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General Management Laws: A Compendium

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Clinton T. Brass, Coordinator
Analyst in American National Government
Government and Finance Division

General Management Laws: A Compendium

Summary

This report (hereafter “compendium”) is a companion to CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*. In combination, these reports have three main objectives: (1) to identify and describe the major management laws under which the executive branch of the federal government is required to operate, including their rationale, design, and scope; (2) to assist Members of Congress and their staff in oversight of executive branch management; and (3) to help Congress when considering potential changes to the management laws themselves, as well as other legislation, including authorization statutes and appropriations.

The compendium contains profiles of selected “general management laws” — broad statutes designed to regulate the activities, procedures, and administration of all or most executive branch agencies. The quality of the general management laws, as well as their implementation, are considered crucial to maintaining the accountability of the executive branch to Congress, the President, and the public. Moreover, these laws influence the effectiveness of federal agencies when they implement, evaluate, and help formulate public policies.

The compendium includes more than 90 separate entries that describe general management laws for the executive branch of the federal government. The entries in the compendium are organized into the following seven functional categories: (1) Information and Regulatory Management; (2) Strategic Planning, Performance Measurement, and Program Evaluation; (3) Financial Management, Budget, and Accounting; (4) Organization; (5) Procurement and Real Property Management; (6) Intergovernmental Relations Management; and (7) Human Resources Management and Ethics. These categories include many laws and topics, including the Freedom of Information Act (FOIA, section I.E.), Privacy Act (I.F.), Federal Advisory Committee Act (FACA, I.G.), National Environmental Policy Act (NEPA, I.L.), Data Quality Act (I.O.), Inspector General Act (II.A.), Government Performance and Results Act (II.B.), Balanced Budget and Emergency Deficit Control Act (III.D.), Budget Enforcement Act (III.E.), Government Corporation Control Act (IV.A.), Davis-Bacon Act (V.F.), Unfunded Mandates Reform Act (UMRA, VI.C.), Hatch Act (VII.A.(5) and VII.A.(29)), Ethics in Government Act (VII.B.), Federal Tort Claims Act (VII.E.), and issues like information security (section I), improper payments (section III), services acquisition and contracting (section V), and federal employees and civil service laws (e.g., the National Security Personnel System at the Department of Defense, and the Department of Homeland Security personnel system (section VII.A)).

For each entry in the compendium, one or more CRS analysts present a brief history of the general management law, describe the law’s major provisions, discuss key developments and issues, and provide source readings for readers who want more information. The compendium reflects the status of general management laws at the end of the first session of the 108th Congress, and will be updated along with the companion report to reflect actions taken through the close of the 108th Congress.

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The following CRS analysts contributed to this compendium.

Coordinator: Clinton T. Brass

Mildred L. Amer
Keith Bea
Richard S. Beth
James M. Bickley
Clinton T. Brass
Hinda Ripps Chaikind
Henry Cohen
Curtis W. Copeland
Charles V. Dale
Louis Fisher
Sharon S. Gressle
L. Elaine Halchin
T. J. Halstead
Bill Heniff Jr.
Henry B. Hogue
H. Steven Hughes
Mark Jickling
Frederick M. Kaiser
Robert Keith
Genevieve J. Knezo

Kevin R. Kosar
John R. Luckey
Bob Lyke
Virginia A. McMurtry
Steven Maguire
Gerald Mayer
John D. Moteff
Thomas Nicola
Patrick J. Purcell
Harold C. Relyea
Morton Rosenberg
James V. Saturno
Barbara L. Schwemle
Christine Scott
Jeffrey W. Seifert
Michael V. Seitzinger
Michael Simpson
Stephanie Smith
Mitchel A. Sollenberger
William G. Whittaker

Mildred Boyle provided research production assistance.

Suggestions and comments for future editions may be sent to [cbrass@crs.loc.gov].

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General Management Laws: A Compendium

Introduction

Purposes

This report, *General Management Laws: A Compendium* (hereafter “compendium”), is a companion to CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass. In combination, these reports have three main objectives:

- to identify and describe the major general management laws under which the executive branch is required to operate, including their rationale, design, and scope;
- to assist Members of Congress and their staff in overseeing management of the executive branch; and
- to help Congress when considering potential changes to the management laws, as well as other legislation, including authorizing statutes and appropriations.¹

The compendium contains profiles of selected “general management laws” — broad statutes designed to regulate the activities, procedures, and administration of all or most executive branch agencies.² The quality of the general management laws, as well as their implementation, are considered crucial to maintaining the accountability of the executive branch to Congress, the President, and the public. Moreover, these laws influence the effectiveness of federal agencies when they implement, evaluate, and help formulate public policies.

As a complement to this compendium, the *General Management Laws: Major Themes and Management Policy Options* report (“companion report”) focuses on major themes and possible management policy options for Congress that emerge when the general management laws are viewed together, as a whole. The compendium reflects the status of general management laws at the end of the first

¹ A related report, CRS Report RL30240, *Congressional Oversight Manual*, describes the major purposes, processes, techniques, and information sources for congressional oversight of the executive branch.

² Agencies are sometimes exempted from the coverage of specific general management laws due to a category into which they fall (e.g., department, government corporation, etc.), specific provisions in an agency’s authorizing statute or appropriations, or provisions in the general management law itself.

session of the 108th Congress, and will be updated along with the companion report to reflect actions taken through the close of the 108th Congress.³

How the Compendium and Companion Report Are Organized

Compendium. This compendium includes more than 90 separate entries that describe general management laws for the executive branch. The entries are organized into the following seven functional categories:⁴

- Information and Regulatory Management;
- Strategic Planning, Performance Measurement, and Program Evaluation;
- Financial Management, Budget, and Accounting;
- Organization;
- Procurement and Real Property Management;
- Intergovernmental Relations Management; and
- Human Resources Management and Ethics.

Within the management field, *functions* typically refer to “business areas that require related bundles of skill” or “groups of people with similar skills and performing similar tasks.”⁵ (In the private sector, by way of comparison, functions often include marketing, finance, production, and human resources.) This functional orientation is a major theme that the companion report addresses.

³ Previous versions of this compendium, coordinated by Ronald C. Moe, reflected the status of general management laws at the close of the 104th, 105th, and 106th Congresses, respectively. This compendium stands on the shoulders of these efforts.

⁴ The listed functions are not necessarily the only way to categorize the report’s entries into sections, which could have been aggregated differently or further broken down.

⁵ For more discussion of functional structures and perspectives within a management context, see John R. Schermerhorn Jr., *Core Concepts of Management* (Hoboken, NJ: John Wiley & Sons, 2004), pp. 119-120, and Peter F. Drucker, *Management* (New York: Harper & Row, 1974), pp. 558-563. This usage of the term *function* differs from usages found in Title 5 of the *United States Code* and in budgetary accounting. In Title 5, the term *function* is used in several contexts, including agency strategic plans (5 U.S.C. § 306, requiring agencies to specify goals and objectives for major functions and operations of the agency), transfer of functions (5 U.S.C. § 3503), and reductions in force (5 U.S.C. § 3502). Title 5 does not define the term, but the implementing regulations for transfer of functions and reductions in force define *function* as “all or a clearly identifiable segment of an agency’s mission (including all integral parts of that mission), regardless of how it is performed” (5 C.F.R. § 351.203). With regard to budgetary accounting, the term *function* refers to categories of federal spending, organized according to the purpose or mission of government (e.g., income security, energy, and international affairs). The Congressional Budget and Impoundment Control Act of 1974 established the first statutory foundation for budget function classifications (see 2 U.S.C. § 632(a)(4) and 31 U.S.C. § 1104(c)). For background on budget function classifications, see CRS Report 98-280, *Functional Categories of the Federal Budget*, by Bill Heniff Jr.; and U.S. General Accounting Office, *Budget Function Classifications: Origins, Trends, and Implications for Current Uses*, GAO/AIMD-98-67, Feb. 1998.

Most of the compendium's entries discuss a specific law, or in some cases, several related laws. The "Human Resources Management and Ethics" section, however, presents most civil service laws according to their codification in Title 5 of the *United States Code* — the way that practitioners and specialists typically discuss these laws. For each entry in this compendium, one or more CRS analysts present a brief history of the general management law in a section entitled *Statutory Intent and History*, describe the law itself in a section entitled *Major Provisions*, and close with a summary of key developments and issues in a *Discussion* section. Finally, for readers interested in more detail, each entry cites *Selected Source Reading*.

All the entries in the compendium conform to the overall structure described above; but because the laws have different audiences, levels of complexity, and histories, the entries sometimes differ in extent, level of detail, or emphasis.

Companion Report. In turn, as a complement to this compendium, the companion report identifies potential management policy options for Congress.⁶ First, the companion report provides historical context on the roles that Congress and the President play in managing the executive branch. Next, the companion report briefly discusses the extent to which management in the public and private sectors can be compared. Finally, the largest share of the companion report analyzes major themes that run through the general management laws and identifies potential management policy options for Congress. The themes include:

- **Discretion for the Executive Branch.** Congress frequently faces the issue of how much discretion to give the executive branch. Congress has several management policy options to address delegation situations and help balance agency flexibility with accountability.
- **Standardization vs. Customization.** Should the management laws under which agencies operate be standardized, with rules that apply uniformly to many different agencies? Or should some agencies have agency-specific laws that are customized to each agency's internal and external environments? Or should there be a mix of the two approaches? The report discusses advantages and disadvantages of the different approaches and analyzes two options for Congress when making these decisions.
- **Functional Silos vs. Integrated General Management.** A functional perspective (e.g., looking at agency operations from the perspective of a budget officer or human resources officer) is important, because it can boost efficiency through specialization and ensure centralized control over strategic decisions. However, if functional orientations become inward-looking, various functions can operate as "silos" — in isolation from one another — resulting

⁶ CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass.

in coordination problems or missed opportunities. The report analyzes policy options for Congress to bring an integrated general management perspective to solve agency management problems.

- **Making and Measuring Progress.** For over two decades, many executive branch agencies have suffered from persistent, major management problems. Often these problems relate to areas the general management laws were intended to address. The report analyzes potential options for measuring and motivating agency progress in improving management practices.
- **Agency “Chief Officers” and Interagency Councils.** Statutorily created “chief officers” (e.g., chief financial officers and chief acquisition officers) have increased in number and importance in federal agencies, as in the private sector. Congress also established interagency councils of these officers. The report analyzes options for Congress in considering whether additional chief officers and councils should be established, and how Congress might make the councils more accountable.

I. Information and Regulatory Management

A. Federal Register Act

Statutory Intent and History

The Federal Register Act was originally legislated in 1935 (49 Stat. 500) to establish accountability and publication arrangements for presidential proclamations and executive orders and for federal agency rules and regulations. The centerpiece of the resulting system is the *Federal Register*, an executive gazette produced by the Office of the Federal Register of the National Archives and Records Administration. It is printed by the Government Printing Office and lately has been available, as well, in electronic formats (online and via CD-ROM).⁷

In many respects, the Federal Register Act of 1935 was a response to the increasing number of regulations, rules, and related administrative actions of the New Deal era, and the fugitive status of these instruments. The expansion of the federal government during World War I had resulted in the presidential and agency issuance of a growing quantity of administrative requirements. Brief experience with a gazette — *The Official Bulletin* — had been beneficial, but of temporary, wartime, duration.⁸ Its disappearance made a difficult situation worse. A contemporary observer characterized the operative situation in 1920 as one of “confusion,”⁹ and another described the deteriorating conditions in 1934 as “chaos.”¹⁰ During the early days of the New Deal, administrative law pronouncements were in such disarray that, on one occasion, government attorneys arguing a lawsuit before the Supreme Court were embarrassed to find their case was based upon a nonexistent regulation,¹¹ and on another occasion, discovered they were pursuing litigation under a revoked executive order.

The response was the mandating of the *Federal Register*. Produced in a magazine format, it is now published each business day. Soon after enacting the Federal Register Act, Congress, in 1937, amended it and inaugurated the *Code of Federal Regulations*, a useful supplement to the *Register* (50 Stat. 304). This cumulation of the instruments and authorities appearing in the gazette contains almost all operative agency regulations, and is now updated annually.

⁷ Commercially produced electronic versions of the *Federal Register* are available for purchase from private sector vendors who have introduced value-added features, such as search capability or annotations, to the basic GPO text.

⁸ John Walters, “The Official Bulletin of the United States: America’s First Official Gazette,” *Government Publications Review*, vol. 19, May-June 1992, pp. 243-256.

⁹ John A. Fairlie, “Administrative Legislation,” *Michigan Law Review*, vol. 18 (Jan. 1920), p. 199.

¹⁰ Erwin N. Griswold, “Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation,” *Harvard Law Review*, vol. 48 (Dec. 1934), p. 199.

¹¹ *United States v. Smith*, 292 U.S. 633 (1934), appeal dismissed on the motion of the appellant without consideration by the Court.

Later, the general statutory authority underlying the *Federal Register* was relied upon for the creation of other series of publications — the *United States Government Manual*, which has been available for public purchase since 1939; the *Public Papers of the Presidents*, which were first published in 1960; and the *Weekly Compilation of Presidential Documents*, which was begun in the summer of 1965.

Major Provisions

The cumulative and operative authority of the Federal Register Act may be found in Chapter 15 of Title 44, *United States Code*. The Office of the Federal Register (OFR) is mandated and the appointment of its director by the Archivist of the United States is authorized. Responsibility for the production of the *Federal Register* and the preservation of the original copies of documents published in it are vested in the Archivist.

The original and two duplicate originals or certified copies of a document required or authorized to be published in the *Federal Register* must be filed with the OFR. Materials so filed are marked with a notation as to the date and hour of receipt. One copy of filed materials is immediately available for public inspection at the OFR.

Filed materials are transmitted to the Government Printing Office (GPO), which is responsible for the production and distribution of the *Federal Register*. The GPO also prepares, produces, and distributes periodic cumulative indices of the daily issues of the *Register*.

Documents which must be published in the *Federal Register* include:

- presidential proclamations and executive orders, except those not having general applicability and legal effect or effective only against federal agencies or persons in their capacity as officers, agents, or employees thereof;¹²
- documents or classes of documents that the President may determine from time to time have general applicability and legal effect;
- documents or classes of documents that may be required to be so published by act of Congress; and
- other documents or classes of documents authorized to be published by regulations prescribed with the approval of the President.

Conversely, the act declares that “comments or news items of any character may not be published in the Federal Register” (44 U.S.C. § 1505(b)).

The requirements for filing documents for publication in the *Federal Register* may be suspended by the President during “an attack or threatened attack upon the

¹² The Federal Register Act states that “every document or order which prescribes a penalty has general applicability and legal effect” (44 U.S.C. § 1505).

continental United States.” Such a suspension remains in effect “until revoked by the President, or by concurrent resolution of the Congress” (44 U.S.C. § 1505(c)).

Federal Register operations are supervised by the Administrative Committee of the Federal Register, which is chaired by the Archivist of the United States and includes a Department of Justice officer designated by the Attorney General, and the Public Printer. The director of the Office of the Federal Register serves as committee secretary. This panel, with the approval of the President, prescribes the regulations governing the *Federal Register*, including such matters as the documents to be authorized by regulation for publication in the gazette, the manner and form in which the *Register* is produced, and certain distribution matters and charges concerning it.

The Administrative Committee, with the approval of the President, also supervises and manages the production of the *Code of Federal Regulations*. The *Code* is a “complete codification of the documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the Federal Register or by filing with the Administrative Committee, and are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions” (44 U.S.C. § 1510(a)). The Office of the Federal Register prepares and publishes the codifications appearing in the *Code*.

The *Federal Register*, the *Code of Federal Regulations*, and other series of publications produced pursuant to the general authority of the Federal Register Act are available to the public through sales, OFR and other websites ([http://www.archives.gov/federal_register/index.htm]), and distribution to federal depository libraries.

Discussion

While most major federal administrative law instruments — such as executive orders, presidential proclamations, and agency rules and regulations — are published in the *Federal Register* and *Code of Federal Regulations*, not all such authorities are so produced. During the past few years, concern has been expressed from time to time in Congress about certain national security directives of the President not being subject to accountability or publication under the Federal Register Act. They have been variously denominated as *National Security Decision Memoranda* during the Nixon-Ford Administrations, as *Presidential Directives* during the Carter Administration, as *National Security Decision Directives* during the Reagan Administration, as *National Security Directives* during the George H. W. Bush Administration, and as *Presidential Decision Directives* by the Clinton Administration. In 1988, a House subcommittee held hearings on a proposal to amend the Federal Register Act to provide accountability in the use of these presidential directives. A complication in so legislating is that these instruments are usually all security classified. Another type — *Homeland Security Presidential Directives* — was launched by President George W. Bush in late October 2002. This development sparked renewed congressional concern about accountability for these presidential directives.

Selected Source Reading

U.S. Congress. House. Committee on Government Operations. *Executive Orders and Proclamations: A Study of a Use of Presidential Powers*. Committee print. 85th Congress, 1st session. Washington: GPO, 1957.

———. *Presidential Directives and Records Accountability Act*. Hearing on H.R. 5092. 100th Congress, 2nd session. Washington: GPO, 1989.

CRS Report 98-611. *Presidential Directives: Background and Overview*, by Harold C. Relyea.

U.S. National Archives and Records Administration. Office of the Federal Register. *Code of Federal Regulations: Title 1 — General Provisions*. Washington: GPO, 1997.

Harold C. Relyea

B. Administrative Procedure Act

Statutory Intent and History

With the advent of the New Deal, greater expectations and reliance were placed upon the federal government for the achievement of certain political and social objectives. This required the development of both an expanded administrative law process and new regulatory agencies. Unlike a number of European states at that time, the United States did not have in place a sophisticated administrative system and had to build one. The first step was the passage of the Federal Register Act (described elsewhere in this compendium) in 1935, which required all federal agencies to publish notice of their rules, proposed rules, and legal notices in a single, readily available source, later to be known as the *Federal Register*.

Although substantial progress was made in uniform public notice and publication processes for regulation making by the agencies, a single general management law covering all the agencies was not passed until after World War II. The Administrative Procedure Act (APA; 60 Stat. 237; 5 U.S.C. § 551 et seq.), enacted in 1946, is considered the seminal federal administrative legislation of the modern era. The major contribution of the act was to establish for the first time minimum procedural requirements for certain types of agency decision making processes. Its general purposes were to (1) require agencies to keep the public currently informed of agency organization, procedures, and rules; (2) provide for public participation in the rulemaking process; (3) prescribe uniform standards for the conduct of formal rulemaking and adjudicatory proceedings (i.e., proceedings required by statute to be made on the record after opportunity for agency hearing); and (4) restate the law of judicial review of agency action.

The act imposes on agencies certain requirements for two modes of agency decision making: rulemaking and adjudication. In general, the term *agency* refers to any authority of the government of the United States, whether or not it is within, or subject to review by, another agency. Congress, the courts, and the governments of territories, possessions, and the District of Columbia are excluded.

Major Provisions

The APA has two major subdivisions: Sections 551-559, dealing with general agency procedures, and Sections 701-706, dealing with judicial review. In addition, several sections dealing with administrative law judges are scattered throughout Title 5 (Sections 1305, 3105, 3344, 5372, and 7521).

The structure of the APA is shaped around the distinction between rulemaking and adjudication, with different schemes of procedural requirements prescribed for each. *Rulemaking* is agency action that formulates the future conduct of persons, through the development and issuance of an agency statement designed to implement, interpret, or prescribe law or policy. It is essentially legislative in nature because of its future general applicability and its concern for policy considerations. *Adjudication*, on the other hand, is concerned with determination of past and present rights and liabilities. The result of an adjudicative proceeding is the issuance of an order.

Beyond the distinction between rulemaking and adjudication, the APA subdivides each of these categories of agency action into formal and informal proceedings. Whether a particular rulemaking or adjudicatory proceeding is considered to be “formal” depends on whether the proceeding is required by statute to be “on the record after opportunity for an agency hearing” (5 U.S.C. § 553(c), § 554(a)). The act prescribes elaborate procedures for both formal rulemaking and formal adjudication, and relatively minimal procedures for informal rulemaking. Virtually no procedures are prescribed by the APA for the remaining category of informal adjudication, which is by far the most prevalent form of governmental action.

Rulemaking. Section 553 sets the requirements for *informal rulemaking* (also known as notice and comment rulemaking). An agency must publish a notice of proposed rulemaking in the *Federal Register*, afford interested persons an opportunity to participate in the proceeding through the submission of written comments or, at the discretion of the agency, by oral presentation, and when consideration of the matter is completed, incorporate in the rules adopted “a concise general statement of their basis and purpose” (5 U.S.C. § 553(c)). A final rule must be published in the *Federal Register* “not less than 30 days before its effective date” (5 U.S.C. § 553(d)). Interested persons have a right to petition for the issuance, amendment or repeal of a rule (5 U.S.C. § 553(e)). Although the APA does not specify a minimum period for public comment, at least 30 days have been traditionally allotted. More recently, Executive Order 12866¹³ has prescribed that covered agencies allow at least 60 days. Agencies are free to grant additional procedural rights, and Congress has at times particularized requirements for certain agencies or programs.

The APA also provides for *formal rulemaking*, a procedure employed when rules are required by statute to be made on the record after an opportunity for agency hearing. Essentially, this procedure requires that the agency issue its rule after the kind of trial-type hearings procedures normally reserved for adjudicatory orders (discussed below).

Adjudication. Sections 554, 556, and 557 apply to formal adjudications (i.e., cases for which an adjudicatory proceeding is required by statute to be determined on the record after an agency proceeding). Sections 556 and 557 spell out the specific procedures to be utilized in formal adjudication. In brief, a trial type hearing must be held, presided over by members of the agency or an administrative law judge (ALJ). Section 556 prescribes the duties of ALJs, the allocation of burden of proof, and parties’ rights to cross-examination. Section 557 provides that an ALJ must issue an initial decision, which becomes the agency’s final decision if not appealed. The record must show the ruling on each finding, conclusion, or exception raised. *Ex parte* communications relevant to the merits of a pending formal agency proceeding are prohibited.

Judicial Review of Agency Action. Sections 701-706 constitute a general restatement of the principles of judicial review embodied in many statutes and

¹³ 3 C.F.R., 1993 Comp., pp. 638-649.

judicial decisions; however, they leave the mechanics regarding judicial review to be governed by other statutes or court rules.

Section 701 establishes a presumption of reviewability of agency actions by providing that the action “of each authority of the Government of the United States” is subject to judicial review except where “statutes preclude judicial review,” or “where agency action is committed to agency discretion by law” (Section 701(a)(1),(2)). The Supreme Court has consistently supported the strong presumption of reviewability, requiring a “showing of ‘clear and convincing’ evidence of a ... legislative intent to restrict access to judicial review.” (*Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986)). Moreover, the exception for actions “committed to agency discretion” is narrowly construed and is applicable only in “rare instances where statutes are drawn in such broad terms that in a given case, there is no law to apply” (*Volpe*, supra, 401 U.S. at 410).

A challenge may be brought by any person who is “adversely affected or aggrieved” by the action “within the meaning of the relevant statute” (5 U.S.C. § 702). Courts deciding the standing of a person challenging a rule also must comply with the limitations on federal court jurisdiction imposed by the “case or controversy” requirement of Article III of the Constitution, which has been interpreted to require that a party bringing an action in federal court demonstrate an “injury in fact,” caused by the violation of a legally protected interest, that is concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical (see *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 473 (1982); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). In addition, parties seeking to establish constitutional standing are required to show that their injury “fairly can be traced to the challenged action” and that the injury is likely to be redressed by a favorable judicial decision (*Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge*, supra, at 472). A person challenging an agency rule who satisfies Section 702’s test is also likely to satisfy the injury requirement for constitutional standing. Indeed, courts typically merge their discussions of Section 702’s “adversely affected or aggrieved” language with the constitutional injury requirement (see, e.g., *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)).

