa–9(c). This report covers events through September 29, 1995. My last report, dated May 18, 1995, covered events through April 18, 1995.

1. On March 15 of this year by Executive Order No. 12957, I declared a separate national emergency pursuant to the International Emergency Economic Powers Act and imposed separate sanctions. Executive Order No. 12959, issued May 6, 1995, then significantly augmented those new sanctions. As a result, as I reported on September 18, 1995, in conjunction with the declaration of a separate emergency and the imposition of new sanctions, the Iranian Transactions Regulations, 31 CFR Part 560, have been comprehensively amended.

There have been no amendments to the Iranian Assets Control Regulations, 31 CFR Part 535, since the last report. However, the amendments to the Iranian Transactions Regulations that implement the new separate national emergency are of some relevance to the Iran-United States Claims Tribunal (the ''Tribunal'') and related activities. For example, sections 560.510, 560.513, and 560.525 contain general licenses with respect to, and provide for specific licensing of, certain transactions related to arbitral activities.

2. The Tribunal, established at The Hague pursuant to the Algiers Accords, continues to make progress in arbitrating the claims before it. Since my last report, the Tribunal has rendered four awards, bringing the total number to 566. As of September 29, 1995, the value of awards to successful American claimants from the Security Account held by the NV Settlement Bank stood at $2,368,274,541.67.

Iran has not replenished the Security Account established by the Accords to ensure payment of awards to successful U.S. claimants since October 8, 1992. The Account has remained continuously below the $500 million balance required by the Algiers Accords since November 5, 1992. As of September 29, 1995, the total amount in the Security Account was $188,105,627.95, and the total amount in the Interest Account was $32,066,870.62.

Therefore, the United States continues to pursue Case A/28, filed in September 1993, to require Iran to meet its obligations under the Accords to replenish the Security Account. Iran filed its Statement of Defense in that case on August 31, 1995. The United States is preparing a Reply for filing on December 4, 1995.