In addition to constitutional requirements, the judiciary has developed prudential rules to constrain the instances in which review may be obtained. Like their constitutional counterparts, these judicially imposed limits on the exercise of federal jurisdiction are “founded in concern about the proper — and properly limited — role of the courts in a democratic society” (see *Warth v. Seldin*, 422 U.S. 490, 498 (1974)). However, unlike their constitutional counterparts, they may be modified or abrogated by Congress. The prudential components of the standing doctrine require that (1) a plaintiff assert his own legal rights and interests rather than those of third parties; (2) a plaintiff’s complaint be encompassed by the “zone of interests” protected or regulated by the constitutional or statutory guarantee at issue; and (3) courts decline to adjudicate “‘abstract questions of wide public significance’ which amount to ‘generalized grievances’ pervasively shared and most appropriately addressed in the representative branches” (*Valley Forge*, supra, at 472).

Any standing inquiry is further complicated in instances when an organization seeks to challenge agency action. An organization may have standing to sue if it has been injured as an entity, and may likewise possess standing to sue on behalf of its members, so long as the members would otherwise have standing to sue in their own right; the interests the organization seeks to protect are germane to its purpose; and neither the claim asserted nor the relief requested requires the participation of individual members (see *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)).

The forum for judicial review of agency rules is determined by statute. Statutes containing judicial review provisions applicable to rulemaking generally call for direct, pre-enforcement review in the courts of appeals, and usually specify requirements as to venue, timing of review, and scope of review. If there is no specifically applicable judicial review provision governing the agency's rule, a challenge to the rule will normally be through an action for an injunction or declaratory relief in a district court. Jurisdiction must be obtained through one of the general jurisdictional statutes, the most frequently asserted being 28 U.S.C. § 1331, the so-called "federal question" provision, which gives district courts "original jurisdiction of all civil actions wherever the matter in controversy ... arises under the Constitution, laws, or treaties of the United States." Other jurisdictional provisions that may be used are 28 U.S.C. § 1337 (actions arising under commerce-related statutes) and 28 U.S.C. § 1361 (mandamus jurisdiction).

Section 706 sets forth the scope of review of agency actions. In general, the scope of review depends on the nature of the agency determination under challenge. Agency conclusions on questions of law are reviewed *de novo*. When a court reviews an agency's construction of a statute it administers, the court is required to uphold Congress's intent where Congress has directly spoken to the precise statutory question at issue. If the statute is silent or ambiguous with respect to the specific issue, however, the agency's interpretation of the statute must be upheld if the agency's construction of the statute is permissible (see *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984)). The Supreme Court has clarified the limits of this standard, ruling that *Chevron* deference applies only in instances when Congress has delegated authority to an agency to make rules carrying the force of law, and when the agency interpretation claiming deference was promulgated pursuant to that authority (see *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

Agency exercises of judgment or discretion, such as in informal rulemaking or informal adjudication, are reviewed under the "arbitrary, capricious, abuse of discretion" standard. Under this standard, an agency determination will be upheld if it is rational, based on a consideration of the relevant factors, and within the scope of the authority delegated to the agency by Congress. The agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. A court is not to substitute its judgment for that of the agency (see *Motor Vehicle Mfr's Assoc. v. State Farm Mut. Auto Ins. Co.*, 463, U.S. 29, 42-43 (1983)).

Agency determinations of fact, typically in challenges of agency adjudications, are reviewed under the "substantial evidence" test when the agency determination is reviewed on the record of an agency proceeding required by statute (see *Consolo v.*

FMC, 383 U.S. 607, 618-21 (1966)), citing (*Universal Camera v. NLRB*, 340 U.S. 474 (1951)).

Discussion

The APA retains its preeminence as the general management law governing agency decisionmaking by means of rulemaking and adjudication. Essentially unamended by Congress since 1946, it has maintained its vitality in the face of vast and fundamental changes in the nature and scope of federal government responsibilities. In great measure this accommodation has come about because of judicial rulings that have effected important transformations of the meaning and scope of its otherwise neutral and spare terminology. The hallmark of our modern administrative state — agency rulemaking through the process of informal rulemaking — is a creative judicial cultivation. With the encouragement of the courts, rulemaking replaced adjudication as the dominant formal decision making process. Administrative lawmaking was “democratized” in a series of decisions between 1965 and 1983 that expanded both the obligations of agencies and the role of reviewing courts. The result has been the transformation, without benefit of legislative amendment, of informal rulemaking into a new, on-the-record proceeding that has fostered widespread public participation in the process.

To be sure, Congress has not simply silently acquiesced in this revolutionary transformation. Although Congress has never undertaken a comprehensive revision of the APA, it has always recognized that it could do so, and with increasing frequency, it has supplanted the APA’s requirements with more explicit directives for particular agencies and programs mirroring the above-described judicial innovations. Often this legislation has been aimed at formalizing the procedural protections ensuring effective and meaningful public participation in agency policymaking. Thus, certain health, environmental, and consumer protection statutes, for example, contain detailed “hybrid-rulemaking” requirements and procedural as well as substantive changes.¹⁴

Moreover, the deregulation movement of the 1970s and 1980s successfully focused attention on the economic consequences of regulation and the need for a broader analytic approach to regulatory decision making that assessed the impacts of costs and new technologies. The executive branch took the lead by adding new layers of clearances for rules by executive order that included requirements for consideration and evaluation of their costs and benefits. (See Executive Orders 12291, 12498, and 12866).¹⁵ Proposed regulatory reform legislation in recent Congresses has included bills that not only would have codified the judicially created procedural requirements of the last two decades, but also would have required all

¹⁴ See, e.g., 42 U.S.C. § 300g-1(d) (requiring public hearing prior to the promulgation of regulations pursuant to the Safe Drinking Water Act); 15 U.S.C. § 2605 (providing for public hearing and opportunity for cross-examination of witnesses prior to promulgation of regulations under the Toxic Substances Control Act); and 15 U.S.C. § 2058 (providing for a public hearing before promulgation of rules under the Consumer Product Safety Act).

¹⁵ See 3 C.F.R., 1981 Comp., pp. 127-134; 3 C.F.R., 1985 Comp., pp. 323-325; and 3 C.F.R., 1993 Comp., pp. 638-649, respectively.

agencies engaged in rulemaking to utilize methodologies requiring detailed risk assessment and cost benefit analysis for major regulations which would have been subjected to intense judicial review. While these particular reform efforts have been unsuccessful, Congress has passed several notable measures, including a mechanism that subjects all agency rules to congressional review and possible veto; a procedure to require the General Accounting Office to conduct an independent evaluation of an agency's cost-benefit analysis of a proposed or final rule when requested by a chair or ranking member of a committee of jurisdiction; a process designed to restrict regulations imposing unfunded costs on state and local governments and the private sector; and a process designed to ensure that federal agencies use and disseminate accurate information. There is also an emerging and controversial trend on the part of agencies to attempt to enhance public participation in the administrative process by accepting electronically submitted comments.

While the APA's basic rulemaking model is relatively straightforward, it has been argued that the additional requirements that have been imposed by Congress, the executive branch, and the courts have made the rulemaking process rigid and burdensome upon agencies. In turn, this has led to the argument that rulemaking has become "ossified," with agencies either undertaking resource and time intensive steps to ensure that a rule will withstand increased scrutiny, or simply circumventing the traditional rulemaking process by issuing policy statements and interpretive rules to effectuate compliance with a regulatory agenda. Ultimately, however, it would appear that the current APA scheme is likely to continue to be the key vehicle for formulating and implementing agency policy directives.

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Morton Rosenberg
T. J. Halstead

C. Federal Records Act and Related Chapters of Title 44

Statutory Intent and History

Proper maintenance of federal records within the departments and agencies has been legislatively addressed by Congress since the earliest days of the republic. When chartering the initial departments, for example, Congress authorized the heads of these entities to issue regulations for, among other matters, the custody, use, and preservation of the records, papers, and property.¹⁶ It was also the responsibility of these officials to ensure that these regulations were observed in practice.

Through the years, Congress from time to time legislated additional requirements and administrative arrangements concerning federal records. In 1934, for instance, a major step was taken with the mandating of the National Archives (48 Stat. 1122).¹⁷ The head of this entity, the Archivist of the United States, has subsequently become a major policy leader regarding the entire life cycle of federal records, including their (1) creation or collection; (2) processing; (3) transmittal, including access and dissemination; (4) use; (5) active storage; (6) inactive storage; and (7) final disposition.¹⁸

The Federal Records Act of 1950 (64 Stat. 583) was another milestone. While it is most often remembered for its placement of the Archivist and the National Archives under the authority of the Administrator of the General Services Administration,¹⁹ among the statute's important innovations were:

- creation of the National Historical Publications Commission to “make plans, estimates, and recommendations for such historical works and collections of sources as it deems appropriate for printing or otherwise recording at the public expense ... [and to] cooperate with and encourage both governmental and nongovernmental institutions, societies, and individuals in collecting and preserving and, when it deems such action to be desirable, in editing and publishing the papers of outstanding citizens of the United States and such other documents as may be important for an understanding and appreciation of the history of the United States” (44 U.S.C. §§ 2501-2506);

¹⁶ See, for example, 1 Stat. 28, 49, and 65; these and similar provisions were consolidated in the *Revised Statutes of the United States* (1878) at Section 161, which is presently located in the *United States Code* at 5 U.S.C. § 301.

¹⁷ The National Archives was rechartered in the National Archives and Records Administration Act of 1984 (98 Stat. 2280), which largely constitutes Chapter 21 of Title 44 of the *United States Code*.

¹⁸ Peter Herson, “Information Life Cycle: Its Place in the Management of U.S. Government Information Resources,” *Government Information Quarterly*, vol. 11, 1994, pp. 143-170.

¹⁹ This relationship ended in 1984 when the National Archives was restored to the status of an independent agency within the executive branch.

- authorizing the analysis, development, promotion, and coordination of standards, procedures, and techniques “designed to improve the management of records, to insure the maintenance and security of records deemed appropriate for preservation, and to facilitate the segregation and disposal of records of temporary value,” and other related actions (44 U.S.C. §§ 2904-2906);
- authorizing the establishment, maintenance, and operation of records centers “for the storage, processing, and servicing of records for Federal agencies pending their deposit with the National Archives of the United States or their disposition in any other manner authorized by law” (44 U.S.C. § 2907);
- prescribing the records management responsibilities of agency heads (44 U.S.C. §§ 3101-3107); and
- prescribing archival administration responsibilities for the deposit of federal agency and congressional records “determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government” in the National Archives, and other related actions (44 U.S.C. §§ 2107-2111).

The provisions of the Federal Records Act and those of subsequent records management statutes are largely codified in chapters of Title 44 of the *United States Code*.

Major Provisions

Within Title 44 of the *United States Code*, Chapters 21, 22, 29, 31, and 33 contain major provisions of records management law. The first of these, Chapter 21, after prescribing the establishment, organization, and principal leadership of the National Archives and Records Administration, specifies certain general authority, duties, and responsibilities of the Archivist. These include procedures and conditions for the acceptance of records for historical preservation; responsibility for the custody, use, and withdrawal of records transferred to the Archives; responsibilities for the preservation, arrangement, duplication, and exhibition of records by the Archivist; and the procedures and conditions governing the establishment of a presidential archival depository or presidential library to be accepted and maintained by the Archivist.²⁰

Chapter 22 contains the provisions of the Presidential Records Act of 1978 (92 Stat. 2523), which marked a major change in federal policy on the custody and preservation of presidential records. As a consequence of the Watergate incident and related matters, the official papers and records of President Richard Nixon were

²⁰ Concerning the acceptance and maintenance of presidential archival depositories by the Archivist, see CRS Report RS20825, *Presidential Libraries: The Federal System and Related Legislation*, by Harold C. Relyea.

placed under federal custody by specially legislated arrangements — the Presidential Recordings and Materials Preservation Act of 1974 (88 Stat. 1695). This statute requires that these materials remain in Washington, DC, where they are maintained under the supervision of the Archivist. Thus, Nixon neither could take his presidential records and documents with him when he left office, nor could place them in a presidential library outside the nation's capital.

This 1974 statute also created the temporary National Study Commission on Records and Documents of Federal Officials (88 Stat. 1698). The panel was tasked “to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation.” Its final report was issued in March 1977.²¹

Responding partly to some of the commission's recommendations, Congress legislated the Presidential Records Act in 1978. After defining “presidential records,” the statute specifies that all such materials created on or after January 20, 1981, are subject to its provisions. It effectively made presidential records federal property, to remain under the custody and control of the Archivist when each incumbent President left the White House. Jimmy Carter was the last occupant of the Oval Office who could freely take away his records and papers.

Chapter 29, setting out the records management authority and responsibilities of the Archivist and the Administrator of General Services, contains core provisions from the Federal Records Act of 1950. Specified here are the objectives of federal records management, the two officials' general responsibilities for records management, and the Archivist's authority to establish standards for the selective retention of records, inspect agency records, and establish, maintain, and operate records centers.

Chapter 31, also containing core provisions from the Federal Records Act, prescribes the records management responsibilities of the federal agencies, including the general duties of agency heads, the requirement to establish and maintain “an active, continuing program for the economical and efficient management of the records of the agency,” and certain related procedural matters.

Chapter 33 is devoted to the disposal of federal records. It authorizes the Archivist to issue regulations and utilize a system of records lists and disposition schedules to eliminate non-current agency records lacking preservation value.

²¹ U.S. National Study Commission on Records and Documents of Federal Officials, *Final Report of the National Study Commission on Records and Documents of Federal Officials* (Washington: GPO, 1977). Also see Anna Kasten Nelson, “The Public Documents Commission: Politics and Presidential Records,” *Government Publications Review*, vol. 9, Sept./Oct. 1982, pp. 431-451.

Discussion

Most of the existing statutory law concerning records management was developed when paper formats dominated federal recordkeeping and production. During the past few decades, the adequacy of this authority has come into question as electronic forms and formats have become more prevalent. The many challenges of the electronic record phenomenon continue to be discussed and evaluated. General Records Schedule (GRS) 20, a primary, government-wide, records management directive, has been revised recently, and efforts are underway to develop an electronic records archive at the National Archives.

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Harold C. Relyea

D. Congressional Review of Regulations Act

Statutory Intent and History

The Supreme Court's acceptance in 1937 of the New Deal's rejection of passive, minimalist governance, and its replacement by a more activist governmental philosophy, signaled the beginning of the era of the administrative state that has seen the emergence of a pattern of pervasive governmental economic and social regulation. Since 1937, an unbroken line of Supreme Court and lower court decisions has provided legitimacy for broad delegations of congressional power to the executive, and has fostered and nurtured the hallmark of the modern administrative state, agency lawmaking through the process of informal rulemaking. With the encouragement of the courts, rulemaking has replaced adjudication as the dominant formal administrative decision making process.

The necessity to delegate increasing amounts of legislative power to administrative agencies to accomplish the expanded objective of government, while at the same time maintaining congressional control and responsibility over the exercise of the delegated authority, created a constitutional tension, however. This tension has been manifested over the years by a variety of legislative attempts to develop a review mechanism that would allow Congress to exercise its oversight responsibility to assure agency accountability in the exercise of delegated authority. Initially, Congress increasingly relied on the legislative veto, a device that allowed it to delegate power conditionally and to retrieve it, or block agency exercise of its delegated authority, by the action of both houses, one house, a committee, or, at times, by a committee chairman alone. In 1983, in *INS v. Chadha* (462 U.S. 919 (1983)), the Supreme Court found all such veto mechanisms to be an unconstitutional exercise of legislative power because of their failure to follow the Constitution's exclusive prescription for lawmaking: bicameral passage and presentment to the President for his signature or veto.

The immediate consequence of the Supreme Court's ruling was to force Congress to rely more heavily on its traditional mechanisms of control of administrative action, such as the authorization and appropriations process, committee oversight and investigations, and the confirmation process as means of restraining perceived regulatory excesses. In addition, regulatory reform proposals throughout the 1980s and 1990s consistently contained requirements that agencies perform cost-benefit, cost-effectiveness and risk assessment analyses as integral parts of their rulemaking processes.

None of these government-wide reforms succeeded until the enactment of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 110 Stat. 857-874). Subtitle E of the act for the first time established a mechanism by which Congress can disapprove, on a fast-track, virtually all federal agency rules. Failure to report a covered rule for congressional review will prevent the rule from becoming effective. The effectiveness of major rules is stayed for 60 days to allow for congressional scrutiny. A rule vetoed by the passage of a joint resolution of disapproval is deemed never to have been effective and an agency may not propose to issue a substantially similar rule without further congressional authorization.

However, a number of unresolved interpretive issues, as well as certain structural problems, have limited the effectiveness of this review mechanism.

Major Provisions

The congressional review mechanism, codified at 5 U.S.C. §§ 801-808, requires that all agencies promulgating a covered rule must submit a report to each house of Congress and to the Comptroller General (CG) that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A rule cannot take effect if the report is not submitted (Section 801(a)(1)(A)). Each house must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee (Section 801(a)(1)(C)). In addition, the promulgating agency must submit to the CG (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made "available" to each house (Section 801(a)(1)(B)).

Section 804(3) adopts the definition of *rule* found at 5 U.S.C. § 551(4) which provides that the term "means the whole or part of an agency statement of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy."²² The legislative history of Section 551 (4) indicates that the term is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well."²³ The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make,"²⁴ including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, and memoranda of understanding, among other types of actions.²⁵ Thus a broad range of agency action is potentially subject to congressional review.

²² Section 804(3) excludes from the definition "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations of non-agency parties."

²³ U.S. Attorney General, *Manual on the Administrative Procedure Act*, 13 (1948).

²⁴ *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

²⁵ See, for example, *Chem Service, Inc. v. EPA*, 12 F.3d 1256 (3rd Cir. 1993)(memorandum of understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993)(interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F.Supp 1346 (E.D. La 1988)(federal personnel manual letter issued by the Office of Personnel Management); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2nd Cir. 1995)(affirming lower court's ruling that SEC "no action" letter was a rule within Section 551(4)).

The Comptroller General and the administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a “major rule,” defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs of processing for consumers, industries, or state and governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the OIRA administrator (Section 804(2)). If a rule is deemed major by the OIRA administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801 (a)(1) or its publication in the *Federal Register*, whichever is later. The statute requires that the CG’s report “shall include an assessment of the agency’s compliance with the procedural steps required by Section 801(a)(1)(B).” However, the CG has interpreted his duty under this provision narrowly as requiring that he simply determine whether the prescribed action has been taken, i.e., whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not whether the action was properly done or was in accord with congressional intent.

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 days after Congress receives the report submitted pursuant to Section 801(a)(1) or after the rule is published in the *Federal Register*; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one house votes and fails to override the veto, or 30 days after Congress receives the message; or (3) the date the rules would otherwise have taken effect (unless a joint resolution is enacted) (Section 801(a)(3)).

Thus, the earliest a major rule can become effective is 60 days after the submission of the report required by Section 801(a)(1) or its publication in the *Federal Register*, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds “good cause in that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement (Section 801(c)). Finally, a third route is available under Section 801(a)(5), which provides that “the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under Section 802.” All other rules take effect “as otherwise allowed by law,” after having been submitted to Congress under Section 801(a)(1) (Section 801(a)(4)).

All covered rules are subject to disapproval even if they have gone into effect. Congress has reserved to itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of the Senate or 60 legislative days of the House prior to the date Congress adjourns a session of Congress, the period during

which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of Congress (Section 801(d)(1)). Such held-over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the House in the succeeding session, and as though a report under Section 801(a)(1) was submitted on that date (Section 801(d)(2)(A), (e)(2)). But a held-over rule takes effect as otherwise provided (Section 801(d)(3)). Only the opportunity to consider and disapprove is extended.

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time (Section 801(f)). If a rule that is subject to any statutory, regulatory, or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution (Section 803). A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, any reissued or new rule that is “substantially the same” as a disapproved rule cannot be issued unless it is specifically authorized by a law enacted subsequent to the disapproval of the original rule (Section 801(b)(2)).

Section 802(a) provides a process for an up-or-down vote on a joint resolution of disapproval within a 60-day period (excluding days when either house is adjourned for more than three days). The period begins running either on the date on which the Section 801(a)(1) report is submitted, or when the rule is published in the *Federal Register*, whichever is later.

The law spells out an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge, it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to amendment or postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of (Section 802(d)(1)). Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order (Section 802(d)(2)). At the conclusion of debate, an up-or-down vote on the joint resolution is to be taken (Section 802(d)(3)).

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one house passes a joint resolution before the other house acts, the measure of the other house is not referred to a committee. The procedure of the house receiving a joint resolution “shall be the same as if no joint resolution had been received from the other house, but the vote on final passage shall be on the joint resolution of the other house” (Section 802(f)(1)(2)).

Section 805 precludes judicial review of any “determination, finding, action or omission under this chapter.” This would insulate from court review, for example, a determination by the OIRA administration that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency

determination that “good cause” requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General’s assessment of an agency’s report.

Discussion

As of January 14, 2004, the Comptroller General had submitted reports pursuant to Section 801(a)(2)(A) to Congress on 488 major rules.²⁶ In addition, GAO has cataloged the submission of 32,865 non-major rules as required by Section 801(a)(1)(A). To date, 29 joint resolutions of disapproval have been introduced relating to 21 rules. One rule has been disapproved: the Occupational Safety and Health Administration’s (OSHA’s) ergonomics standard in March 2001. A second rule, the Federal Communication Commission’s (FCC’s) rule relating to broadcast media ownership, was disapproved by the Senate on September 16, 2003 but was not acted upon by the House.

After eight years, the limited use to which the rulemaking review mechanism has been put does not appear to be attributable to a lack of familiarity with the law, but rather to a number of other factors. Some have argued that agencies are more carefully assessing their regulations to avoid possible congressional disapproval resolutions. Others maintain that the current review process discourages utilization of the act. These critics point to a number of interpretive issues concerning the scope of the law’s coverage, the judicial enforceability of its key requirements, and whether a disapproval resolution may be directed at part of a rule as factors which introduce uncertainties into the use of the disapproval resolution process.

Specific problems identified by critics of the current process include (1) the lack of a screening mechanism to identify rules that require congressional review; (2) the absence of an expedited review procedure in the House of Representatives; (3) the deterrent effect of the ultimate need for a supermajority of both houses to veto a rule; (4) the reluctance to disapprove an omnibus rule where only a part of the rule raises objections; (5) the uncertainty of which rules are covered by the act; (6) the uncertainty whether the failure to report a covered rule to Congress can be reviewed and sanctioned by a court; and (7) the scope of the limitation that precludes an agency from promulgating a “substantially similar rule” after the disapproval of a rule. Perceived agency failures to report rules covered by the CRA for review and the lack of any basis to timely challenge the substantiality of agency cost-benefit analyses were the subject of oversight hearings in both houses during the 106th Congress. A product of those inquiries was the passage of the Truth in Regulating Act of 2000, which required the Comptroller General to conduct an independent evaluation of an agency’s cost-benefit assessment accompanying a proposed or final economically significant rule when requested by a chair or ranking minority member of a committee of jurisdiction. The CG’s evaluations were to be completed within 180 days of the request. Although the CG’s evaluations were not integrated to coincide with time requirements of the CRA, they could have provided a basis for prompting review action under this mechanism. However, no monies were ever appropriated for the pilot program, and its authorization expired in January 2004.

²⁶ U.S. General Accounting Office, *Reports on Federal Agency Major Rules*, available at [<http://www.gao.gov/decisions/majrule/majrule.htm>], visited Jan. 22, 2004.

Two bills have been introduced in the 108th Congress to address some of the deficiencies cited by critics of the review mechanism. H.R. 110 would require that all rules encompassed by the definition of *rule* in 5 U.S.C. § 551(4) cannot “have the force and effect of law” unless they are enacted into law by means of expedited consideration procedures established for each house by the proposal. The bill would apparently displace the current CRA mechanism. H.R. 3356 would amend the CRA by establishing a Joint Administrative Procedures Committee (JAPC) composed of 24 Members, 12 from each house, which would act as an oversight and screening body for Congress with respect to existing and proposed major rules. The bill also would provide for expedited consideration procedures for joint resolutions of disapproval for the House of Representatives comparable to those of the Senate; authorize the JACP, within 30 days after the required report to Congress was received, to report a committee resolution recommending that each standing committee with jurisdiction to which such report was provided report a joint resolution of disapproval; and would allow an agency to reissue or promulgate a new rule to replace a disapproved rule if it carried out the recommendation, if any, of the JACP in the report submitted by the joint committee to the committees of jurisdiction recommending disapproval action. Neither of the bills has as yet received committee action.

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Morton Rosenberg

E. Freedom of Information Act

Statutory Intent and History

The Freedom of Information (FOI) Act was originally adopted by Congress in 1966 (80 Stat. 250) and was codified in 1967 (81 Stat. 54; 5 U.S.C. § 552), when it also became operative law. As enacted, the FOI Act replaced the public information section of the Administrative Procedure Act (APA) (60 Stat. 237), which was found to be ineffective in providing the public with a means of access to unpublished records of federal departments and agencies. Subsection (a) of the FOI Act reiterated the requirements of the APA public information section that certain operational information — e.g., organization descriptions, delegations of final authority, and substantive rules of general policy — be published in the *Federal Register*.

Subsection (b) statutorily established a presumptive right of access by any person — individual or corporate, regardless of nationality — to identifiable, existing, unpublished records of federal departments and agencies without having to demonstrate a need or even a reason for such a request. Subsection (b)(1)-(9) lists nine categories of information that may be exempted from the rule of disclosure. The burden of proof for withholding material sought by the public was placed upon the government. Denials of requests could be appealed to the head of the agency holding the sought records, and ultimately pursued in federal district court. The law specifies the direct costs which agencies may recover when responding to requests for records.

The product of 11 years of investigation and deliberation in the House of Representatives and half as many years of consideration in the Senate, the FOI Act was legislated by Congress in the face of considerable opposition by the executive departments and agencies. This opposition produced a hostile environment for the development, passage, and early administration of the statute. As a result, portions of the law have been subjected to a high judicial gloss for reasons of both clarification and interpretation. To maintain faithful administration of the FOI Act and to preserve its purpose, Congress has found it necessary to conduct vigorous oversight of its implementation and, on four occasions, to amend its provisions.

Reporting in 1972 on the initial implementation of the statute, a House oversight committee concluded that the “efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy ... of two administrations.”²⁷ To remedy the situation, the following amendments to the FOI Act were approved in 1974 (88 Stat. 1561): (1) a request need only “reasonably describe” the material being sought; (2) only the direct costs of search for and duplication of requested records could be recovered by agencies; (3) documents could be furnished without charge or at reduced cost if doing so would be in the public interest; (4) a court might inspect records in camera when making a determination concerning their exemption from disclosure; (5) response to an initial request must be made within 10 working days, and to an administrative appeal

²⁷ U.S. Congress, House Committee on Government Operations, *Administration of the Freedom of Information Act*, H.Rept. 92-1419, 92nd Cong., 2nd sess. (Washington: GPO, 1972), p. 8.

request, within 20 working days; (6) responsive pleading to an FOI Act lawsuit must be made within 20 days; (7) complainants who substantially prevail in FOI Act lawsuits may be awarded court costs and attorney fees; and (8) any segregable portion of a requested record shall be disclosed after exempt parts are deleted. The amendments also expanded the definition of *agency* for FOI Act matters, required agencies to report annually on FOI Act administration and operations, and clarified two of the statute's exemptions.

In 1976, an FOI Act amendment clarifying the language of the third exemption to the rule of disclosure was attached to the Government in the Sunshine Act, another open government law (90 Stat. 1241, at 1247).

Additional amendments to the FOI Act were enacted in 1986 as a rider to an omnibus anti-drug abuse law (100 Stat. 3207-48). These modifications strengthened protections concerning law enforcement records and revised the fee and fee waiver provisions of the FOI Act. In this latter regard, separate fee arrangements were prescribed when records are requested (1) for commercial use; (2) by an educational or noncommercial scientific institution or a news media representative; and (3) by all others besides these types of requesters. The Office of Management and Budget was mandated to issue government-wide fee and fee waiver guidelines.²⁸

The most recent amendment of the FOI Act occurred in 1996 during the closing weeks of the 104th Congress. These amendments (110 Stat. 3048), addressing shortcomings in administration as well as the new challenges posed by electronic forms and formats, inclusively defined covered records, required materials to be provided in the form or format requested, increased the initial response period from 10 to 20 days, encouraged agencies to maintain multitrack processing systems based upon the complexity of requests received, established expedited processing in cases where a "compelling need" is demonstrated, and modified agency reporting requirements, among other changes.

Major Provisions

Subsection (a) of the FOI Act requires that certain operational information — e.g., organization descriptions, delegations of final authority, and substantive rules of general policy — be published in the *Federal Register*.

Subsection (b) prescribes a procedure whereby any person may request access to identifiable, existing, unpublished records of the federal departments and agencies. No need, 'or even a reason', for such a request must be demonstrated. The burden of proof for withholding material sought by the public is placed upon the government.

Although the statute specifies nine categories of information which may be protected from disclosure, these exemptions do not require agencies to withhold records, but merely permit access restriction. Allowance is made in the law for the

²⁸ These guidelines are found in the *Federal Register*, vol. 52, Mar. 27, 1987, pp. 10012-10020.

exemption of (1) information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order; (2) information relating solely to agency internal personnel rules and practices; (3) data specifically excepted from disclosure by a statute which either requires that matters be withheld in a non-discretionary manner, or establishes particular criteria for withholding, or refers to particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter- or intra-agency memoranda or letters which would not be available by law except to an agency in litigation; (6) personnel, medical, and similar files the disclosure of which would constitute an unwarranted invasion of personal privacy; (7) certain kinds of investigatory records compiled for law enforcement purposes; (8) certain information relating to the regulation of financial institutions; and (9) geological and geophysical information and data, including maps, concerning oil and gas wells. Disputes over the availability of agency records may ultimately be settled in court.

Agencies responding to FOI Act requests are permitted by the statute to charge fees for certain activities — document search, duplication, and review — depending on the type of requester: a commercial user; an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; a news media representative; or the general public. However, requested records may be furnished by an agency without any charge or at a reduced cost, according to the law, “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Both the Office of Management and Budget and the Department of Justice coordinate FOI Act policy and activities within the executive branch.

Discussion

The effective operation of the FOI Act owes much to diligent congressional oversight and corrective amendment of the statute. Initial agency hostility to the statute has subsided over the subsequent 35 years, but some agency administrative practices adverse to the effective operation of the law continue to be problematic. Ongoing judicial scrutiny and interpretation is closely watched by Congress for departures from congressional intent. Apart from these continuing challenges, information developments, such as more widespread government use of e-mail, could prompt congressional review of whether additional FOI Act adjustments may be needed.

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Harold C. Relyea

F. Privacy Act

Statutory Intent and History

In the Privacy Act of 1974 (5 U.S.C. § 552a) Congress mandated personal privacy protection in several regards concerning federal agency operations and practices. Its eclectic provisions can be traced to several contemporaneous events prompting congressional interest in securing personal privacy.

Since the years of the late 19th century, various developments — not the least of which the introduction of new, intrusive technologies — have contributed to more disparate understandings of the concept of privacy and infringements upon it. Congress made an initial effort at legislating a new kind of privacy protection in 1970 when enacting the Fair Credit Reporting Act regulating the collection and dissemination of personal information by consumer reporting entities (84 Stat. 1128; 15 U.S.C. § 1681 et seq.).

With the Crime Control Act of 1973, Congress prohibited federal personnel and state agencies receiving law enforcement assistance funds pursuant to the statute from making unauthorized disclosures of personally identifiable criminal history research or statistical information. It also permitted “an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this [law] ... to review such information and to obtain a copy of it for the purpose of challenge or correction” (87 Stat. 197, at 215-216; 42 U.S.C. § 3789g).

That same year, the Advisory Committee on Automated Personal Data Systems, established by Secretary of Health, Education, and Welfare Elliot L. Richardson in early 1972, offered an important consideration. The panel’s July 1973 final report recommended “the enactment of legislation establishing a Code of Fair Information Practice for all automated personal data systems.” Such a code would: punish unfair information practice with civil and criminal penalties; provide injunctive relief to prevent violations of safeguard requirements; empower individuals to bring suits for unfair information practices to recover actual, liquidated, and punitive damages, in individual or class actions; and allow the recovery of reasonable attorneys’ fees and other costs of litigation incurred by individuals who bring successful suits.²⁹

Congressional efforts to legislate notice, access, and emendation arrangements for individuals concerning personally identifiable records maintained on these individuals by federal departments and agencies began in the House in June 1972, but did not extend beyond the subcommittee hearing stage during the 92nd Congress. However, a few days before these inaugural House hearings on legislation that would evolve into the Privacy Act, a burglary occurred at Democratic National Committee headquarters. It was the beginning of the Watergate incident, which would

²⁹ U. S. Department of Health, Education, and Welfare, Secretary’s Advisory Committee on Automated Personal Data Systems, *Records, Computers, and the Rights of Citizens* (Washington: GPO, 1973), pp. xxiii and 50.

significantly affect attitudes toward privacy protection legislation and the leadership for such legislation.

Legislation leading to the enactment of the Privacy Act began in the House largely to create a procedure whereby individuals could learn if federal agencies maintained files on them, review the contents of the records in these files, correct inaccuracies they contained, and know how this information was being used and by whom. In the Senate, a privacy protection bill sponsored by Senator Sam Ervin Jr., initially sought largely to establish a Federal Privacy Board and to create standards and management systems for handling personally identifiable information in federal agencies, state and local governments, and other organizations. Other aspects of privacy policy were added to these bills as they moved through their respective houses of Congress, and then were reconciled in a somewhat unusual manner to create an amalgamated bill acceptable to the House, the Senate, and the President.

House hearings began in mid-February 1974 under Representative William S. Moorhead, chairman of the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations, and a principal manager of the legislation. The subcommittee held markup discussions in May, June, and July. These deliberations resulted in a clean bill (H.R. 16373), which was introduced by Representative Moorhead with 13 bipartisan co-sponsors in mid-August and favorably reported by the subcommittee without a dissenting vote. The Committee on Government Operations considered the legislation in mid-September, substituted revised text for the original language, and favorably reported it. President Gerald Ford, who had recently succeeded to the Oval Office after President Richard Nixon's early August resignation, endorsed the House bill in an October 9 statement.³⁰ The measure was considered by the House on November 20 and 21, and approved, with amendments, on a 353-1 yea-and-nay vote.³¹

A somewhat different counterpart privacy proposal emerged in the Senate. Senator Ervin introduced his bill (S. 3418) on May 1, 1974, with bipartisan cosponsorship. Hearings on this and related legislation occurred in June. During June, July, and August, staff of the Senate Committee on Government Operations, its Ad Hoc Subcommittee on Privacy and Information Systems, and the Subcommittee on Constitutional Rights of the Committee on the Judiciary — all panels chaired by Senator Ervin — further refined the language of the bill. In a mid-August committee markup, a staff-developed version of the measure was amended and favorably reported to the Senate.

The new text of the bill would have established the Privacy Protection Commission, composed of five members appointed by the President from private life and subject to Senate approval. The commission would have been responsible for compiling and publishing an annual directory of information systems subject to the provisions of the bill, enforcing the legislation, and developing model guidelines for

³⁰ U.S. Office of the President, *Public Papers of the Presidents of the United States: Gerald R. Ford, 1974, Book I* (Washington: GPO, 1976), pp. 243-244.

³¹ *Congressional Record*, vol. 120, Nov. 20, 1974, pp. 36643-36660; *ibid.*, Nov. 21, 1974, pp. 36955-36977.

its implementation, including the conduct of research in this regard. The bill also would have established federal agency standards and management systems for handling information relating to individuals. These included fair information practice principles, disclosure standards, mailing list restrictions, and civil and criminal penalties.

On November 21, the Senate considered the Ervin legislation; amendments developed by committee staff and the Office of Management and Budget (OMB) were adopted, and the resulting version of the legislation was approved.³² The following day, the Senate took up the House counterpart bill, struck its language and substituted in lieu thereof the language of the Ervin bill, and approved the amended version of the House bill.³³

With only a few weeks remaining before the 93rd Congress would adjourn *sine die*, House and Senate managers found they had very little time to reconcile the two differing bills. There was, however, strong desire for the passage of such legislation, not only as a so-called Watergate reform, but also as a tribute and memorial to Senator Ervin, who was retiring from congressional service. Consequently, Representative Moorhead and Senator Ervin, with the concurrence of their respective committees, agreed to the rare arrangement of having their committee staffs negotiate a mutually agreeable legislative measure. After this effort reduced 108 substantive differences to eight, the leaders of the respective House and Senate committees brought those to resolution.³⁴ In lieu of a conference committee report, a staff analysis of the compromise legislation was produced.³⁵ The major concession was the relegation of the enforcement commission to the status of a temporary national study commission. Its oversight responsibilities were vested in OMB, but without enforcement authority.

On December 11, the House adopted the Senate bill after striking its original language and inserting in lieu thereof provisions of its own bill.³⁶ The Senate concurred in the House amendment by passing its own amendment on a 77-8 vote on December 17, clearing the measure for further House action.³⁷ The following day, the House agreed to the Senate amendments with an amendment of its own,³⁸ and the Senate concurred with the House amendments the same day, clearing the measure for the President's signature.³⁹ The Privacy Act was signed into law by President Ford on December 31, 1974 (88 Stat. 1896; 5 U.S.C. § 552a). In his signing statement, the President said the new law "signified an historic beginning by codifying fundamental

³² *Congressional Record*, vol. 120, Nov. 21, 1974, pp. 36882-36921.

³³ *Ibid.*, Nov. 22, 1974, pp. 37064-37069.

³⁴ *Ibid.*, Dec. 17, 1974, p. 40400.

³⁵ See *ibid.*, pp. 40405-40408.

³⁶ *Ibid.*, Dec. 11, 1974, pp. 39200-39204.

³⁷ *Ibid.*, Dec. 17, 1974, pp. 40397-40413.

³⁸ *Ibid.*, Dec. 18, 1974, pp. 40879-40886.

³⁹ *Ibid.*, pp. 40730-40731.

principles to safeguard personal privacy in the collection and handling of recorded personal information by federal agencies.”⁴⁰

Major Provisions

The Privacy Act provides privacy protection in several ways. First, it sustains some traditional major privacy principles. For example, an agency shall “maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity” (5 U.S.C. § 552(e)(7)).

Second, similar to the Fair Credit Reporting Act, the Privacy Act provides an individual who is a citizen of the United States, or an alien lawfully admitted for permanent residence, with access and emendation arrangements for records maintained on him or her by most, but not all, federal agencies. General exemptions in this regard are provided for systems of records maintained by the Central Intelligence Agency and federal criminal law enforcement agencies.

Third, the statute embodies a number of principles of fair information practice. For example, it sets certain conditions concerning the disclosure of personally identifiable information; prescribes requirements for the accounting of certain disclosures of such information; requires agencies to “collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs”; requires agencies to specify their authority and purposes for collecting personally identifiable information from an individual; requires agencies to “maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination”; and provides civil and criminal enforcement arrangements.

Discussion

Since its enactment, the Privacy Act has been amended on five occasions. In 1982, the Debt Collection Act added a new exception to the disclosure prohibition for disclosures made to consumer credit reporting agencies (96 Stat. 1749, adding 5 U.S.C. § 552a(b)(12)). That same year, the Congressional Reports Elimination Act changed the annual report requirement of the Privacy Act and modified the provision for publication of agency systems of records (96 Stat. 1819, at 1821-1822, modifying 5 U.S.C. § 552a(e)(4) and (p)). In 1984, the Central Intelligence Agency Information Act resolved a long-standing controversy by specifying that the Privacy Act is not authority “to withhold from an individual any record which is otherwise accessible to the individual under the provisions of” the Freedom of Information Act (96 Stat. 2209, at 2211-2212, adding 5 U.S.C. § 552a(q)(2)). Amendments in 1988 (102 Stat. 2507, adding 5 U.S.C. § 552a(o),(p),(q), and (u), and amending 5 U.S.C. § 552a(a),

⁴⁰ *Public Papers of the Presidents of the United States: Gerald R. Ford, 1975, Book I*, pp. 1-2.

(e), and (v)) and 1990 (104 Stat. 1388-334, modifying 5 U.S.C. § 552a(p)) established new procedures and data protection boards to ensure privacy, integrity, and verification of data disclosed for computer matching.

Perhaps the facet of the Privacy Act that has been the most successful is its access procedure. The volume of access requests by record subjects has grown steadily, for the most part, since the Privacy Act was first implemented. It is, however, about a third of the access request volume of the Freedom of Information Act. Moreover, it appears that the total denial caseload is small in proportion to request volume.

Similarly, the volume of requests to amend personal records is also steadily growing, though it is not nearly so great as the volume of access requests, and the total denial caseload is small in proportion to the amendment request volume.

In a June 2003 report, the General Accounting Office urged improved leadership and guidance by the Office of Management and Budget to improve agency compliance with the Privacy Act. Around this same time, as public revelations about the efforts of some agencies to engage in data mining for homeland security purposes — searching private sector databases for personal information — became known, some urged amendment of the Privacy Act to clarify its scope regarding such practices.

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Harold C. Relyea

G. Federal Advisory Committee Act

Statutory Intent and History

Congress formally acknowledged the merits of using advisory committees to obtain expert views drawn from business, academic, government, and other interests when it enacted the Federal Advisory Committee Act (FACA) in 1972 (5 U.S.C. Appendix; 86 Stat. 700).

The legislative history pertaining to FACA reveals that Congress had two major concerns about advisory committees before 1972. The first concern was that the public perceived many advisory committees as duplicative and inefficient, and otherwise lacking adequate controls or oversight. The second concern was the widespread belief that advisory committees did not adequately represent the public interest, and that committee meetings were too often closed to the public.

Congressional enactment of FACA established the first requirements for the management and oversight of federal advisory committees to ensure impartial and relevant expertise. As required by FACA, the General Services Administration (GSA) administers and provides management guidelines for advisory committees. GSA also submits an annual report to the President and Congress, based on the information provided by the federal agencies concerning the meetings, costs, and membership of advisory committees. During FY2003, GSA reported a total of 953 advisory committees, with 31,385 individuals serving as members during the year. Related expenditures of \$282.5 million were used in FY2003 to provide member compensation, travel and per diem expenses, and other administrative costs associated with advisory committees. On March 14, 2000, GSA announced the elimination of its annual report on advisory committees, relying instead on its website to make available the detailed reports covering each committee's activities during the fiscal year.⁴¹ GSA also issues an annual summary report for Congress pertaining to advisory committee management and performance.

Major Provisions

FACA requires that the advice provided by advisory committees be objective and accessible to the public. Each advisory committee meeting is presumptively open to the public, with certain exceptions. Adequate notice of meetings must be published in advance in the *Federal Register*. Subject to the requirements of the Freedom of Information Act, all papers, records, and minutes of meetings must be made available for public inspection.

FACA contains guidelines for membership, mandating that any legislation establishing an advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed," and that the committee's recommendations not be inappropriately influenced by the appointing authority or by any special interest.

⁴¹ The GSA website is available at [<http://fido.gov/facadatabase>], visited Dec. 11, 2003.

Each advisory committee must file a charter containing its mandate and duties, frequency of meetings, membership, and the agency to which, or official to whom, the committee reports. The act requires the Library of Congress to maintain a depository of committee reports, papers, and charters. Pursuant to FACA, each advisory committee goes out of existence after two years unless its charter is renewed or is otherwise prescribed by statute.

Discussion

Since the enactment of FACA in 1972, congressional oversight hearings have revealed that, while the goals of FACA are still relevant, some of its provisions have occasionally needed clarification. From 1983 through 1989, legislation was introduced in the Senate to strengthen FACA's management controls, as well as to establish new ethical, financial, and conflict of interest disclosure requirements for committee members.⁴² These proposed amendments were never enacted, in part due to the stringent disclosure requirements required of potential committee members. In 1997, FACA was amended to provide for increased public participation in activities by committees created by the National Academy of Sciences and the National Academy of Public Administration in support of executive branch decision making processes.⁴³

Because federal agencies needed clarification of FACA's statutory requirements, GSA began issuing administrative and interpretive guidelines in 1983 pertaining to the implementation of FACA. These final rules provide guidance to agency committee management officers (CMOs) for the establishment and management of advisory committees. On January 14, 2000, GSA issued a proposed rule for revised management guidelines in the *Federal Register*.⁴⁴ The following year, on July 19, 2001, GSA issued its final rule providing additional guidance to CMOs based on statutory provisions and internal agency procedures.⁴⁵

In order to curtail the proliferation of advisory committees, President William Clinton issued E.O. 12838 in 1993, requiring the elimination of one-third of the advisory committees not created by statute.⁴⁶ In addition, executive branch departments and agencies were proscribed from administratively creating new advisory committees without the approval of the Director of the Office of Management and Budget (OMB). The following year, as part of the National Performance Review, Vice President Albert Gore issued a memorandum indicating each agency should reduce advisory committee costs by 5%. The memorandum also stated that President Clinton would not support legislation establishing new advisory

⁴² S. 1641 was introduced on July 19, 1983, and S. 2127 was introduced on Nov. 17, 1983; S. 2721 was introduced on Aug. 10, 1988, and S. 444 was introduced on Feb.23, 1989.

⁴³ 111 Stat. 2689.

⁴⁴ 65 *Federal Register* 2504.

⁴⁵ 41 C.F.R. § 102-3 (2003, pp. 11-44).

⁴⁶ 3 C.F.R., 1994 Comp., p. 590.

committees or exemptions from FACA.⁴⁷ On October 5, 1994, OMB issued Circular No. A-135, entitled “Management of Federal Advisory Committees.” This circular requires OMB and GSA to monitor agency compliance with E.O. 12838 to reduce the number of advisory committees.

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Stephanie Smith

⁴⁷ U.S. Office of the Vice President, “Memorandum for the Heads of Executive Departments and Agencies on the Management of Federal Advisory Committees,” June 28, 1994, *Annual Report of the President on Federal Advisory Committees* (Washington: GPO, 1995), p. A7.

H. Government in the Sunshine Act

Statutory Intent and History

The Government in the Sunshine Act (90 Stat. 1241; 5 U.S.C. § 552b) was initially enacted in 1976. It requires collegially headed federal executive agencies whose members are appointed by the President with the advice and consent of the Senate to hold certain meetings in public. The act applies to meetings during which deliberations determine, or result in the joint conduct or disposition of, official agency business. The act applies to more than 45 federal collegial bodies, consisting primarily of independent regulatory boards and commissions having from three to seven members. The statute specifies 10 exceptions to its rule of openness that may be invoked by the agencies. Any doubt as to whether a meeting should be open or closed, however, is to be resolved in favor of an open meeting, according to the act's legislative history. Decisions to close a meeting are subject to judicial review.

Major Provisions

The major provisions of the Sunshine Act include (1) a presumption of open meetings; (2) public notice of an agency meeting, indicating the time, location, subject of the meeting, whether the meeting is open or closed, and the name and telephone number of the official designated to respond to requests for information about the meeting; (3) 10 exemptions by which an agency may close a portion or all of a meeting and withhold information; (4) procedures an agency is to follow when closing a meeting, which include a majority vote of the members and certification by the general counsel that the meeting may properly be closed; and (5) judicial review of an agency's action to close a meeting.

A meeting may be closed if it involves: (1) national security matters that are specifically authorized by an executive order to be protected and are properly classified; (2) internal personnel rules and practices; (3) matters specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) formal censure or accusation of a crime; (6) clearly unwarranted invasion of personal privacy; (7) law enforcement investigatory records or information; (8) information contained in, or related to, reports used by agencies responsible for the regulation or supervision of financial institutions; (9) information whose premature disclosure would: (a) lead to financial speculation or significantly endanger a financial institution; or (b) significantly frustrate a proposed agency action; or (10) issuance of a subpoena or other related judicial matter.

Discussion

The consensus of observers is that the act has been only partially successful in opening bureaucratic decision making processes to public scrutiny. Although federal agencies now routinely follow the Sunshine Act's requirements, empirical research suggests that, after the law was passed, agency practices changed in ways that may have served to circumvent openness. The number of meetings, as well as the number of open meetings or partly open meetings, declined steadily from 1979 to 1984 as agencies resorted to wider use of the exemption provisions. In addition, some

agencies used notation voting, which permitted members to vote sequentially on paper on the basis of circulated written materials, thereby making formal meetings unnecessary.⁴⁸

The implementation of the Sunshine Act has been characterized by difficulties in finding the proper balance between the value of unfettered public access, on one hand, and candid agency deliberations, on the other.⁴⁹ The resulting tension is evident in the disagreements over two issues: (1) the definition of what constitutes a “meeting,” for purposes of the act; and (2) whether the act has diminished the collegial nature of decision making, thereby affecting the quality of agency decisions.

Under the act, a *meeting* is defined as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.”⁵⁰ Deciding when a deliberation determines or results in agency action, however, has proven to be difficult.

Two opposing views have dominated the discussion regarding the definition of a *meeting*. Adherents of a broad definition hold that a meeting encompasses every stage of the decision making process, including the early collective inquiry stage when members hold informal discussions and explore various positions. Supporters of a narrower view, in contrast, hold that a meeting encompasses only the more advanced stage of the decision making process, when members focus on a specific proposal or proposals.⁵¹

The Supreme Court supported the narrower definition in 1984, when it held that under the act, a *meeting* did not include preliminary discussions among agency officials.⁵² The Court ruled that consultative process sessions need not be public, because the “statutory language contemplates discussions that ‘effectively predetermine official actions.’” It held that, in order to fall under the *meeting* definition, such discussions must be “‘sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.’”

⁴⁸ See U.S. Congress, Senate Committee on Governmental Affairs, *Government in the Sunshine Act: History and Recent Issues*, committee print, 101st Cong., 1st sess. (Washington: GPO, 1989), pp. 58-98.

⁴⁹ Administrative Conference of the United States, “Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act,” *Administrative Law Review*, vol. 49 (spring 1997), p. 422.

⁵⁰ 5 U.S.C. § 552b(a)(2).

⁵¹ For a further development of these views, see David A. Barrett, “Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act,” *Texas Law Review*, vol. 66, May 1988, pp. 1195-1228.

⁵² *Federal Communications Commission v. ITT World Communications*, 466 U.S. 463 (1984).

In the second area of contention, some research has suggested that open meeting requirements may have suppressed the spirit of candor in meeting discussions and thereby reduced collegiality in organizations subject to the act's provisions. A study of this issue involving multi-member agency officials revealed that many are reluctant to discuss substantive issues at open meetings.⁵³ Those seeking to amend the act believe that collegial decisions should lead to better, more informed decision making. This goal, they argue, is defeated by the need to open most meetings to the public, which they believe prevents the type of extensive and consequential interaction among members that should be the end product of collegial decision making. To support this view, they cite data consisting of members' recollections of how decisions were made before the act was implemented. Their proposed solution is to amend the act to provide for a limited pilot project that would give agencies greater leeway to close a meeting, provided that within five days of the meeting, a "detailed summary" would be made available to the public. If such a project proved successful, Congress could then make permanent changes in the statute.⁵⁴

Several arguments against amending the act have also been advanced. Some researchers question the view that collegial decision making prior to the implementation of the act was more deliberative and meaningful than it has been since then. They assert that the earlier collegial decision making model was only partially realized. They maintain that decisions from this era "frequently reflected more the influence of staff or of chairpersons in association with staff than a true amalgamation of member views informed by staff expertise."⁵⁵ Furthermore, the evidence suggests that "members are inclined to prepare more thoroughly for open meetings than for closed ones."⁵⁶ Consequently, it could be argued that members are better informed in their decision making than they were prior to the act. Finally, opponents of amending the Sunshine Act have sometimes suggested that it is incumbent upon members of the multi-member agencies to shed their reluctance to deliberate more meaningfully in public meetings.⁵⁷

⁵³ David M. Welborn, William Lyons, and Larry W. Thomas, "Implementation and Effects of the Federal Government in the Sunshine Act," *Administrative Conference of the United States: Recommendations and Reports 1984* (Washington: GPO, 1985), pp. 199-261.

⁵⁴ Administrative Conference of the United States, "Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act," pp. 421-428.

⁵⁵ David M. Welborn, William Lyons, and Larry W. Thomas, "The Federal Government in the Sunshine Act and Agency Decision Making," *Administration and Society*, vol. 20, Feb. 1989, p. 470.

⁵⁶ *Ibid.*, p. 472.

⁵⁷ This position is ascribed to representatives of the press by Randolph May in "Reforming the Sunshine Act," *Administrative Law Review*, vol. 49 (spring 1997), p. 418.

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Henry B. Hogue

I. Paperwork Reduction Act of 1995

Statutory Intent and History

Replacing the ineffective Federal Reports Act of 1942 (56 Stat. 1078), the Paperwork Reduction Act of 1980 (94 Stat. 2812; 44 U.S.C. § 3501) was enacted largely to relieve the public of the mounting information collection and reporting requirements of the federal government. It also promoted coordinated information management activities on a government-wide basis by the director of the Office of Management and Budget (OMB), and prescribed information management responsibilities for the executive agencies. Realizing that the provisions of the Federal Reports Act were inadequate to control the proliferation of required paperwork, Congress had established the Commission on Federal Paperwork, a temporary national study panel, in 1974 (88 Stat. 1789). The 1980 statute implemented many of the commission's recommendations and reflected a congressional desire to define more clearly the oversight responsibilities of OMB regarding federal information collection and reporting requirements. To assist the OMB Director, the statute established the Office of Information and Regulatory Affairs (OIRA) within OMB, and authorized its administrator to develop and administer uniform information policies in order to ensure the availability and accuracy of agency data collection.

Although OIRA's original authorization expired in 1983, the office was funded on an annual basis from OMB's general appropriations until passage of the Paperwork Reduction Reauthorization Act in 1986 (100 Stat. 3341). This legislation approved funding for OIRA through FY1989, and strengthened congressional oversight of OIRA by requiring Senate confirmation of its administrator. Also, the management focus of the act was sharpened with the 1986 amendments, which refined the concept of "information resources management" (IRM), which is "the planning, budgeting, organizing, directing, training, promoting, controlling, and management activities associated with the burden, collection, creation, use, and dissemination of information by agencies, and includes the management of information and related resources such as automatic data processing equipment." This key term and its subset concepts would receive further definition and explanation in 1995, making IRM a tool for managing the contribution of information activities to program performance, and for managing related resources, such as personnel, equipment, funds, and technology.

Largely due to continued failure to reach an agreement concerning OIRA's regulatory review role, legislative attempts to reauthorize OIRA during the 101st and the 102nd Congresses were unsuccessful. During the 103rd Congress, a reauthorization measure was passed by the Senate by unanimous vote, but the House did not have time to complete action on such legislation. In 1995, as part of the House Republican Contract with America, a revised Paperwork Reduction Act (PRA) was enacted to reauthorize OIRA for six years (109 Stat. 163; 44 U.S.C. § 3501).

Major Provisions

The PRA of 1995 reaffirms the principles of the original 1980 act by reducing the information collection burden on the public, and providing more efficient management of information resources by federal agencies. The statute set 10% paperwork reduction goals for the first two years of OIRA's authorization, and a 5% reduction for the remaining four years. OIRA is required to develop and implement government-wide guidelines for the collection, dissemination, and processing of federal information. The objective of minimizing the paperwork burden for individuals and small businesses is extended explicitly to educational and nonprofit institutions, federal contractors, and tribal governments. The authority and functions of OIRA are revised, specifying information dissemination and related agency oversight responsibilities. Another provision strengthens the public's rights if an agency should require information requests that are not in compliance with the provisions of the PRA.

The federal agencies are required to evaluate proposed collections of information, manage information resources to reduce information collection burdens on the public, and ensure that the public has timely and equitable access to information products and services. Except where specifically authorized by statute, the agencies are prohibited from establishing exclusive, restricted, or other distribution arrangements that interfere with timely and equitable public availability of public information; restricting or regulating the use, resale, or redissemination of public information by the public; charging fees or royalties for resale or redissemination of public information; or establishing user fees that exceed the cost of dissemination. Actions that the agencies must take with respect to information technology are specified, and the Federal Information Locator System is replaced with an agency-based electronic Government Information Locator Service to identify the major information systems, holdings, and dissemination products of each agency.

Discussion

Since 1980, OIRA's implementation of the PRA has been criticized by Congress, the General Accounting Office (GAO), and the business community. An early controversy surrounded OMB's decision to assign OIRA primary responsibility for regulatory reforms and other regulatory functions not associated with OIRA's paperwork responsibilities. In 1983, GAO concluded that only limited progress had been made by OMB in information resources management, and recommended that Congress amend the statute to prohibit OIRA from performing nonrelated duties such as regulatory review.⁵⁸

The PRA gives OMB significant authority to conduct reviews of federal agency paperwork requirements in proposed rules. Critics of OMB's paperwork clearance powers maintain that OMB has too much discretion in determining agency record-keeping requirements, and has used its authority in a selective and political manner to control the government's information collection activities. Many also believe that

⁵⁸ See U.S. General Accounting Office, *Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain*, GAO/GGD-83-35, Apr. 20, 1983.

its review of rules and reports provides OMB with excessive control of the entire regulatory process.

Even though the PRA stresses the importance of a government-wide information policy, congressional hearings and GAO studies have consistently faulted OMB for neglecting this important issue, while concentrating on paperwork control and regulatory review functions. As federal agencies have made greater use of electronic information technology, criticism has arisen that OIRA focuses on the collection and dissemination of paper documents, while failing to develop policies concerning the use of electronic formats.

In response to the statutory requirement of the PRA that OMB develop and implement uniform and consistent information resources management policy, OMB issued Circular No. A-130, *Management of Federal Information Resources*, in 1985. The circular set forth government-wide guidelines for the collection, dissemination, and processing of federal information systems and technology. Subsequently, OMB published a series of notices in the *Federal Register* inviting public comment on proposed revisions of the circular. In July 1994, OMB issued a final revision of A-130 to address agencies' internal management practices for information systems and information technology.⁵⁹

Two major segments of the National Defense Authorization Act for FY1996 (110 Stat. 186) contained provisions either amending or glossing the PRA. Subsequently denominated the Clinger-Cohen Act (110 Stat. 3009-393), these segments transfer the authority for information technology acquisitions from the General Services Administration to OMB. The Director of OMB is assigned new duties for coordinating the purchase of information systems with OIRA and the Office of Federal Procurement Policy. As part of the budget process, OMB is required to analyze the costs and risks associated with capital investments for the purchase of federal information acquisitions. The position of Chief Information Officer (CIO) is established within each agency to coordinate and monitor the implementation of information technology programs.

More recent amendments to the PRA were made by the Government Paperwork Elimination Act of 1998 (112 Stat. 2681-749). This statute makes the Director of OMB responsible for providing government-wide direction and oversight regarding "the acquisition and use of information technology, including alternative information technologies that provide for electronic submission, maintenance, or disclosure of information as a substitute for paper and for the use and acceptance of electronic signatures." In fulfilling this responsibility, the director, in consultation with the National Telecommunications and Information Administration (NTIA) of the Department of Commerce, is tasked with developing, in accordance with prescribed requirements, procedures for the use and acceptance of electronic signatures by the executive departments and agencies. A five-year deadline is prescribed for the agencies to implement these procedures.

⁵⁹ U.S. Office of Management and Budget, "Management of Federal Information Resources, OMB Circular No. A-130, July 25, 1994," *Federal Register*, vol. 59, July 25, 1994, pp. 37906-37928.

The Director of OMB is also tasked by the statute to “develop procedures to permit private employers to store and file electronically with Executive agencies forms containing information pertaining to the employees of such employers.” In addition, the director, in cooperation with NTIA, is to conduct an ongoing study of the use of electronic signatures under the new law, with attention to paperwork reduction and electronic commerce, individual privacy, and the security and authenticity of transactions. The results of this study are to be reported periodically to Congress.

Finally, electronic records submitted or maintained in accordance with the statute’s procedures, “or electronic signatures or other forms of electronic authentication used in accordance with such procedures, shall not be denied legal effect, validity, or enforceability because such records are in electronic form.” The act further specifies: “Except as provided by law, information collected in the provision of electronic signature services for communications with an executive agency ... shall only be used or disclosed by persons who obtain, collect, or maintain such information as a business or government practice, for the purpose of facilitating such communications, or with the prior affirmative consent of the person about whom the information pertains.”

The PRA authorization of appropriations for OIRA expired at the end of FY2001. When Congress returns to the PRA to reauthorize OIRA appropriations, it will have an opportunity to consider several prevailing issues which may be addressed through amendment or extension of the statute. For instance, critics continue to assert that the act’s current provisions do not go far enough to minimize costly reporting burdens for small businesses, educational institutions, and state and local governments. Other issues of concern to some are agency website management and accountability, as well as various aspects of government e-mail management.

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Harold C. Relyea

J. Regulatory Flexibility Act of 1980

Statutory Intent and History

The Regulatory Flexibility Act (RFA) of 1980 (94 Stat. 1164; 5 U.S.C. §§ 601-612) was enacted in response to concerns raised during a White House conference on small business about the differential impact of federal regulations on small business. The RFA requires federal agencies to assess the impact of their forthcoming regulations on *small entities*, which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, federal agencies must prepare a regulatory flexibility analysis at the time that either proposed or certain final rules are issued. The act requires the analysis to describe (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

A regulatory flexibility analysis is not, however, required if the head of the agency issuing the rule certifies that it will not have a “significant economic impact on a substantial number of small entities.” The RFA does not define the terms *significant economic impact* or *substantial number of small entities*, thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are triggered. Also, the RFA’s analytical requirements do not apply to any final rule for which the agency is not required to publish a proposed rule. Although the original RFA did not permit judicial review of agencies’ actions under the act, amendments to the act in 1996, as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA; 110 Stat. 857), permitted judicial review regarding, among other things, agencies’ regulatory flexibility analyses for final rules and any certifications that their rules will not have a significant impact on small entities.

In addition, the RFA requires agencies to publish a “regulatory flexibility agenda” in the *Federal Register* each October and April listing regulations that the agency expects to propose or promulgate and which are likely to have a significant economic impact on a substantial number of small entities. The act also requires agencies to review final rules with a significant impact within 10 years of their promulgation to determine whether they should be amended or rescinded. Another section of the statute requires the chief counsel of the Small Business Administration’s (SBA’s) Office of Advocacy to monitor and report at least annually on agencies’ compliance with the act.

The RFA also requires agencies to ensure that small entities have an opportunity to participate in the rulemaking process, and the 1996 amendments to the act in SBREFA put in place special requirements for proposed rules issued by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). EPA and OSHA are required to convene “advocacy review panels” before publishing a regulatory flexibility analysis for a proposed rule. The review panel must consist of full-time federal employees from the rulemaking

agency, the Office of Management and Budget, and SBA's chief counsel for advocacy, and the panel must collect advice and recommendations from representatives of affected small entities about the potential impact of the draft rule.

Major Provisions

The major provisions of the RFA, as amended: (1) require federal agencies to publish in the *Federal Register* each October and April a list of forthcoming rules that are likely to have a significant economic impact on a substantial number of small entities; (2) require federal agencies to prepare a regulatory flexibility analysis for any covered proposed or final rule that the agency concludes is likely to have a significant economic impact on a substantial number of small entities; (3) require the regulatory flexibility analyses to have certain elements; (4) require EPA and OSHA to convene an advocacy review panel before publishing any proposed rule likely to have a significant economic impact on a substantial number of small entities; (5) require the chief counsel in the Advocacy Office in SBA to monitor agencies' compliance with the act and prepare an annual report; (6) require agencies to review their final rules with a significant impact within 10 years of their promulgation to determine whether they should be amended or rescinded; and (7) permit judicial review of agencies' regulatory flexibility analyses and determinations that their rules do not have a significant economic impact on a substantial number of small entities.

Discussion

The SBA chief counsel for advocacy's reports on the RFA generally indicate that compliance with the act has been uneven. GAO has also repeatedly examined the implementation of the act, and a recurring theme in GAO's reports is the varying interpretation of the RFA's requirements by federal agencies. Agencies differ dramatically regarding what constitutes a "significant" economic impact and a "substantial" number of small entities. They also differ on what rules they are required to review within 10 years of their issuance — those that had a significant impact at the time they were issued or those that currently have that impact. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a *significant economic impact* and a *substantial number of small entities* mean in a rulemaking setting.

The 1996 amendments to the act providing for judicial review and advocacy review panels for EPA and OSHA rules have proven effective. The SBA chief counsel for Advocacy's annual report on the RFA for FY2003 said that judicial review "has encouraged agencies to increase their compliance with the requirements of the RFA." Advocacy review panels have permitted small entities to participate early in the rulemaking process — before proposed rules are written and agencies positions become more fixed.

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Curtis W. Copeland

K. Negotiated Rulemaking Act

Statutory Intent and History

The Negotiated Rulemaking Act of 1990, as amended and permanently authorized in 1996 (110 Stat. 3870; 5 U.S.C. §§ 561-570a), seeks to overcome what some observers describe as an adversarial relationship between agencies and affected interest groups that often accompanies the federal rulemaking process. The concept of negotiated rulemaking (sometimes referred to as “regulatory negotiation” or “reg-neg”) emerged in the 1980s as a supplement to the traditional procedure for developing regulations. The act largely codified the practices of those agencies that had previously used the negotiated rulemaking procedure and incorporated relevant recommendations of the now defunct Administrative Conference of the United States (ACUS). The act encourages (but does not require) agencies to consider convening a negotiated rulemaking committee before developing and issuing a proposed regulation under the Administrative Procedure Act (APA), described elsewhere in this compendium. The committee, composed of representatives of the agency and the various interest groups that would be affected by the proposed regulation, addresses areas of concern in the hope that it can reach agreement on a proposed regulation. The agency can (but, again, is not required to) then issue the agreed-upon proposal as a proposed rule, and, if appropriate after public comment, as a final rule under the APA. Since committee agreement is normally by unanimous consent, the expectation is that any rule drafted through negotiated rulemaking would be easier to implement and less likely to be the subject of subsequent litigation. In establishing negotiating committees, agencies must comply with the Federal Advisory Committee Act (described elsewhere in this compendium). Agency actions related to establishing, ending, or supporting the committees are not judicially reviewable.

Following passage of the Negotiated Rulemaking Act, ACUS served as a clearinghouse on regulatory negotiation matters and assisted agencies in establishing procedures for the conduct of regulatory negotiations and the training of personnel. When ACUS was abolished in 1995, some of its resources and responsibilities in the area were assumed by the Federal Mediation and Conciliation Service (FMCS). The Clinton Administration’s National Performance Review recommended increased use of negotiated rulemaking, and Executive Order 12866 (September 1993) directed agencies to consider the use of consensual mechanisms, such as negotiated rulemaking, when developing regulations. Congress has sometimes required agencies to use negotiated rulemaking in developing rules in certain areas.

Major Provisions

The major provisions of the act require that (1) a negotiated rulemaking committee consist of at least one member of the agency and no more than 25 members, unless the head of the agency determines that more are needed; (2) the agency select an impartial “facilitator” to chair meetings, subject to the approval of the committee by consensus; (3) an agreement on any negotiated rulemaking must be unanimous, unless the negotiated rulemaking committee agrees to other conditions; (4) any proposal agreed to by the negotiated rulemaking committee is not binding on the agency or other parties; and (5) the head of an agency, when deciding whether to establish a negotiated rulemaking committee, assure that (a) there are a

limited number of identifiable interests that will be significantly affected by the rule; (b) there is a reasonable likelihood that a committee can be convened with a balanced representation of interested parties who are willing to negotiate in good faith; and (c) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time. The act also allows agencies to pay reasonable travel and per diem expenses, and reasonable compensation, to committee members under certain conditions.

Discussion

Negotiated rulemaking is a possible supplement to, but not a replacement of, the normal rulemaking procedures that agencies are required to follow under the APA. For any proposal agreed to by a negotiated rulemaking committee to take effect, the agency must still develop and issue it as a regulation under the provisions of the APA. The use of negotiated rulemaking by federal agencies is strictly voluntary. Also, negotiated rulemaking does not impair any rights otherwise retained by agencies or private parties. Even if agreement is reached on a proposal by a negotiated rulemaking committee, neither the agency nor the other members of the committee are bound by the agreement. An agency need not issue the proposed regulation drafted by the committee. If an agreed-upon proposal is issued by the agency as a regulation under the APA, it may still be challenged in court by parties who previously agreed to it in committee.

Agencies are encouraged to convene and use a negotiated rulemaking committee only when certain conditions are expected to produce a successful or favorable result (e.g., easy identification of those likely to be affected by the rule and, where differences exist, the parties' willingness to consider each others' points of view). Since agreement by the parties generally must be by unanimous consent, it is essential that the parties involved be willing to compromise in order to reach agreement. The fact that participants may change their minds and later challenge a regulation they initially supported can increase their willingness to participate in the process.

These factors can, however, also serve to limit the instances when agencies see negotiated rulemaking as a viable option. In addition, agency experience with the technique indicates that negotiated rulemaking can be more costly than conventional rulemaking methods, particularly at the front end of the process. Finally, research indicates that negotiated rulemaking does not appear to reduce the overall time taken to issue a rule or to make rules more likely to avoid litigation. These findings are particularly notable given that agencies are instructed to use negotiated rulemaking only when they expect success. Other research, however, indicates that negotiated rulemaking can increase satisfaction with the substance of the final rule and with the overall process.

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Curtis W. Copeland

L. National Environmental Policy Act

Statutory Intent and History

The National Environmental Policy Act of 1969 (NEPA) was enacted on January 1, 1970 (83 Stat. 852; P.L. 91-190; 42 U.S.C. § 4321). The act is considered to be landmark legislation which “set the Nation on a new course of environmental management” (H.Rept. 92-316). The Preamble to the law states:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Its “action-forcing” directives are meant to ensure that environmental values are given appropriate consideration in all programs of the federal government. Its policy declaration and its procedures for environmental impact assessment have been adopted in many similar state laws, and also by other nations.

The preparation of environmental impact statements (EISs) has heightened awareness of, and attention to, the environmental effects of actions by federal agencies while also increasing public participation. The requirements of the law have played a limited role in what decisions are ultimately made because the law is procedural, and does not establish environmental standards. It has spawned an enormous amount of information-gathering and analysis activities, which have been criticized by supporters as (substantively or scientifically) inadequate and by critics as too burdensome.

The National Environmental Policy Act should be distinguished from the substantive body of environmental protection laws, which attempt to correct pollution and resource problems ranging from air and water quality and noise and toxic substances control to the various statutes related to resource development, such as surface mining regulation, coastal zone and offshore management, or various public land programs. In contrast, NEPA is a relatively short policy declaration and impact assessment law designed to avoid or prevent such problems by informing the public about environmental consequences before a project is begun, and has been more associated with “administrative reforms” within federal agencies than with any particular aspect of (physical) environmental protection. NEPA compliance is required in connection with many other laws, if the action is one that triggers the EIS preparation criterion of “significantly affecting the quality of the human environment.”

Government-wide rules of the Council on Environmental Quality (CEQ) require impact statement preparation to be integrated as much as possible with studies, surveys, and analyses under other federal environmental review laws — such as the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, and, for example, water quality permits, as well as executive orders on floodplain management and wetlands protection. However, once

an agency complies with NEPA's information-based procedures, the act's effect on ultimate decisions is limited by the agency's other mandates.

While there now seems to be agreement about the utility of assessing the environmental consequences of major federal actions, the long-term compliance trends depend on whether individual agencies will continue to adapt their practices to the streamlined, but rigorous, process in CEQ regulations for more fully integrating the impact analyses with agency plans and programs. Otherwise, lessened compliance could evolve and lead to new legal challenges.

Enforcing requirements for preparation of environmental impact statements is partially achieved through public participation and judicial reviews. The role of the courts in interpreting and enforcing compliance has been perhaps the most controversial aspect of NEPA's previous implementation. Some NEPA compliance issues have been raised anew in court challenges — especially during a period when program changes affect federal resource management of public lands. Typical of the effects on NEPA compliance are the EIS “categorical exclusions,” issued by federal agencies which permit additional activities on public lands that would now be excluded from the NEPA process, unless considered as part of overall assessments in broad, “areawide EISs.” An evaluation of the cumulative results of these excluded actions is often not feasible. (See reference for 2003 NEPA Task Force, as well as specific legislative provisions for streamlining compliance for grazing, P.L. 108-7 and 108-11; forest health, P.L. 108-148; and aviation projects, P.L. 168-176.)

Major Provisions

Title I.

Section 101: Policies and Goals. (a) Congress declared: “it is the continuing policy of the federal government ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (b) In order to carry out the policy ... it is the continuing responsibility of the federal government ... to improve and coordinate federal plans, functions, programs, and resources” to achieve six broadly stated goals that address future environmental quality objectives, with the paramount concerns including “responsibilities ... as trustee of the environment for succeeding generations,” attaining “beneficial uses of the environment without degradation, or risk to health or safety”; preserving “diversity” of natural, historic, and cultural heritages; achieving a “balance between population and resource use”; and enhancing the “quality of renewable resources and ... maximum attainable recycling.”

Section 102: Administration. Congress directed that, to the fullest extent possible, the laws of the United States shall be administered in accordance with these policies, and further directed all federal agencies to incorporate the policies and goals through information and methods for appropriate consideration of environmental values by using “a systematic, interdisciplinary approach,” and by considering “presently unquantified environmental amenities and values.”

Section 102(2)(C): Environmental Impact Statements. As an “action-forcing” mechanism to carry out those policies and procedures, agency officials are required to include a “detailed statement” of environmental impacts as part of “every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.” This statement of environmental impact is to assess any “adverse environmental effects,” and alternatives to the proposed action, local short-term uses of the environment in relation to “long-term productivity,” and “any irreversible and irretrievable commitments of resources” involved.

Prior to taking action, the responsible federal official is to consult any federal agency with jurisdiction or special expertise on any environmental impacts and to make the “statement and the comments and views of the appropriate Federal, State, and local agencies...available to the President, the Council on Environmental Quality, and to the public.”

Other provisions of Section 102 require federal agencies to (1) separately develop alternative courses of actions for unresolved resource conflicts; (2) “support ... international cooperation in ... preventing ... a decline in the quality of mankind’s world environment”; (3) provide advice and information to other units of governments, institutions, and individuals; (4) develop ecological information on resource-oriented projects; and (5) assist the CEQ.

Section 103: Review. Section 103 requires agencies to “review their present statutory authority ... for ... any deficiencies ... which prohibit full compliance,” while Sections 104 and 105 affirm existing environmental authorities, and supplement them with NEPA.

Title II. Title II created in the Executive Office of the President a three-member Council on Environmental Quality to oversee the administration of national environmental policy and to assist in the President’s annual Environmental Quality Report to Congress. This report is to examine (1) the status and condition of the natural environment; (2) trends in the quality, management, and utilization of the environment, and their effects; (3) the adequacy of natural resources; (4) a review of environmental programs and activities; and (5) a program for remedying deficiencies, along with legislative recommendations.

Another major duty of the council is to advise and recommend policies to the President. (The council’s authority to guide the NEPA process — including its new regulations — has been supplemented by Executive Orders 11514, 11991, and 12114.)

Highlights of Judicial Interpretation of NEPA. Major court decisions involving the National Environmental Policy Act have:

- held it to be a “full disclosure” law — pertaining to federal agencies administrative records and information concerning impacts — for actions subject to the act;

- required “strict compliance” with the procedures — entailing a unique balancing analysis of the environmental costs and benefits of a proposed action;
- ruled that the consideration of alternatives to the proposed action must be of a broad nature and not necessarily confined to an agency area of statutory authority;
- further ruled that the alternatives and environmental consequences must be given full consideration in decision making (and subject to Administrative Procedure Act compliance);
- affirmed the long-standing practice of preparing regional or programmatic impact statements for related federal actions (i.e., “comprehensive impact statements”);
- supplemented the public participation afforded through EIS comment procedures by liberally construing standing requirements applicable to persons seeking judicial review of agency NEPA compliance; and
- upheld the provisions for obtaining access to relevant information through the Freedom of Information Act.

The Council on Environmental Quality’s authority to issue its implementing regulations — binding upon the federal agencies — has been broadly endorsed by the Supreme Court, whose reviews of lower court opinions have held procedural compliance with NEPA to be sufficient.

Discussion

A continuing issue for future NEPA implementation is its effect on the policy level of decision making, given its early application — and some say its overemphasis on procedural matters — at the project level. This “level of assessment” issue, and its potential for “trivialization” of the act’s basic policy purposes, seems to be of less concern as greater experience is gained in applying the law, since site-specific, project level assessments generally serve real purposes in the government’s decision making processes — i.e., public accountability for agency actions; a framework for citizen participation in resolving controversies; and a more systematic approach for generating environmental information. Furthermore, numerous, but “properly scoped,” impact statements that are prepared efficiently can conceivably minimize “on the ground” impacts at the present time, given the limitations in the methodologies for assessing the broader scope and longer-term environmental effects.

Another recurring question is whether NEPA’s clear requirement for environmental assessments of agencies’ legislative proposals is being adequately implemented or enforced — under the regulations’ new flexible criteria — to address environmental concerns at the earliest stages of program initiatives originating in the executive branch. While the impact assessment and interagency review process has

increasingly been used as an integral framework for structuring some decision making activities — i.e., relating the NEPA analysis to project feasibility or federal or state coordination activities — the longer-term question is whether these advantages outweigh the procedural uncertainties that would be associated with analyzing environmental impacts of more fundamental policy choices. For example, in the 1990s, the President’s authority to negotiate new international trade agreements (without the most formal level of NEPA compliance) was upheld.

The most basic policy issue regarding the viability of the overall NEPA process is in maintaining a sufficiently neutral and flexible environmental information, assessment, and review procedure to accommodate actions and decisions of the utmost variety, complexity, and controversy to which the law applies — without the mechanics of the procedures themselves becoming a part of the controversy. In part, this is a matter of efficiency — of how usefully the process serves public decision making by holding agencies accountable without undue regulatory-type burdens — and partly a matter of equity, so that all reasonable alternatives, points of view, and parties to a decision can (over time) benefit from informed debate about environmental effects.

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Harry Steven Hughes

M. E-Government Act of 2002

Statutory Intent and History

The E-Government Act of 2002 (116 Stat. 2899; P.L. 107-347) was enacted to enhance access to government information and the delivery of information and services to citizens, employees, and other agencies and entities. To meet this goal, the statute authorizes \$345 million over four years for e-government initiatives. It also assigns considerable influence to the Office of Management and Budget (OMB) to ensure that information technology (IT) investments throughout the federal government embrace a citizen-centered, cross-agency, and performance-based strategy.

As defined in the statute, *e-government* refers to “the use by Government of web-based Internet applications and other information technologies, combined with processes that implement these technologies, to (A) enhance the access to and delivery of Government information and services to the public, other agencies, and other Government entities; or (B) bring about improvements in Government operations that may include effectiveness, efficiency, service quality, or transformation” (116 Stat. 2902). Both the term and the concept of e-government are relatively new in government parlance. The phrase appeared, without explanation, in the initial September 7, 1993 report of the National Performance Review (NPR).⁶⁰ A joint report of the NPR and the Government Information Technology Services Board, issued on February 3, 1997, gave the term more prominence and substance.⁶¹ Almost three years later, in a December 17, 1999 memorandum to the heads of executive departments and agencies, President William Clinton directed these officials to take certain actions in furtherance of “electronic government.”⁶²

President George W. Bush indicated his support for e-government initiatives early in his Administration when he proposed the creation of an e-government fund. In advance of his proposed budget for FY2002, the President released, on February 28, 2001, *A Blueprint for New Beginnings: A Responsible Budget for America's Priorities*. Introduced as a 10-year budget plan, the *Blueprint*, among other innovations, proposed the establishment of an electronic government account, seeded with “\$10 million in 2002 as the first installment of a fund that will grow to a total of \$100 million over three years to support interagency electronic Government (e-gov) initiatives.” Managed by OMB, the fund was foreseen as supporting “projects that operate across agency boundaries,” facilitating “the development of a Public Key Infrastructure to implement digital signatures that are accepted across agencies for

⁶⁰ Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better & Costs Less*, Report of the National Performance Review (Washington: GPO, 1993), p. 112.

⁶¹ Office of the Vice President, *Access America: Reengineering Through Information Technology*, Report of the National Performance Review and the Government Information Technology Services Board (Washington: GPO, 1997).

⁶² U.S. National Archives and Records Administration, Office of the Federal Register, *Public Papers of the Presidents of the United States: William J. Clinton, 1999* (Washington: GPO, 2001), p. 2317.

secure online communications,” and furthering “the Administration’s ability to implement the Government Paperwork Elimination Act of 1998, which calls upon agencies to provide the public with optional use and acceptance of electronic information, services and signatures, when practicable, by October 2003.”⁶³ About one month later, on March 22, OMB announced that the Bush Administration recommended doubling the amount to be allocated to the e-government fund, bringing it to \$20 million. House appropriators, however, were particularly reluctant to provide more than a quarter of the amount sought by the President. While expressing general support for the purposes of the fund, they also recommended that the Administration work with the House Committee on Government Reform and the Senate Committee on Governmental Affairs to clarify the status of its authorization. The E-Government Act establishes an E-Government Fund in the Treasury of the United States with specific levels of appropriations authorized through FY2006 and “such sums as are necessary for fiscal year 2007” (116 Stat. 2908).

Pursuant to an OMB Memorandum of July 18, 2001, an E-Government Task Force was established to create a strategy for achieving the e-government goals of the Bush Administration. It subsequently identified 23 interagency initiatives designed to better integrate agency operations and IT investments. These initiatives, sometimes referred to as the Quicksilver projects, were grouped into five categories: government to citizen, government to government, government to business, internal efficiency and effectiveness, and addressing cross-cutting barriers to e-government success. Examples of these initiatives included an E-Authentication project, led by the General Services Administration to increase the use of digital signatures; the eligibility assistance online project (also referred to as GovBenefits.gov), led by the Department of Labor to create a common access point for information regarding government benefits available to citizens; and the Small Business Administration’s One-Stop Business Compliance project (later renamed Business Gateway), designed to help businesses navigate legal and regulatory requirements. An additional initiative, a government-wide payroll process project, was subsequently added by the President’s Management Council. In 2002, the E-Clearance initiative, originally included as part of the Enterprise Human Resources Integration project, was established as a separate project, for a total of 25 initiatives. These projects became part of the *President’s Management Agenda — FY2002*, submitted to Congress in August 2001 and featuring five interrelated government-wide initiatives: Strategic Management of Human Capital, Competitive Sourcing, Improved Financial Performance, Expanded Electronic Government, and Budget and Performance Integration.⁶⁴

After the Clinger-Cohen Act of 1996, the E-Government Act takes the next step to improve IT investment and management, requiring OMB to provide a report to Congress annually on the status of e-government. Rather than simply identifying and reporting IT investment at each agency, the statute appears to have engendered a

⁶³ U.S. Executive Office of the President, Office of Management and Budget, *A Blueprint for New Beginnings: A Responsible Budget for America’s Priorities* (Washington: GPO, 2001), pp. 179-180.

⁶⁴ U.S. Executive Office of the President, Office of Management and Budget, *The President’s Management Agenda — FY2002* (Washington: GPO, 2001).

cultural change in IT procurement, from consolidating and integrating IT investments to encouraging performance-based, citizen-centered, cross-agency planning. The statute designates OMB as the lead organization for all federal executive branch IT purchasing and planning, and all federal executive branch agencies must comply with OMB guidance to ensure implementation of e-government.

Major Provisions

The E-Government Act is organized in five titles containing sections which amend various titles of the *United States Code*. Title I of the statute, denominated Office of Management and Budget Electronic Government Services, amends Title 44, *United States Code*, with a new Chapter 36 on Management and Promotion of Electronic Government Services. In addition to defining key terms, Title I establishes an Office of Electronic Government within OMB, headed by an administrator, who is appointed by the President without Senate confirmation. The administrator assists the Director of OMB with all functions assigned in Chapter 36, as well as those assigned to the director by Title II of the statute, and “other electronic government initiatives.” The administrator is also responsible for assisting the OMB Director, deputy director for management, and administrator of the Office of Information and Regulatory Affairs “in setting strategic direction for implementing electronic Government” relevant to certain specified statutory authorities.

Title I of the statute also establishes a Chief Information Officers Council, chaired by the OMB deputy director for management and composed largely of department and agency chief information officers. The council plays an advisory and coordination role. Other features of Title I are creation of the E-Government Fund to support e-government projects; establishment of a government-wide program “to encourage contractor innovation and excellence in facilitating the development and enhancement of electronic Government services and processes”; and mandating an annual e-government status report by the OMB Director to Congress.

Title II of the statute, pertaining to Federal Management and Promotion of Electronic Government Services, specifies the responsibilities of agency heads regarding electronic government; mandates interoperable implementation of electronic signatures for appropriately secure electronic transactions with government; prescribes criteria for maintaining and promoting an integrated federal Internet portal; promotes individual federal court websites and agency use of IT to increase access, accountability, transparency, and public participation in the development and issuance of regulations; fosters improvements in the methods by which government information, including information on the Internet, is organized, preserved, and made accessible to the public; establishes privacy impact assessments for agencies when developing or procuring IT that collects, maintains, or disseminates personally identifiable information or when initiating a new collection of such information; and creates a federal workforce skills development program for using IT to deliver government information and services.

Title II also amends Subpart B of Part III of Title 5, *United States Code*, with a new Chapter 37 mandating an Information Technology Exchange Program, facilitating temporary assignments of federal employees to private sector organizations and of private sector employees to federal agencies to enhance IT

skills. Other provisions mandate studies and evaluations of (1) community technology centers, public libraries, and other institutions providing computer and Internet access to the public; (2) the use of IT to enhance crisis preparedness, response, and consequence management of natural and man-made disasters; and (3) disparities in Internet access for online government services. Another provision tasks the Administrator of General Services with making a coordinated effort to “facilitate the development of common protocols for the development, acquisition, maintenance, distribution, and application of geographic information.”

Title III of the statute, denominated the Federal Information Security Management Act of 2002 (discussed elsewhere in this compendium), amends Chapter 35 of Title 44, *United States Code*, with a new Subchapter III on information security. It supersedes similar provisions found in Subtitle C of Title II of the Homeland Security Act of 2002 (116 Stat. 2135, at 2155). Excepting national security systems, Subchapter III prescribes a comprehensive program, under the direction of the OMB Director, for ensuring the effectiveness of information security controls over information resources that support federal operations and assets. Covered agencies are required to have performed annually an evaluation of the effectiveness of their information security program and practices.

Title IV authorizes generally, unless otherwise specified elsewhere in the act, “such sums as are necessary” to carry out Titles I and II for FY2003-FY2007.

Title V of the statute, denominated the Confidential Information Protection and Statistical Efficiency Act of 2002, vests the OMB Director with responsibility for coordinating and overseeing the confidentiality and disclosure policies established by the title. Subtitle A prescribes limitations on the use and disclosure of statistical data or information, and sets fines and penalties for violations of these limitations. Subtitle B, after identifying the Bureau of the Census, Bureau of Economic Analysis, and Bureau of Labor Statistics, as “designated statistical agencies,” prescribes the responsibilities, as well as the business data sharing ground rules and limitations, of these agencies.

Discussion

Building upon the Clinger-Cohen Act (described elsewhere in this compendium), the E-Government Act serves as the primary legislative vehicle to guide evolving federal information technology management practices and to promote initiatives to make government information and services available online. In doing so, it also represents a continuation of efforts to realize greater efficiencies and reduce redundancies through improved intergovernmental coordination, and by aligning information technology investments. In addition, while the Bush Administration’s Quicksilver initiatives are separate from the E-Government Act, some of the goals of the Quicksilver initiatives are reinforced by the act’s provisions. For example, Section 216 addresses the development of common protocols for geographic information systems, which is also one of the objectives of the Geospatial One-Stop project (<http://www.geo-one-stop.gov/>). Section 203 directs agencies to adopt electronic signature methods. Likewise, the E-Authentication initiative strives to develop a government-wide approach to electronic identity systems (<http://www.cio.gov/eauthentication/>). In addition, some of the act’s broader

provisions, such as those related to the development of privacy guidelines, information security standards, and the identification of means to bridge disparities in Internet access among citizens, contribute to the technological and regulatory infrastructure needed to support e-government generally.

However, while the law is still relatively new, the rapid pace of technological change and the drive to implement initiatives in a timely manner have raised a number of implementation issues that may arise during congressional oversight. One of these issues involves the recruitment and retention of IT managers, at both the chief information officer (CIO) and project manager levels. As IT projects have become more integrated into the function of a department or agency, the role of CIOs has evolved as well. CIOs are reportedly being called upon not only for their technological expertise, but also to provide strategic leadership in the areas of policy, budget, and contract oversight.⁶⁵ The CIO's relationship with top-level department decision makers can also be critical to successfully implementing e-government initiatives. This suggests that in selecting a department-level CIO, one needs to consider the strengths and weaknesses of choosing a career employee, who may have a deeper contextual understanding of the mission and functions of an organization, and recruiting a candidate from the private sector who may bring a wider range of experiences and perspectives to the position.⁶⁶ Similarly, the increased size and complexity of IT projects has further underscored the need for strong project managers to carry out these initiatives. While it is not uncommon for IT project management to be just one of several duties assigned to an individual, some observers have suggested that IT projects with budgets of \$5 million or larger should have dedicated, full-time managers. The possibility of requiring federal IT project managers to obtain some form of professional certification has also been raised.⁶⁷

Another issue is information security. In a series of evaluations published since 1997, the General Accounting Office (GAO) has repeatedly reported that the largest federal agencies have made only limited progress in addressing computer security vulnerabilities, citing information security as a government-wide high risk issue. Specifically, GAO has identified six areas of weaknesses: lack of senior management attention to information security; inadequate accountability for job and program performance related to IT security; limited security training for general users, IT professionals, and security professionals; inadequate integration of security into the capital planning and investment control process; poor security for contractor-provided services; and limited capability to detect, report, and share information on

⁶⁵ Cynthia L. Webb, "Providing the Technology Vision," *Washington Post*, Mar. 6, 2003, available at [<http://www.washingtonpost.com/wp-dyn/articles/A47136-2003Mar5.html>], visited Dec. 3, 2003.

⁶⁶ Sara Michael, "Insider Information," *Federal Computer Week*, Apr. 14, 2003, p. 26.

⁶⁷ Sara Michael, "Do Your Project Managers Measure Up?," *Federal Computer Week*, Nov. 3, 2003, p. 28; Sara Michael, "Execs Call for Full-Time Project Managers," *Federal Computer Week*, Nov. 5, 2003, available at [<http://www.fcw.com/fcw/articles/2003/1103/web-gov-11-05-03.asp>], visited Dec. 3, 2003.

vulnerabilities or to detect intrusions, suspected intrusions, or virus infections.⁶⁸ For e-government activities, service continuity is considered critical not only for the availability and delivery of services, but also to build citizen confidence and trust. The risks of fraud and misuse of sensitive data are concerns as well. Heightened concerns about homeland security and critical infrastructure protection have also drawn attention to the role of information security. The inclusion of Title III of the E-Government Act (referred to as the Federal Information Security Management Act) permanently re-authorizes and amends the Government Information Security Reform Act (GISRA), providing additional means for congressional overseers to assess this issue.

A third issue is the interoperability of technology. Interoperability refers to the ability of a computer system or data to work with other systems or data using common standards or processes. Interoperability is an important part of the larger efforts to improve interagency collaboration and information sharing through e-government and homeland security initiatives. It also represents a significant challenge as the federal government implements cross-agency initiatives, such as the E-Payroll and GovBenefits.gov projects, to eliminate redundant systems and facilitate a “one-stop service delivery” approach to e-government.⁶⁹ One means being used to address this issue is the development of a federal enterprise architecture, at the website [<http://www.feapmo.gov/>]. An enterprise architecture serves as a blueprint of the business functions of an organization, and the technology used to carry out these functions. While this blueprint is still in its early stages, federal agencies are being required to justify their IT investments based partly on their ability to make a strong business case to support each request, and based on how closely the project aligns with the federal enterprise architecture. Decisions made early in the development of the federal enterprise architecture can have significant implications for future IT projects, suggesting that regular assessments of this process may be necessary to help minimize any potential complications.

Other issues include, but are not limited to, balancing the sometimes competing demands of e-government and homeland security, measuring e-government performance, assessing and monitoring the quality of agency IT project “business cases,” and balancing cross-agency funding approaches with oversight interests.

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⁶⁸ U.S. General Accounting Office, *Information Security: Continued Efforts Needed to Fully Implement Statutory Requirements*, GAO-03-852T, June 24, 2003, p. 8.

⁶⁹ U.S. Executive Office of the President, Office of Management and Budget, *Implementing the President's Management Agenda for E-Government - E-Government Strategy*, Apr. 2003, p. 9, available at: [http://www.whitehouse.gov/omb/egov/downloads/2003egov_strat.pdf], visited Dec. 3, 2003.

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Harold C. Relyea
Jeffrey W. Seifert

N. Federal Information Security Management Act of 2002

Statutory Intent and History

The Federal Information Security Management Act of 2002 (FISMA) replaced what has been commonly referred to as the Government Information Security Reform Act (GISRA),⁷⁰ which expired at the end of the 107th Congress. Congress passed two versions of FISMA at the end of the 107th Congress. The first version passed as part of the Homeland Security Act of 2002 (P.L. 107-296, Title X; 116 Stat. 2135, at 2259). The second version passed as part of the E-Government Act of 2002 (P.L. 107-347, Title III; 116 Stat. 2946). The two versions differ slightly. The E-Government Act version takes precedence.⁷¹ The act applies government-wide, including to small and independent agencies of the federal government.

Both GISRA and FISMA represent an effort by Congress to improve federal agency compliance with information security standards and guidelines. Congress put into statute certain requirements, including the requirement that federal agencies submit their information security programs to an annual independent review, and a requirement that the Director of the Office of Management and Budget (OMB) shall report the results of these reviews to Congress.

Congress has long been concerned with securing federal information systems. This concern has grown as the federal government has increased the amount of information it collects and maintains and as the information systems upon which that information is kept become increasingly interconnected and vulnerable to unauthorized access. Both GISRA and FISMA build upon the Computer Security Act of 1987 (P.L. 100-235) and the Paperwork Reduction Act of 1995 (P.L. 104-13). The Computer Security Act required agencies to inventory their computer systems and to develop computer security plans for each. The Paperwork Reduction Act authorized the Director of OMB to oversee the development of information resource management policies, including those related to information security. While FISMA repeals or supersedes various provisions of the Computer Security Act from the *United States Code*, it maintains many of the same roles and responsibilities. Likewise, FISMA expands upon the roles and requirements originally cited in the Paperwork Reduction Act.

Major Provisions

The Federal Information Security Management Act of 2002 has five major provisions. Section 301 of the act amends Chapter 35 of Title 44 of the *United States*

⁷⁰ GISRA was passed as part of the Floyd D. Spence National Defense Authorization Act for FY2001 (P.L. 106-398, Title X, Subtitle G).

⁷¹ In its *FY2002 Report to Congress on Federal Government Information Security Reform* (May 16, 2003), the Office of Management and Budget cites the E-Government Act version as being applicable (see pp. 6 and 16). Also, the E-Government version contains language that states that while its amendments to Chapter 35, Title 44 of the *United States Code* stay in effect, the amendments made to Chapter 35, Title 44 by the Homeland Security Act version do not apply. See 44 U.S.C. § 3549, as enacted by the E-Government Act.

Code by adding a new Subchapter III on Information Security. Section 302 amends 40 U.S.C. § 11331, which relates to the prescription of information security standards. Section 303 of the act amends the National Institute of Standards and Technology Act (NIST; 15 U.S.C. § 278g-3), which assigns to NIST the mission of developing standards for information technology, including security standards for federal information systems. Section 304 amends the National Institute of Standards and Technology Act (15 U.S.C. § 278g-4), which establishes the Information Security and Privacy Advisory Board. Section 305 makes technical changes and conforming amendments, two of which are of some significance.

Chapter 35 of Title 44, *United State Code*, Subchapter III, on Information Security expands upon the authorities and responsibilities for the development, implementation, review, and oversight of policies and practices associated with securing federal information systems. Specifically, it authorizes the Director of OMB to oversee the development and implementation of information security policies, standards, and guidelines across the federal government. The director's authority includes overseeing the development of policies, principles, standards and guidelines; reviewing and approving or disapproving agency security programs; and, taking actions as authorized by 40 U.S.C. § 11303,⁷² including budgetary actions, to ensure compliance with policies, standards, and guidelines. However, only the director's authorities under 40 U.S.C. § 11303 extend to national security systems.⁷³ Development and oversight of standards and guidelines for national security systems are prescribed by law or the President. In addition, FISMA grants to the Secretary of Defense and the Director of Central Intelligence, the authority to oversee the development of information security policies, principles, standards, and guidelines for information systems operated by or for the Department of Defense and the Central Intelligence Agency, if the compromise of information on these systems would have a debilitating impact on the mission of these two agencies. It is not clear if this provision includes systems that do not meet the definition of national security systems.

In addition to assigning the authorities discussed above, Subchapter III also requires each agency to develop and implement an information security program. It prescribes what this program should include. It assigns each agency head the responsibility for developing and ensuring the implementation of the program,

⁷² 40 U.S.C. § 11303 details the director's authority to evaluate agency performance-based programs in acquiring information technology.

⁷³ FISMA defines a national security system as "any information system (including telecommunications system), the function or operation of which: involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapon system or is critical to the direct fulfillment of military or intelligence missions; or is protected at all times by procedures established for information that have been specifically authorized under criteria established by Executive Order or an Act of Congress to be kept classified in the interest of nation security." The definition notes that a system used for routine administrative and business applications (e.g. payroll) shall not be considered a national security system. President Reagan laid out the roles and responsibilities of federal agencies for the protection of national security systems in *National Security Decision Directive 145* (NSDD-145). NSDD-145 remains in effect.

including designating a senior agency information security officer whose responsibility is to ensure compliance with the agency's program. It also requires that agencies evaluate their security programs annually and include the results of these reviews in a number of reports required by Congress, including performance reports and financial reports.

Subchapter III also requires that each agency submit its information security program to an annual independent review. The reviews are to be conducted by the agency's inspector general, if it has one, or an outside evaluator. The subchapter requires that the results be submitted to the Director of OMB who is to summarize them in a report to Congress. This perhaps is the major element of FISMA (and GISRA before it) by which Congress intended to ensure adequate oversight and compliance with federal information security requirements.

FISMA amends 40 U.S.C. § 11331 which authorizes the Secretary of Commerce to prescribe standards and guidelines (developed by NIST, see below) pertaining to federal information systems. Those pertaining to information security are to be made mandatory. This section also authorizes the President to disapprove or modify the Secretary's prescriptions and also allows agencies to follow more strict standards, as long as they contain the mandatory standards prescribed by the Secretary.

FISMA also amends 15 U.S.C. § 278g-3, which gives NIST the mission of developing standards, guidelines, and associated methods and techniques for information systems. These standards and guidelines include those for securing federal information systems, except national security systems.⁷⁴ FISMA primarily amends this section by specifying that NIST shall, at the least, develop standards for categorizing all agency information and information systems, recommending what type of information or system should be included in each category, and developing minimum security requirements for each category. FISMA also instructs NIST that these standards should, to the most practicable extent possible, be technology neutral and allow for the use of commercial-off-the-shelf products.

The amendments to 15 U.S.C. § 278g-4 rename the Computer System Security and Privacy Advisory Board the Information Security and Privacy Advisory Board. The board, which was originally established by the Computer Security Act, advises the Secretary of Commerce and the Director of OMB on information security and privacy issues and reports to the Secretary, the Director of OMB, the Director of the National Security Agency, and Congress.

Finally, FISMA repeals 40 U.S.C. § 11332, which included language originally enacted as part of the Computer Security Act. This language required agencies to develop security plans for their computer systems and to provide personnel training in security awareness and practices. These requirements have been subsumed in agency security program requirements mentioned above. FISMA also amends 44 U.S.C. § 3505 to include a requirement that agencies inventory their major information systems and identify where these systems interface with other systems and networks.

⁷⁴ NSDD-145 assigns this authority to the National Security Agency.

Discussion

Throughout the 1990s, the General Accounting Office (GAO) reported on fundamental problems associated with agency information security plans. In some cases, GAO found that agencies did not have written policies and procedures. In other cases, GAO found that policies and procedures were not enforced. In addition to problems internal to the agencies, GAO cited a lack of oversight to ensure that agencies met their obligations. GISRA addressed these problems by tightening agency requirements in statute (essentially taking OMB's guidelines and putting them in statute). GISRA also addressed the oversight issue by requiring annual independent evaluations of agency security programs, and requiring that the results be reported directly to Congress. OMB's *FY2001 Report to Congress on Federal Government Information Security Reform* formed the baseline by which to better measure agencies' progress in securing their information systems.

In the FY2002 report, OMB cited both progress and remaining issues within the federal government. For example, out of 7,957 federal systems evaluated, the number of systems for which risk assessments have been done increased from 43% to 65%. OMB cited similar increases for the number of systems with updated security plans, and the number of systems with contingency plans. However, OMB identified six areas in which problems persist: lack of management attention; non-existent security performance measures; poor security education and awareness; failure to fully fund and integrate security into capital planning; failure to ensure contractors are secure; and lack of detecting, reporting, and sharing information on vulnerabilities.

GAO's evaluation of the FY2002 results⁷⁵ was more critical of the progress made. For example, while OMB noted that 11 of 24 agencies had assessed risk for 90% to 100% of their systems, GAO noted that 8 reported that they had assessed fewer than 50%. The House Technology, Information Policy, Intergovernmental Relations and the Census Subcommittee of the House Government Reform Committee, which maintains a computer security report card, noted that while 14 agencies improved their grades, based on the subcommittee's scoring, 14 agencies remain with grades below C, and 8 have failed (again, according to the subcommittee scoring).⁷⁶

Also, there remains some tension over the roles and responsibilities for national security systems versus non-national security systems. Part of the reason Congress passed the Computer Security Act was to ensure that the national security community would not have too great a role in setting computer security standards for civilian

⁷⁵ U.S. Government Accounting Office, *Information Security: Continued Efforts Needed to Fully Implement Statutory Requirements*, GAO-03-852T, June 24, 2003.

⁷⁶ Rep. Adam Putnam, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census, House Committee on Government Reform (statement upon the release of the Federal Computer Security Report Card), Dec. 9, 2003. Information regarding the Subcommittee's report card can be found at [<http://reform.house.gov/TIPRC/News?DocumentSingle.aspx?DocumentID=2025>], visited Dec. 19, 2003.

federal computer systems.⁷⁷ There was a similar debate over the definition of *sensitive information* which the act sought to protect. While Congress recognized that, in addition to classified information, the government holds sensitive information, the compromise of which could adversely affect the national interest or conduct of federal programs, or the privacy of individuals, Congress did not intend the term to constitute a formal new category of information.⁷⁸ The act stipulated that the designation of *sensitive* implies no determination as to whether it is subject to public disclosure. However, as individual information systems become increasingly interconnected, including the connection of national security systems to civilian and public systems, some in the national security community are concerned about the level of security of these non-national security systems. FISMA maintains the distinction between roles and responsibilities for national security systems and all other systems. Still, it does require NIST to develop guidelines by which agencies can identify national security systems over which they may have control. Therefore, the number of systems for which more stringent national security standards must be applied may go up, or down.

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⁷⁷ NSDD-145 gave the National Security Agency authority to set technical computer standards and guidelines for national security systems. Congressional concern is discussed in H.Rept. 100-153 (parts I and II), House Science, Space, and Technology Committee, June 11, 1987.

⁷⁸ U.S. Congress, House Committee on Science, Space, and Technology, *Computer Security Act of 1987*, report to accompany H.R. 145, 100th Cong., 1st sess., H.Rept. 100-153, part 1 (Washington: GPO, 1987), p. 24.

O. Data Quality Act

Statutory Intent and History

The Data Quality Act of 2001 (DQA) was enacted as Section 515 of the FY2001 Treasury and General Government Appropriations Act (P.L. 106-554, 44 U.S.C. § 3516 note; 114 Stat. 2763A-153). The DQA, enacted in December 2000 as a two-paragraph last-minute addition to the consolidated appropriations bill, took effect on October 1, 2002. There is no specific or explicit language on statutory intent or legislative history.

Major Provisions

The DQA required the Office of Management and Budget (OMB) to issue guidelines ensuring the “quality, objectivity, utility, and integrity” of information disseminated by the government. In turn, the law instructed most federal agencies to issue their own guidelines, following OMB’s, by October 1, 2002. The act also required agencies to create an administrative process through which interested groups could challenge agency information and seek corrections. OMB, in its guidelines, further defined information quality, and required agencies to follow certain procedures depending on the use, category, and significance of the information. The resulting agency guidelines have varied depending on the area of agency responsibility. The DQA also required each agency to report periodically to the Director of OMB the number and nature of complaints received by the agency regarding the accuracy of its information, and how such complaints were handled.

Discussion

While there is no specific or explicit documentation of statutory intent or legislative history, the DQA amends the Paperwork Reduction Act (PRA) of 1995, and can be seen as related to other government documents and general management laws as well, such as OMB Circular No. A-110, OMB Circular No. A-130, the Freedom of Information Act, the Privacy Act, and the Government in the Sunshine Act. (The laws are described in detail elsewhere in this compendium.)

Under the PRA, the Office of Information and Regulatory Affairs (OIRA) was created within OMB with oversight responsibilities for other federal agencies regarding paperwork (44 U.S.C. § 3503(a) and (b)). OIRA, among other things, is responsible for developing uniform policies for efficient processing, storage, and transmission of information, within and among agencies. The PRA directed the Director of OMB to foster greater sharing of, dissemination of, and access to public information.

Agencies’ data acquisition and publishing rights were stated in OMB Circular No. A-110, Subpart C. Unless specifically waived, federal agencies “have the right ... to obtain, reproduce, publish, or use the data first produced under an award.”

OMB Circular No. A-130 stated a federal policy of “maximizing the usefulness of information disseminated to the public,” but did not provide details about or definitions of quality, integrity, accuracy, or objectivity of information.

The Freedom of Information Act, the Privacy Act, and the Government in the Sunshine Act all contain provisions regulating or generally relating to public access to governmental information, and/or procedures to challenge or correct such information.

The DQA provides more explicitly quality standards for information across the federal government, and procedures to challenge or correct such information.

The DQA applies to all federal agencies that are subject to the PRA. Data quality challenges have been filed with several agencies. Four agencies place all their DQA challenges on their Web pages: the Environmental Protection Agency (EPA); the Commodity Futures Trading Commission (CFTC); the Department of Transportation; and the Forest Service. Discerning other agencies' DQA challenges is a more involved process.

DQA challenges have covered a wide range of complexity. A DQA challenge to the CFTC in September 2003, for example, involved certain data fields missing from a document; the data fields were determined to have resulted from a programming error, and the error was corrected. On the other hand, a lawsuit brought against the White House Office of Science and Technology Policy (OSTP), challenging the data underlying the interagency "National Assessment of the Potential Consequences of Climate Variability and Change" (NACC), was settled out of court on November 6, 2003, with the OSTP posting a notice stating that the NACC was not "subjected to OSTP's Information Quality Act Guidelines."

Proponents contend the law and guidelines will improve the quality of agency science and regulations, and force agencies to regulate based on the best science available. Some of these proponents maintain that the Data Quality Act will help agencies defend their regulations against lawsuits, and reduce the number of lawsuits filed. The U.S. Chamber of Commerce's Vice President, William Kovacs, has praised the act as fair to all groups; under it, the Chamber has challenged information on the EPA website. Some opponents of the law and OMB's guidelines contend the act may have a chilling effect on agency distribution and use of scientific information. These opponents foresee a flood of data quality challenges on a wide range of scientific issues, which, they contend, may tie up agency resources and significantly delay regulations. There is no evidence yet, however, that these concerns have materialized.

Critics also argue that the DQA, and the implementing guidelines, strengthen the position of industrial opponents to federal health and environmental policies and regulations by allowing them an additional method to challenge the science on which the regulations are based. Scientific groups sought to have the draft OMB guidance revised to prevent "harassment" (through repeated data quality challenges) of scientists working on controversial research, and to avoid imposing new obstacles to the publication of research results. The final OMB guidelines address some of these issues, but still allow challenges to the quality of research underlying official agency policies or research results published on agency websites. The guidelines allow challenges to peer-reviewed findings on a case-by-case basis.

The DQA lacks a judicial review provision allowing for a party to take a data quality dispute to court.

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Michael Simpson

II. Strategic Planning, Performance Measurement, and Program Evaluation

A. Inspector General Act of 1978

Statutory Intent and History

Statutory offices of inspector general (OIGs) consolidate responsibility for auditing and investigations within a federal department, agency, or other organization. Established by law as permanent, independent, nonpartisan, and objective units, the OIGs are designed to combat waste, fraud, and abuse (5 U.S.C. Appendix). The early establishments occurred in the wake of major financial and management scandals, first in 1976 in the Department of Health, Education and Welfare — now Health and Human Services (90 Stat. 2429) — and in 1978 in the General Services Administration (GSA). This later episode paved the way for OIGs in GSA and 11 other departments and agencies (92 Stat. 1101). Such offices now exist in nearly 60 federal establishments and entities, including all cabinet departments and the largest federal agencies, as well as many boards, commissions, government corporations, and foundations.⁷⁹

Statutory Underpinnings. Under two major enactments — the Inspector General Act of 1978 (92 Stat. 1101-1109) and the Inspector General Act Amendments of 1988 (102 Stat. 2515-2530) — IGs have been granted a substantial amount of independence and authority to carry out their basic mandate. Each office is headed by an inspector general who is appointed and removable in one of two ways: (1) presidential appointment, subject to the advice and consent of the Senate, and presidential removal in specified federal establishments, including all cabinet departments and larger federal agencies; and (2) agency head appointment and removal in designated federal entities (DFEs), usually smaller boards, foundations, commissions, and corporations.

Coordination and Control. Statutory OIGs have also been affected by several presidential orders designed to improve coordination among the offices and to provide a means for investigating charges of wrongdoing among the IGs themselves and other top echelon officers.

In 1981, President Ronald Reagan established the President's Council on Integrity and Efficiency (PCIE) as a mechanism to coordinate and enhance efforts to

⁷⁹ Separate from the 56 offices directly under the Inspector General Act of 1978, as amended, are three others, which, for the most part, are modeled after the provisions of the basic IG Act. P.L. 101-193 (103 Stat. 1711-1715) created an OIG in the Central Intelligence Agency, whose IG is appointed by the President by and with the consent of the Senate. P.L. 100-504 (102 Stat. 2530) established an office in the Government Printing Office, the only legislative branch entity with such a statutory IG; in this case, the inspector general is appointed by the head of the agency, the Public Printer. In addition, P.L. 108-106 established an office in the new Coalition Provisional Authority (in Iraq), whose IG is appointed by the Secretary of State. For background information on the offices and their evolution, see the citations in the “Selected Source Reading” at the end of this section.

promote integrity and efficiency in government programs and to detect and prevent waste, fraud, and abuse.⁸⁰ Chaired by the Deputy Director of the Office of Management and Budget (OMB), PCIE was composed of the statutory IGs at the time plus other appropriate officials from the Office of Personnel Management, Federal Bureau of Investigation, and the Departments of Defense, Justice, and the Treasury, among others. The membership has since been expanded to include the Comptroller of the Office of Federal Financial Management (an officer in OMB), the Director of the Office of Government Ethics, and the Special Counsel in the Office of Special Counsel. In 1992, following the expansion of IGs to designated federal entities, a parallel Executive Council on Integrity and Efficiency (ECIE) was created for IGs in these entities along with other appropriate officials.⁸¹

Concerns about allegations of wrongdoing by IGs or other high-ranking OIG officials themselves prompted the creation of a new mechanism to investigate such charges. In 1996, President William Clinton established an Integrity Committee, composed of PCIE and ECIE members and chaired by the FBI representative, to receive such allegations; if deemed warranted, these would be referred for investigation to an executive agency with appropriate jurisdiction, including the FBI, or to a special investigative unit consisting of council members.⁸²

Major Provisions

Purposes. Three principal purposes or missions guide the OIGs:

- conduct and supervise audits and investigations relating to the programs and operations of the establishment;
- provide leadership and coordination and recommend policies for activities designed to: (a) promote economy, efficiency, and effectiveness in the administration of such programs and operations; and (b) prevent and detect fraud and abuse in such programs and operations; and
- provide a means for keeping the head of the establishment and Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations, as well as the necessity for and progress of corrective action.

⁸⁰ Executive Order 12301, issued Mar. 26, 1981.

⁸¹ Both PCIE and ECIE now operate under Executive Order 12805, issued by President George H.W. Bush on May 11, 1992. A proposal to codify the two councils has arisen in the 108th Congress. H.R. 3457 would combine them in statute, creating a new Council of the Inspectors General on Integrity and Efficiency. The General Accounting Office (GAO) surveyed the IGs in 2002, about codification of the IG councils and other matters, and found that a majority of IGs interviewed (34 of 53) “indicated that it was important for the PCIE and ECIE to be established in statute.” See U.S. General Accounting Office, *Inspectors General: Office Consolidation and Related Issues*, GAO-02-575, Aug. 2002, p. 44.

⁸² Executive Order 12993, issued by President William Clinton on Mar. 21, 1996.

Appointment, Removal, and General Supervision. Differences in the appointment and removal procedures for IGs exist between those in federal establishments versus those in designated federal entities (see the following section for definitions), although with only a few exceptions, all IGs serve only under the “general supervision” of the agency head.

IGs in Federal Establishments. The President appoints IGs in federal establishments (i.e., cabinet departments and larger federal agencies) by and with the advice and consent of the Senate. The statute also provides that the selection be done without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.

The IG Act, as amended, provides that an inspector general may be removed from office only by the President, who then must communicate the reasons for removal to both houses of Congress. There are no explicit restrictions on the President’s authority; removal may be with or without cause.

Each inspector general “must report to and be under the general supervision of” the establishment head or, to the extent this authority is delegated, to the officer next in rank below the head, and shall not report to, or be subject to supervision by, any other officer. The restriction on supervision is reinforced by another provision: “Neither the head of the establishment nor any other officer shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena.”

Exceptions to this prohibition are few and are spelled out with regard just to certain departments and for specified reasons. Only the heads of the Departments of Defense, Homeland Security, Justice, and the Treasury, along with the U.S. Postal Service, are authorized to prohibit an IG audit, investigation, or issuance of a subpoena which requires access to information concerning ongoing criminal investigations, sensitive operational plans, intelligence matters, counterintelligence matters, and other matters the disclosure of which would constitute a serious threat to national security. (Under separate statutory authority, the Director of Central Intelligence has similar power over the Central Intelligence Agency’s (CIA’s) Inspector General.) Should the agency head exercise this power limiting the IG’s discretion and activities, the reasons must be communicated to the IG and then by the inspector general to specified committees of Congress.

The IG Act also provides for two assistant inspectors general within each IG office in the specified federal establishments: i.e., an Assistant Inspector General for Audits and an Assistant Inspector General for Investigations.

IGs in Designated Federal Entities. The 1988 Amendments to the IG Act provide for appointment, removal, and supervision of inspectors general in “Designated Federal Entities,” such as the Consumer Product Safety Commission, Federal Communications Commission, Federal Labor Relations Authority, Securities and Exchange Commission, and other usually smaller boards, commissions,

corporations, and foundations. The U.S. Postal Service, a public corporation and the government's largest civilian employer, is also a designated federal entity.

The appointment and removal powers over IGs in designated federal entities differ from those governing their counterparts in federal establishments. The IGs in designated entities are appointed by the agency head, who also may remove or transfer the IG; when removing or transferring the IG, the head must promptly communicate in writing the reasons for such action to both houses of Congress. Several caveats to these usual procedures apply to the inspector general in the U.S. Postal Service. This officer is appointed by the Board of Governors and is the only IG with a specified term of office (i.e., seven years). He or she may be removed by the written concurrence of at least seven governors and then only for cause, another distinguishing characteristic from all other statutory inspectors general.

As with the presidentially appointed inspectors general, IGs in the designated federal entities are required to report to and be under the "general supervision" of the agency head. But neither the head nor any other officer is permitted to interfere with an IG audit, investigation, or issuance of a subpoena.

Appropriations and Resources. The 1988 Amendments to the IG Act granted each office of inspector general in a federal establishment a separate appropriation account (31 U.S.C. § 1105(a)(25)), in order to protect its funding level once it had been established by Congress. The OIGs in designated federal entities lack the same appropriations protection.

All IGs have authority to call on other governmental entities for assistance and to hire their own staff. Adequate facilities, equipment, supplies, and other basic resources are to be provided by the host agency. In addition, IGs have access to a Criminal Investigator Academy to train their personnel and an Inspector General Forensic Laboratory (P.L. 106-422).

Duties. Following the act's broad mandates, each inspector general is required to perform specific duties in order to achieve the goals of detecting and preventing waste, fraud, and abuse. These duties illustrate the IG's unique role within the agency and the broad grant of authority delegated by Congress. The IGs are expected to:

- provide policy direction for, and conduct, supervise, and coordinate audits and investigations;
- review existing and proposed legislation and regulations relating to programs and operations;
- make recommendations in the reports concerning the impact of the laws;
- recommend policies for, and conduct, supervise, or coordinate other relevant activities of the establishment;

- recommend policies for, and conduct, supervise, or coordinate relationships with federal agencies, with state and local agencies, and with nongovernmental entities with regard to identifying and prosecuting participants in fraud or abuse; and
- report expeditiously to the Attorney General whenever an inspector general has reasonable grounds to believe that there has been a violation of federal criminal law.

Reporting and Notification Requirements. Complementing the obligation to keep the agency head and Congress “fully and currently informed,” IGs are required to make two basic types of reports to the agency head and Congress and to keep them informed through other means.

Semiannual Reports. Inspectors general are required to make semiannual reports, summarizing the OIG’s activities for the previous six months, itemizing waste, fraud, and abuse problems, and identifying proposals for corrective action. The 1988 amendments refined and enhanced several of the semiannual reports’ ingredients. For example, reports must contain certain entries, some of which include:

- a description of significant problems, abuses, and deficiencies relating to programs and operations;
- a description of recommendations for corrective action;
- an identification of each significant recommendation contained in the previous reports on which corrective action has not been completed; and,
- statistical information relating to costs, management of funds, and related matters.

The IG reports go directly to the agency head, who must transmit them unaltered to appropriate congressional committees within 30 days. After another 60 days, such reports are made available to the public. The agency head is authorized to append comments and specific data and information to the IG reports; this additional information includes statistical tables showing audit reports and dollar value of recommendations of disallowed costs and projected savings of recommendations for funds which could be put to a better use.

This periodic reporting requirement is affected by the Reports Consolidation Act (RCA) of 2000 (P.L. 106-531), approved at the end of the 106th Congress. The enactment encourages the consolidation of financial and performance management reports within departments and agencies into a single annual report, in order to enhance coordination and efficiency within them; improve the quality of relevant information; and provide it in a more meaningful and useful format for Congress, the President, and the public. As part of this overall plan, RCA provides that the consolidated annual report include a statement from the agency’s inspector general; it is to describe the agency’s most serious management and performance challenges

— the so-called “top 10” challenges that IGs have been identifying over the previous three years — and briefly assess the agency’s progress in addressing them. The IG’s statement must be submitted to the agency head at least 30 days before it is due; he or she may comment upon it but not change it.

Seven-Day Letter Reports. The Inspector General Act also requires the IG to report immediately to the agency head whenever the inspector general becomes aware of “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations.” Such communications must be transmitted — unaltered but allowing for comments the head deems appropriate — by the agency head to the appropriate congressional committees within seven days.

The Intelligence Community Whistleblower Protection Act, as amended, reinforces such notifications.⁸³ It covers all employees in the intelligence community who want to bring an “urgent concern” based on classified information to the attention of Congress. The process to accomplish this is elaborate and complex — with the inspector general playing a key role in reviewing and transmitting the information to the House and Senate Select Committees on Intelligence, the exclusive recipients — to protect the material from unauthorized disclosure while recognizing the right of Congress (and the agency head) to be notified of such urgent concerns.

Other Notification Provisions. Additionally, the act requires an inspector general to keep the agency head and Congress “fully and currently informed by means of the reports [described above] and otherwise.” This concept of keeping the head and Congress informed “otherwise” includes a variety of mechanisms: testifying at congressional hearings, meeting with lawmakers and staff, and responding to requests for information or reports from Congress or its committees.

Authority. In order to carry out the purposes of the law, Congress has granted the inspectors general broad authority. Section 6 of the codified legislation authorizes the IGs, among other things:

- to conduct audits and investigations and make reports relating to the administration of programs and operations;
- to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials which relate to programs and operations with respect to which the IG has responsibilities under the enactment;
- to request assistance from other federal, state, and local government agencies;

⁸³ Codified at 5 U.S.C. Appendix 8H for all agencies directly under the Inspector General Act of 1978 and at 50 U.S.C. § 403q(d)(5) for the CIA.

- to issue subpoenas for the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary to perform the IG's functions;⁸⁴
- to administer to or take from any person an oath, affirmation, or affidavit;
- to have direct and prompt access to the agency head;
- to select, appoint, and employ officers and employees in order to carry out the functions, powers, and duties of the office of the inspector general;
- to obtain the services of experts and consultants on a temporary or intermittent basis, as authorized by 5 U.S.C. § 3109; and
- to enter into contracts and other arrangements for audits, studies, and other services with public agencies as well as private persons, and to make such payments as may be necessary to carry out the law.

The scope of the IGs' investigative authority is seen further in the range of matters the IG may investigate stemming from an employee complaint or disclosure of information. The inspector general is authorized to receive and investigate complaints or information from an employee concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety. In such instances, the inspector general shall not disclose the identity of the employee without the employee's consent, unless the IG determines that such disclosure is unavoidable during the course of the investigation. The law also prohibits any reprisals against employees who properly make complaints or disclose information to the IG.

Inspectors general in the federal establishments now have independent law enforcement authority in law (P.L. 107-296). Previously, the criminal investigators in these OIGs had acquired such powers in several different ways: through existing offices that have been transferred to the OIG; through statutory grants affecting specific agencies and jurisdictions; and through special deputation by the U.S. Marshals Service in the Department of Justice. These grants and the attendant processes, however, were seen as cumbersome and time-consuming as well as being limited in scope and duration; the result was an unequal set of powers among OIGs.

Notwithstanding these broad powers, inspectors general are not authorized to take corrective action or institute changes themselves. Indeed, the 1978 act specifically prohibits the transfer "of program operating responsibilities" to an inspector general.

⁸⁴ This section does not permit the IG to use the subpoena power to obtain documents and information from other federal agencies (5 U.S.C. App. 3, § 6).

Discussion

Statutory inspectors general have been granted a substantial amount of independence, authority, and resources to combat waste, fraud, and abuse in federal programs and operations. The IGs' broad mandate allows them flexibility for the responsibilities they emphasize and the roles they adopt. Their activities can focus on investigations or audits, and increasingly inspections (or program evaluation), depending upon their job orientation, their expertise and experience, the types of programs and operations within the agency, and the problems they perceive. Their roles, moreover, can cross a wide spectrum of possibilities. These can range from a proactive, preventive role, in which the IG functions as an "insider," working closely with management to upgrade agency operations, to an ad hoc reactive, detection role, in which the IG functions as an "outsider," investigating and uncovering illegalities and other misconduct.

Inquiries and concerns have existed about the IGs and their operations: whether certain individual offices and particular IGs are effective, and how this effectiveness is measured and compared. Calls for additional statutory authority — such as testimonial subpoena power — and other enhancements have also been expressed. Proposals relating to the IG community include prescribing a term of office (e.g., seven or 10 years) for IGs in designated federal entities, to help reduce their high turnover rate; changing IG budget submission procedures; making the PCIE and ECIE statutory or combining the two; extending offices to certain agencies which lack one now; transforming some posts in which the IG is appointed by the agency head to one appointed by the President (with Senate advice and consent); placing offices in several designated federal entities under one inspector general or placing one or more of the designated federal entities under the jurisdiction of an IG in a federal establishment; and merging the two statutory offices in the Treasury Department (the Treasury Inspector General for Tax Administration, who covers the Internal Revenue Service, and the Treasury IG who handles the remainder of the department).⁸⁵

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⁸⁵ H.R. 3457, 108th Congress, for instance, would set a term of office for the IGs; allow their removal "for cause", provide for the submission of the IG budget requested amount to OMB and Congress, for comparative purposes; set up a combined Council of the Inspector Generals on Integrity and Efficiency; and provide for personnel flexibilities in office of the inspector general (OIG) hirings, pay, promotion, and reductions in force.

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B. Government Performance and Results Act of 1993

Statutory Intent and History

Congress's stated intent in enacting the Government Performance and Results Act of 1993 (GPRA or the "Results Act"; P.L. 103-62; 107 Stat. 285),⁸⁶ was to direct agencies to (1) clarify their program responsibilities and become more cost efficient; (2) account for the performance and outcomes of their activities and programs; and (3) improve management. The legislation reflected Congress's desire to reduce budget deficits and improve congressional decision making by using information about whether statutory objectives are achieved, and about the effectiveness and efficiency of federal programs and spending. The law requires agencies to move from defining budgets in terms of inputs and program outputs, to focus on outcomes and results.⁸⁷ Agencies are required to set goals, generate information and reports needed to measure program performance, and move toward performance budgeting. The National Performance Review, state government experiences with performance budgeting, and the "total quality management" (TQM) movement contributed to congressional interest in performance management and budgeting.

The "Results Act" was one of several major pieces of legislation enacted in the 1990s that were intended to improve management and accountability in federal agencies. The others, detailed elsewhere in this compendium, included the Chief Financial Officers Act of 1990 (104 Stat. 2838) that provided for the establishment of chief financial officers (CFOs) in the 24 largest federal departments and agencies, which together control about 98% of the government's gross budget authority. The Government Management Reform Act of 1994 (110 Stat. 3410) required all CFO agencies to prepare and have audited financial statements for their operations beginning with FY1996. The Information Technology Management Reform Act of 1996 (110 Stat. 679, later renamed the Clinger-Cohen Act of 1996, 110 Stat. 3009-393) requires agencies to establish performance measures to evaluate how their information technology activities support agency program efforts.

Major Provisions

GPRA directs agencies with budgets over \$20 million⁸⁸ to develop, in consultation with Congress and other stakeholders, long-term goals and six-year strategic plans to be revised every three years; to set annual performance goals and develop annual performance plans based on the strategic goals; and to report annually on actual performance compared to the targets. Federal agencies started to submit

⁸⁶ Codified at 5 U.S.C. prec. § 301, § 306; 31 U.S.C. § 1101 & nt, § 1105, §§ 1115-1119, prec. § 9701, §§ 9703-9704; 39 U.S.C. prec. § 2001, §§ 2801-2805.

⁸⁷ The statute defines *output measure* as "the tabulation, calculation, or recording of activity or effort and can be expressed in a quantitative or qualitative manner." *Outcome measure* means "assessment of the results of a program activity compared to its intended purpose" (Sec. 4(f)).

⁸⁸ Except for the Central Intelligence Agency, General Accounting Office, Panama Canal Commission, and the U.S. Postal Service (which is governed by separate, but similar, provisions of the same law).

annual performance plans to Congress beginning with the FY1999 budget cycle. The Office of Management and Budget (OMB) submitted the first annual government-wide performance plan with the President's FY1999 budget. The performance report cycle began in 2000 with reports covering FY1999. Quantitative measures are required except when OMB approves non-quantitative alternatives (as outlined in the statute) for programs that cannot be expressed "in an objective, quantifiable, and measurable form"

Anticipating bureaucratic obstacles and the need to alter traditional procedures, budget, and reporting systems, Congress recognized that successful implementation of GPRA would require major changes in agencies' cultures and procedures. Thus, Congress phased in GPRA over a seven-year period and authorized pilot projects. Congress attempted to avoid top-down OMB control, and allowed each agency to develop a performance measurement process that conforms to its unique functions. Only federal employees may prepare strategic plans, performance plans, and reports, since these activities are "inherently governmental functions." In addition, guidance issued by OMB admonishes agencies to keep costs down and not increase paperwork.

In statutorily required reports that used the results of the pilot projects, OMB did not recommend changes to the law, and GAO reported that agency implementation varied in quality, utility, and responsiveness, but that improvements could be made.⁸⁹ In a letter to Congress, January 18, 2001, reporting as mandated by P.L. 103-62, OMB declined to recommend to Congress that performance budgeting be required statutorily.⁹⁰

Major changes to GPRA have been accomplished both by statute and by administrative directive. The Reports Consolidation Act of 2000⁹¹ authorized agencies to combine annual performance reports with financial reports required under the CFO Act. The following year OMB made the consolidation mandatory and set forth a schedule of accelerated deadlines.⁹² The performance and accountability reports covering FY2003 were due by January 30, 2004, and beginning with FY2004, the consolidated reports are due by November 15, 2004. The Federal Financial Assistance Management Improvement Act of 1999⁹³ requires federal agencies and non-federal entities that are recipients of federal financial assistance to set annual goals and to measure compliance relating to efficiency and coordination, delivery of

⁸⁹ U.S. Office of Management and Budget, *The Government Performance and Results Act, Report to the President and the Congress*, May 1997; and U.S. General Accounting Office, *The Government Performance and Results Act, 1997 Government-wide Implementation Will Be Uneven*, GGD-97-109, June 1997.

⁹⁰ U.S. Office of Management and Budget, Report to the Hon. J. Dennis Hastert, from Jacob J. Lew, Jan. 18, 2001, and CRS Report RL32164, *Performance Management and Budgeting in the Federal Government: Brief History and Recent Developments*, by Virginia A. McMurtry.

⁹¹ P.L. 106-531, 114 Stat. 2537.

⁹² U.S. Office of Management and Budget, *Form and Content of Agency Financial Statements*, Bulletin No. 01-09, Sept. 25, 2001.

⁹³ P.L. 106-107, 113 Stat. 1486.

services, and simplification of processing as part of the agency's compliance with GPRA. Most recently, GPRA was amended by the Homeland Security Act of 2002.⁹⁴ Agencies are required to augment descriptions in their annual performance plans regarding how they will achieve their performance goals and objectives⁹⁵ by also describing the "strategies" and "training" that are required to meet those goals and objectives. In addition, the agency chief human capital officers (CHCOs) established by the Homeland Security Act are required to prepare this portion of agency annual performance plans.⁹⁶ The amendment to GPRA also requires agencies to review, in their annual program performance reports, their performance relative to their strategic human capital management.⁹⁷

Significant changes relating to GPRA have also occurred through the annual revisions to OMB Circular No. A-11, "The Preparation, Submission, and Execution of the Budget."⁹⁸ In 1995 OMB for the first time issued Part 2, "Preparation and Submission of Strategic Plans," to OMB Circular No. A-11. By 1999, Part 2 covered "Preparation and Submission of Strategic Plans, Annual Performance Plans, and Annual Program Performance Reports." Among the changes made in June 2002 (now found in A-11, Part 6) were requirements that agency annual performance plans include performance goals used in assessments of program effectiveness, that agencies restructure their budget accounts and substitute outputs and outcomes for the current lists of program activities in program and financing schedules, and that agencies integrate performance and budget in performance plans. The revision of A-11 in July 2003 requires agencies to prepare performance budgets for FY2005 and to incorporate their GPRA performance plans into their budget requests.

Discussion

A number of congressional hearings and reports overseeing implementation of the law have been produced since 1993.⁹⁹ For instance, a committee report on FY1999 performance plans concluded that the plans were "disappointing." It noted that the strategic plans did not lay a good foundation for performance plans; that agencies did not deal with major management problems, lacked reliable data to verify and validate performance, and often did not give results-oriented performance measures; and that many performance measures were not linked to day-to-day activities. The report found that a "culture change" was required to ensure

⁹⁴ As provided by the Chief Human Capital Officers Act of 2002, enacted as Title XIII of the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2289).

⁹⁵ As required by 31 U.S.C. § 1115(a)(3).

⁹⁶ See the discussion of Title 5 U.S.C. Chapter 14, elsewhere in this compendium, for more on the establishment and duties of agency CHCOs.

⁹⁷ 31 U.S.C. § 1116(d)(5).

⁹⁸ A current version of Circular No. A-11 is available electronically at [<http://www.whitehouse.gov/omb/circulars/index.html>], visited Jan. 22, 2004.

⁹⁹ CRS Report RS20257, *Government Performance and Results Act: Brief History and Implementation Activities*, by Genevieve J. Knezo.

implementation.¹⁰⁰ A report by former Chairman Thompson of the Senate Governmental Affairs Committee critiqued FY1999 performance reports and observed that most do not “inform Congress and the public about what agencies are doing and how well they are doing it.”¹⁰¹

GAO has published assessments of individual agency GPRA performance plans and reports and has summarized its assessments in a variety of reports and testimony.¹⁰² The House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations held a hearing on “The Results Act: Has It Met Congressional Expectations?” (June 19, 2001). Compliance with GPRA was identified as a major management challenge in *Government at the Brink, Urgent Federal Government Management Problems Facing the Bush Administration*, released by Senator Fred Thompson.¹⁰³

To mark the 10-year anniversary of enactment of the law, hearings were held by the Subcommittee on Government Efficiency and Financial Management of the House Committee on Government Reform in April 2003,¹⁰⁴ and by the full House Committee on Government Reform in September 2003.¹⁰⁵ Many of the themes enunciated in the earlier reports have continued to resonate throughout the 10 years since enactment. For instance, reporting on GPRA in the FY2004 budget request, OMB said:

¹⁰⁰ Rep. Dick Armey, Sen. Larry Craig, Rep. Dan Burton, Rep. Bob Livingston, and Rep. John Kasich, *The Results Act: It's the Law; the November 1997 Report*. (Document available from CRS upon request.)

¹⁰¹ U.S. Congress, Senate Committee on Governmental Affairs, *Management Challenges Facing the New Administration*, committee print, report of Senator Fred Thompson, Chairman, 106th Cong., 2nd sess., Oct. 2000, S.Prt. 106-62 (Washington: GPO, 2000).

¹⁰² For individual plans, see “Reports on the Government Performance and Results Act,” available at [<http://www.gao.gov/>], visited Jan. 22, 2004. See also U.S. General Accounting Office, *Managing for Results: Using GPRA to Help Congressional Decisionmaking and Strengthen Oversight*, T-GGD-00-95, Mar. 22, 2000; and David Walkier, statement of the Comptroller General of the United States, “Results-oriented Government; Using GPRA to Address 21st Century Challenges,” in hearing on *What Happened to GPRA? A Retrospective Look at Government Performance and Results*, Sept. 18, 2003, available at: [<http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=408>], visited Dec. 18, 2003.

¹⁰³ Sen. Fred Thompson, Committee on Governmental Affairs, *Government at the Brink*, 2 vol. (Washington: June 2001), available at [http://www.senate.gov/~gov_affairs/], visited Jan. 22, 2004, from the “Committee Documents” menu, under “Reports.” See also Sen. Fred Thompson, “Thompson Unveils Agency Performance Report Grades,” press release, Oct. 30, 2000. (Document available from CRS upon request.)

¹⁰⁴ U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency and Financial Management, *Performance, Results, and Budget Decisions*, 108th Cong., 1st sess., Apr. 1, 2003, p.73.

¹⁰⁵ U.S. Congress, House Committee on Government Reform, *What Happened to GPRA? A Retrospective Look at Government Performance and Results*, available at: [<http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=408>], visited Dec. 18, 2003.

Unfortunately, the implementation of this law has fallen far short of its authors' hopes. Agency plans are plagued by performance measures that are meaningless, vague, too numerous, and often compiled by people who have no direct connection with budget decisions. Today, agencies produce over 13,000 pages of performance plans every year that are largely ignored in the budget process.¹⁰⁶

There is also criticism that Congress does not use performance and results information in authorizing programs or appropriating funding for them.¹⁰⁷ A January 2002 GAO report, *Managing for Results: Agency Progress in Linking Performance Plans with Budgets and Financial Statements*, said that three-fourths of federal agencies were connecting performance planning, budgeting and financial reporting at aggregated goal levels, but that more links were required at specific program levels to assist in internal management and congressional decision making.

President George W. Bush's report, *The President's Management Agenda* (August 2001), stressed results-oriented management and included budget and performance integration as one of five government-wide initiatives.¹⁰⁸ Performance was an important theme in the FY2003 budget request when the Administration said it used performance analyses to make funding decisions for over 100 federal programs across all agencies. This represented the first time a President's budget submission formally attempted to link budget requests with program performance.¹⁰⁹

The Bush Administration has developed a formal program assessment rating tool (PART) that agencies must use to evaluate program performance. This is intended to "...inform and improve agency GPRA plans and reports, and establish a meaningful, systematic link between GPRA and the budget process."¹¹⁰ Programs are rated by agency managers and OMB staff according to questionnaires developed by OMB. Circular No. A-11 now requires that agencies' performance budgets include information from the PART assessments. The President's FY2004 budget included a separate volume, *Performance and Management Assessments*, which arrayed PART evaluations for 234 programs. Other parts of the budget contained information on "Rating the Performance of Federal Programs" and "Budget and Performance Integration." OMB's PART instructions for FY2005 subject an additional 20% of all programs to PART evaluations, with 100% of federal programs to be evaluated this way by FY2008. Critics of PART argue that the "subjectiveness" used in

¹⁰⁶ U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2004*, p. 49.

¹⁰⁷ This topic was discussed in statements by witnesses from OMB and GAO, and by the committee chairman in U.S. Congress, *What Happened to GPRA? A Retrospective Look at Government Performance and Results*.

¹⁰⁸ For an overview of the President's Management Agenda, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry.

¹⁰⁹ "Rigorous OMB Performance Measures Will Be Used to Frame Agency Budget Proposals for FY2004," *Washington Fax*, Jan. 23, 2002; see the chapter on "Governing with Accountability," in U.S. Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2003*.

¹¹⁰ See OMB Memorandum M-02-10, July 16, 2002.

determining performance measures may lead to poor budget decision making practices.¹¹¹

Some agencies have not yet adequately defined their goals, program objectives, expected outcomes, and results, and have not developed appropriate measures for them. It is difficult to develop quantitative or alternative measures for some program areas, for example, programs designed to support basic research or certain diffuse policy objectives. Concerns have been stated about the costs and benefits of developing new results-oriented performance measurement systems, about the lack of interagency coordination to use similar measures for similar programs, and about the need to link “Results Act” implementation to the everyday work of program managers. Some critics recommend that Congress set clear performance goals in authorizing legislation,¹¹² set clear performance standards in appropriations legislation, and use PART to grade programs and help with funding decisions.

Other issues relate to the plausibility of achieving the intent of the statute, and to its fundamental assumptions and purposes. Some say that GPRA is a wasteful paperwork exercise since, typically, executive and legislative decisions about funding priorities and program continuation are based more on political debate and objectives and less on the kind of performance data that are intended to be generated from the GPRA mandates. Others believe performance management and budgeting are feasible, and assert that accountability and congressional control over the budget will increase as Congress uses objective, results-oriented information to oversee agencies and develop budget priorities.

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¹¹¹ S. Haley, “OMB Performance Pressures May Divert Agencies from Important Priorities, House Science Committee Minority Asserts,” *Washington Fax*, Mar. 7, 2003.

¹¹² Philip Joyce, *Linking Performance and Budgeting: Opportunities in the Federal Budget Process*, IBM Center for The Business of Government, Oct. 2003, available at [http://www.businessofgovernment.org/pdfs/Joyce_Report.pdf], visited Dec. 18, 2003.

C. Clinger-Cohen Act of 1996

Statutory Intent and History

The Information Technology Management Reform Act (ITMRA; 110 Stat. 679;¹¹³ 40 U.S.C. § 759) was incorporated as an amendment into the National Defense Authorization Act for Fiscal Year 1996 (110 Stat. 186). In October 1996, the name of this act was formally changed to the Clinger-Cohen Act (110 Stat. 3009; 31 U.S.C. § 3512) in recognition of its two principal sponsors. The law provides that each federal agency buy the best and most cost effective information technology available. Under the law, the General Services Administration's (GSA's) role as the central agency for information technology acquisition policy is repealed. Each federal agency is given responsibility for information technology acquisition and management with a Chief Information Officer (CIO) to help achieve this goal. Financial accounting and management responsibilities also are given to each federal agency. The purpose of the law is to streamline and improve information technology procurement policies at federal agencies, as well as give each federal agency the flexibility to make information technology purchases relevant to its mission.

The Clinger-Cohen Act replaced the Automatic Data Processing Act (79 Stat. 1127), the Brooks Act.¹¹⁴ The Brooks Act, passed in 1965, was intended to address problems of “[p]assive, partial, or informal types of leadership” in the purchase, lease, maintenance, operation, and utilization of automatic data processing (ADP) by federal agencies. At that time ADP technology and its applications were still relatively new although their use was becoming more widespread; however, federal agencies were reporting that they were having greater difficulty complying with Bureau of the Budget regulations for annual agency-wide budget reviews.¹¹⁵ The Brooks Act centralized and coordinated this process by giving the General Services Administration “operational responsibility” for ADP management, utilization and acquisition through a “revolving fund.” (79 Stat. 1126).

In the years following its passage, however, advances in information technology and applications created problems for agencies operating under the Brooks Act. Policymakers, in turn, sought to redress problems that had arisen from a centralized federal acquisition, procurement, and financial accounting system. Increasingly, many viewed the Brooks Act as causing procurement delays, imposing standardized technology and application solutions, and mismatching technology solutions with agency missions. The Information Technology Management Reform Act (S. 946), introduced by Senator William S. Cohen, was considered by policymakers during the 104th Congress. S. 946 was intended to provide the executive branch with the flexibility to acquire technologies and services incrementally, enter into modular contracts with vendors rather than more costly longer-term contracts, and obtain

¹¹³ To be codified at 40 U.S.C. § 759 nt, § 1401 & nt, §§ 1411-1413, §§ 1421-1428, §§ 1441-1442, §§ 1451-1452, § 1461, §§ 1471-1475, §§ 1491-1492, §§ 1501-1503; 41 U.S.C. § 434.

¹¹⁴ Named after its principal sponsor, former Rep. Jack Brooks.

¹¹⁵ The Bureau of the Budget was the predecessor agency to the Office of Management and Budget (OMB), before OMB was established via Reorganization Plan No. 2 in 1970.

information technologies and services that fit agency needs. A companion bill, identical to the Senate legislation, was introduced by Representative William Clinger (H.R. 830) in the House of Representatives. H.R. 830 was passed by the House of Representatives on February 22, 1995. After H.R. 830 was referred to the Senate, S.946 was substituted for the House legislation.

Many congressional policymakers sought to implement information technology acquisition and procurement management reform during the 104th Congress. Advocates saw an opportunity for implementing the reforms in S. 946 by incorporating the bill into the National Defense Authorization Act for Fiscal Year 1996 (S. 1124), as Division E of the legislation. Congressional policymakers had been interested in reforming and streamlining all Department Defense (DOD) acquisition and procurement processes. By incorporating S. 946 into the FY1996 DOD authorization bill, policymakers brought this reform to all federal agency information technology acquisition and procurement management. The final version of S. 1124 passed the House of Representatives on January 24, 1996, and the Senate on January 26, 1996. It was approved by President Clinton on February 10, 1996. (110 Stat. 679).

Major Provisions

The Clinger-Cohen Act contains extensive procedural, technical, and policy revisions of federal information technology acquisition and procurement management. These provisions can be summarized as (1) repeal of GSA's primary role in setting policy and regulations for federal information technology acquisition, while giving most of this responsibility to individual federal agencies; (2) creation of Chief Information Officers (CIOs) in federal agencies to provide advice to heads of agencies on policies to develop, maintain and facilitate information systems as well as help evaluate, assess, and report on these policies; (3) creation of a simplified, clear, and understandable process of information technology acquisition by federal agencies; and (4) initiation of two specific pilot programs which authorize federal agencies to enter into competitive contracts with the private sector.

The provisions creating the CIOs and establishing the pilot programs have received much attention. The creation of CIOs in federal agencies was based on a perceived need to decentralize federal procurement, application, and evaluation of information technologies, benefit overall government performance, and bring expertise to the federal agencies. The two pilot programs are intended to reward cost savings and performance. The first type of program is the Share-in-Savings pilot program. This program provides acquisition and procurement incentives to the private sector, in which a federal agency can pay private sector contractors an amount equal to a portion of savings (the share-in-savings) achieved by the government. The second pilot program was the Solutions-Based Contracting pilot program. Under this program, executive branch acquisition of information technology must include criteria that incorporate objectives defined by the federal government as well as a streamlined contractor process. The private sector is allowed to provide solutions to effectively achieve agency objectives. The law also requires that simple and clear selection factors, communication, proposals, evaluation, and system implementation be used by the executive branch.

Discussion

Early oversight of the implementation of the Clinger-Cohen Act immediately following its passage and the departure of its sponsors from Congress was relatively limited.¹¹⁶ However, as Congress has become increasingly interested in Internet, information technology, and e-government issues, some provisions of the Clinger-Cohen Act have received additional attention in the 107th and 108th Congresses.

One concern has been the recruitment and retention of CIOs. A shortage of qualified CIOs, and regular turnover of personnel, compounded by salary and compensation disparities between government and private sector opportunities, have raised concerns about the government's ability to maintain the momentum and continuity of major e-government and IT initiatives.¹¹⁷ As IT projects have become more integrated into the function of a department or agency, the role of CIOs has evolved as well. CIOs are being called upon not only for their technological expertise, but also to provide strategic leadership in certain areas of policy, budget, and contract oversight.¹¹⁸ The CIO's relationship with top-level department decisionmakers can also be critical to successfully implementing e-government initiatives. This suggests that in selecting a department-level CIO, one needs to consider the strengths and weaknesses of choosing a career employee, who may have a deeper contextual understanding of the mission and functions of an organization, and recruiting a candidate from the private sector, who may bring a wider range of experiences and perspectives to the position.¹¹⁹

Concerns have also been raised about organizational and budgetary obstacles possibly hindering CIO performance. The Clinger-Cohen Act requires that the CIO report directly to the agency head, and have information resource management as a primary function. However, in many cases, these requirements have not been met. Results from GAO studies of government CIOs within the first few years of the enactment of the Clinger-Cohen Act showed that it was not uncommon for CIOs to report to the Deputy Secretary or other agency head subordinates rather than directly to the Secretary. In addition, CIOs frequently wore several hats within their agencies.¹²⁰ Due to the apparent lack of more current studies, it is unclear how this situation has evolved in recent years.

¹¹⁶ Some observers suggest this may have been partly the result of the act's principal sponsors' departure from Congress; in 1997, Senator William Cohen left Congress to become the Secretary of Defense, and Representative William Clinger retired.

¹¹⁷ Diane Frank, "CIOs Find Crowded Agenda Wearing," *Federal Computer Week*, June 30, 2003, p. 8.

¹¹⁸ Cynthia L. Webb, "Providing the Technology Vision," *Washington Post*, Mar. 6, 2003, available at [<http://www.washingtonpost.com/wp-dyn/articles/A47136-2003Mar5.html>], visited Dec. 3, 2003.

¹¹⁹ Sara Michael, "Insider Information," *Federal Computer Week*, Apr. 14, 2003, p. 26.

¹²⁰ U.S. General Accounting Office, *Chief Information Officers: Ensuring Strong Leadership and an Effective Council*, GAO-T-AIMD-98-22, Oct. 27, 1997; *Information Technology: Update on VA Actions to Implement Critical Reforms*, GAO-T-AIMD-00-74, Sept. 21, 2000; and *Chief Information Officers: Implementing Effective CIO Organizations*, GAO-T-AIMD-00-128, Mar. 24, 2000.

The results of the two pilot programs have been mixed. In late 2002, the Solutions-Based Contracting program was repealed by Section 825 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (P.L. 107-314). The reason cited in the conference report (H.Rept. 107-772) was that the legislative authority for the program “has never been used and is not likely to be needed.” Similar concerns have been raised regarding the relative lack of use of the “share-in-savings” pilot program.¹²¹ In a January 2003 report, GAO observed that “there are few documented examples of SIS contracting in the federal government.”¹²² One such example is the Department of Education’s Office of Student Financial Assistance (OFSA), which has entered into a series of “share-in-savings” contracts with Accenture to modernize its computer systems.¹²³ While “share-in-savings” programs are considered by many to be forward-thinking policies with the potential to reduce spending and improve the quality of services, some experts contend that there are a number of obstacles to successfully instituting such programs. These include being able to determine baseline costs and an agency’s willingness to give the contractor more control over the details (so the contractor will feel it has a chance to achieve the cost savings). Some observers have asserted that agencies believe Congress will reduce their appropriations once the cost-savings is verified which, while saving the federal government money, will not provide any direct benefits to them (i.e., a reward). Hence, they believe the agencies have limited incentive to actively pursue such contracts. To help address some of these issues, Section 210 of the E-Government Act, signed into law in December 2002, includes provisions that temporarily allow an expanded use of “share-in-savings” contracts. The provision also provides incentives for agencies, such as the ability to retain a portion of the savings realized from the contract. However, at the time of this writing, implementing guidance from OMB is still forthcoming, and the provision expires in 2005.

While the Clinger-Cohen Act remains in effect and its provisions are still relevant to current agency IT management issues, the passage of the E-Government Act (discussed elsewhere in this compendium) represents a shift in the primary legislative vehicle being used to guide evolving federal information technology management practices and to promote initiatives to make government information and services available online. In doing so, it also represents a continuation of efforts to realize greater efficiencies and reduce redundancies through improved intergovernmental coordination, and by aligning information technology investments. As Congress continues to exercise its oversight role over e-government initiatives, it is anticipated that issues related to the intersection of these laws will also be raised.

¹²¹ Similar concerns were not a significant focus of attention regarding the Solutions-Based Contracting pilot program.

¹²² U.S. General Accounting Office, *Contract Management: Commercial Use of Sharing-in-Savings Contracting*, GAO-03-327, Jan. 2003, p. 3.

¹²³ Diane Frank, “Education Expands Share-in-Savings,” *Federal Computer Week*, May 14, 2001, p. 44; Tanya N. Ballard, “Acquisition Officials Push Share-in-Savings IT Contracting,” *GovExec.com*, Oct. 3, 2003, available at [<http://www.govexec.com/dailyfed/1003/100303t1.htm>], visited Oct. 4, 2003.

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Jeffrey W. Seifert

III. Financial Management, Budget, and Accounting

A. Antideficiency Act

Statutory Intent and History

The so-called Antideficiency Act (33 Stat. 1214, and 34 Stat. 27; 31 U.S.C. §§ 1341-42) actually consists of a series of provisions and revisions incorporated into appropriations laws over the years relating to matters such as prohibited activities, the apportionment system, and budgetary reserves. These provisions, now codified in two locations in Title 31 of the *United States Code*, continue to play a pivotal role in the execution phase of the federal budget process, when the agencies actually spend the funds provided in appropriations laws.

The origins of the Antideficiency Act date back to the 19th century. The initial portion, enacted in 1870 as Section 7 of the General Appropriations Act for Fiscal Year 1871 (16 Stat. 251), provided:

... that it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.

The intent was to prevent expenditures in excess of appropriations. Section 5 of the 1870 law also addressed the issue of congressional controls over budget execution, though not the question of preventing deficiencies. Instead, it provided that unexpended balances of appropriations accounts could only be applied to payment of expenses or contracts incurred during that year.

Major legislative provisions, often referred to as the Antideficiency Acts of 1905 and 1906, sought to strengthen the prohibitions of the 1870 law by expanding its provisions, adding restrictions on voluntary services for the government, and imposing criminal penalties for violations. Most importantly, the laws established a new administrative process for budget execution. This process, which remains in use today, is termed “apportionment” and results in the distribution of the budget authority provided in appropriations law to the agencies in installments, rather than all at once.

In order to provide against disproportionate spending rates by agencies, the 1905 legislation mandated that appropriations be “so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year....” However, the fiscal discipline of this provision was weakened by language allowing apportionments to be “waived or modified in specific cases by the written order of the head of the Executive Department or other Government establishment having control of the expenditure....” (33 Stat. 1257-1258).

This exemption from apportionments by written order provided a broad loophole, widely used by department heads. The 1906 revision sought to tighten the waiver language by stipulating that apportionments could not be waived or modified

“except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment” (34 Stat. 48-49). Moreover, any waiver or modification of apportionment was to be justified in writing and communicated to Congress “in connection with estimates for any additional appropriations required on account thereof.”

In 1933, with Executive Order 6166 issued pursuant to the Economy Act of 1933 (48 Stat. 16), authority for “making, waiving, and modifying apportionments of appropriations” was transferred from agency heads to the Director of the Bureau of the Budget (BOB).¹²⁴ However, BOB had earlier exerted control by administrative means, such as a circular directing each agency to estimate an indispensable level of funding to carry out its activities. Following review by the Bureau and approval by the President, the remainder of the appropriation, or estimated savings, was to be designated a “General Reserve.” So, the apportionment process came to have two objectives: to prevent deficiencies and to effect savings.

The continuing growth and complexity of the federal budget strained the existing system of administrative controls over funds. Eventually, another substantial revision of Antideficiency Act provisions occurred in 1950 (64 Stat. 595), largely based on recommendations in a report to Congress from the Bureau of the Budget and the General Accounting Office (GAO).¹²⁵

The BOB/GAO report suggested that changing conditions during the fiscal year would always require some readjustments, but such changes could be expected to result in surpluses as well as deficiencies. The 1950 amendments incorporated this view and, for the first time, provided a statutory basis for budgetary reserves. The amendments also expanded upon the provisions of earlier regulations by stipulating four justifications for establishing reserves: (1) to provide for contingencies; and to effect savings whenever savings are made possible by or through: (2) changes in requirements; (3) greater efficiency of operations; or (4) other developments subsequent to the date on which such appropriation was made available. The 1950 amendments further spelled out more detailed instructions for the operations of the apportionment process beyond the establishment of reserves, and for subdivision of apportionments at the agency level.

¹²⁴ Dating to the Budget and Accounting Act of 1921, the Bureau of the Budget was originally located within the Department of the Treasury. The law authorized the President to appoint the director and assistant director of the bureau, however, signifying that it was essentially a presidential entity. When the Executive Office of the President was established in 1939, BOB was the first unit designated as a component. In 1970, BOB was reconstituted as the Office of Management and Budget (OMB).

¹²⁵ *Report and Recommendations by the Director of the Bureau of the Budget and the Comptroller General of the United States with Respect to the Antideficiency Act and Related Legislation and Procedures*. Submitted to Senator Styles Bridges, Chairman of Appropriations Committee, June 5, 1947. Typed manuscript. Cited by Louis Fisher in *Presidential Spending Power* (Princeton, NJ: Princeton University Press, 1975), p. 155. The provisions were enacted as a part of the general appropriations act for the fiscal year ending June 30, 1951.

In the mid-1950s, Congress enacted a provision relating to the administration of the apportionment system by the agencies. This 1956 amendment simplified agency systems for subdividing funds by eliminating multiple pockets of funding authority, known as “allowances,” so that administrative controls in the apportionment system would consist solely of allotments (P.L. 84-863, 70 Stat. 782). The following year, provisions relating to the apportionment system were further revised. The effect of the changes was to prohibit the request for apportionments or reapportionments necessitating a deficiency or supplemental estimate unless the agency head determined that such action fell within the exceptions expressly set out in the law (71 Stat. 440).

Major Provisions

Four main types of prohibitions are contained in the Antideficiency Act, as amended: (1) making expenditures in excess of the appropriation; (2) making expenditures in advance of the appropriation; (3) accepting voluntary service for the United States, except in cases of emergency; and (4) making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulation.

The limitations on expending and obligating amounts (31 U.S.C. § 1341) prohibit an officer or employee of the United States government or of the District of Columbia government from:

- making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law; and
- involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law.

The limitations on voluntary services (31 U.S.C. § 1342) prohibit an officer or employee of the United States government or of the District of Columbia government from accepting voluntary services for the United States, or employing personal services in excess of those authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

An entire subchapter (31 U.S.C. §§ 1511-1519) deals with the apportionment system. It contains provisions for definitions and application, for apportionment and establishment of reserves, for officials controlling apportionments, for the administrative division of apportionments, and for authorized apportionments necessitating deficiency or supplemental appropriations. The subchapter further provides for exemptions, prohibited obligations and expenditures, and sanctions entailing adverse personnel actions and criminal penalties. The subchapter does not apply to Congress (the Senate; the House of Representatives; congressional committees; or a Member, officer, employee, or office of either house of Congress, or of the Office of the Architect of the Capitol) (31 U.S.C. § 1511(b)(3)).

The central enforcement provision is found in Section 1517. An officer or employee of an agency subject to apportionment is prohibited from making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulation. Violations are punishable by appropriate administrative discipline, including possible suspension from duty without pay or removal from office (Section 1518), and/or by criminal penalties, including a fine of not more than \$5,000, imprisonment for not more than two years, or both (Section 1519).

Discussion

The framework for the apportionment process, as refined in the 1950 amendments, remains the basis for federal budget execution. However, evolution of the process continues, occasionally being modified by statute or executive order, but more frequently affected as a result of agency regulations, decisions of the Comptroller General, and other legal opinions.

The Impoundment Control Act (Title X of the 1974 Congressional Budget and Impoundment Control Act, 88 Stat. 297) amended the 1950 language regarding budgetary reserves in an effort to tighten control over executive branch discretion. The 1974 legislation served to delete the “other developments” justification contained in the 1950 amendments. Henceforth, reserves were to be established “solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations” (88 Stat. 332). Under the 1974 law, reserves were to be considered as a type of deferral, or temporary postponement of spending, in contrast to a rescission, or permanent cancellation.¹²⁶

The prohibitions in the Antideficiency Act against spending monies in advance or in excess of appropriations sometimes lead to “funding gap” situations — when action on appropriations measures is not completed before the start of the new fiscal year and interim continuing resolutions lapse or are themselves delayed. For many years, agency officials generally maintained operations during periods of expired funding, while attempting to cut or postpone all non-essential obligations. Such action, while in technical violation of the Antideficiency Act prohibition on incurring obligations from Congress, was usually redressed by passing continuing resolutions effective retroactively to the beginning of the fiscal year.

The situation changed in the early 1980s with the issuance of two opinions by Attorney General Benjamin Civiletti concerning implications of the Antideficiency Act in instances of funding gaps.¹²⁷ According to these opinions, when appropriations lapse, federal managers are to act immediately to terminate the agency’s normal operations in an orderly way; however, various exceptions in the

¹²⁶ A restatement of deferral authority was provided in the Balanced Budget and Emergency Deficit Reduction Reaffirmation Act of 1987 (101 Stat. 785-786).

¹²⁷ “Applicability of the Antideficiency Act Upon a Lapse in an Agency’s Appropriations,” 4 *A Op. O.L.C.* 16 (1980); “Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations,” 5 *Op. O.L.C.* 1 (1981).

Antideficiency Act allow some functions to continue. The Attorney General also stated that the Department of Justice would strictly enforce the criminal provisions of the act in cases of future violations.¹²⁸

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¹²⁸ See U.S. General Accounting Office, *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31, Mar. 3, 1981. The 1980 and 1981 Opinions of the Attorney General are included as appendices. The Budget Enforcement Act of 1990 (104 Stat. 1388-573) amended Title 31 to further limit voluntary services allowable under the Antideficiency Act.

B. Budget and Accounting Act of 1921

Statutory Intent and History

The Budget and Accounting Act of 1921 (42 Stat. 20) grew out of Progressive Era views that saw legislatures as inherently corrupt, and sought to place more trust and more authority in executive and administrative institutions. The most important of several studies made on budgeting was that of President Taft's Commission on Economy and Efficiency (1910-1912). The commission's report, however, was virtually silent on the role of the legislature in the executive budget system it recommended, and its proposal languished in Congress. In spite of this, it remained on the national agenda, strongly supported by the Institute for Government Research (later the Brookings Institution), and support for an executive budget was included in presidential platforms by both Republicans and Democrats.¹²⁹

During World War I, the administrative machinery of the federal government was severely taxed, giving new impetus to administrative reform in its aftermath. In 1919, Congress took up the issue of a national budget system, establishing select committees in both the House and Senate to hold hearings and make recommendations. The House Select Committee held 11 days of hearings in September and October 1919. The Senate Committee held four additional days of hearings in December 1919 and January 1920. Legislation embodying these recommendations was passed overwhelmingly in both chambers in 1920, but was vetoed by President Wilson, who questioned the constitutionality of a provision involving his removal power over the proposed office of Comptroller General. After the election of Warren G. Harding to the presidency in 1920, the bill was passed with only minor changes in the removal power provision, and signed into law as the Budget and Accounting Act of 1921.

Characterized as “probably the greatest landmark of our administrative history except for the Constitution itself,”¹³⁰ the Budget and Accounting Act established in law the duty of the President to submit each year a single, consolidated budget proposal for congressional consideration. The act stands as the foundation of the modern presidency because it made the President the administrative, as well as political, head of the executive branch. It meant that the President alone was responsible for making budget requests, so that each department and agency would no longer be able to act independently of presidential direction. The act also established the Bureau of the Budget (predecessor of the current Office of Management and Budget) to provide the President with the resources necessary to produce such a proposal, and the General Accounting Office, to provide Congress with the resources to ensure accountability.

¹²⁹ It was included in the Republican platform in 1916 and 1920, and the Democratic platform in 1920. In 1916 the Democrats had endorsed a return to consolidated control of appropriations in Congress, but not a presidential budget. See Donald Bruce Johnson, ed. *National Party Platforms* (rev. ed.), vol. 1, 1840-1956 (Urbana, IL: University of Illinois Press, 1978).

¹³⁰ Herbert Emmerich, *Federal Organization and Administrative Management* (Tuscaloosa, AL: University of Alabama Press, 1971), p. 40.

Major Provisions

The Budget. Sections 201-206 of Title II of the Budget and Accounting Act establishes the requirements for the President to submit a budget proposal to Congress each year. Section 201 originally required the President to submit his budget on “the first day of each regular session [of Congress].” This requirement has been amended on several occasions (see below). Section 201 also lists requirements for the budget’s contents, including estimates of expenditures “necessary in his judgment for the support of the Government for the ensuing fiscal year,” except that estimates prepared by the legislative branch and the Supreme Court for their own expenditures should be included without revision. Other requirements include estimates of receipts for the ensuing fiscal year; estimates of expenditures and receipts for the fiscal year in progress, and expenditures and receipts of the last completed fiscal year; all essential facts regarding federal debt; and “such other financial statements and data as in his opinion are necessary or desirable.” Sections 202-204 establish other requirements for the budget submission — requiring that the President make recommendations on managing any surplus or deficit (Section 202); providing for the transmittal of necessary supplemental estimates (Section 203); and specifying generally the form that estimates take (Section 204). Section 205 dealt with the submission of the FY1923 budget, the first under the act. Finally, Section 206 prohibits departments and agencies from submitting independent budget requests to Congress, as they had in the past, thus affirming the authority of the President as the head of the executive branch.

There has been no fundamental change in this part of the act, although there have been numerous modifications and additions. For example, the requirement in Section 201 that the President’s budget be submitted “on the first day of each regular session” was amended by the Budget and Accounting Procedures Act of 1950 (64 Stat. 2317) to read “during the first fifteen days of each regular session.” This was subsequently amended to “on or before the first Monday after January 3 of each year (or on or before February 5 in 1986)” by the Balanced Budget and Emergency Deficit Control Act of 1985 (99 Stat. 1037), and finally to “on or after the first Monday in January but not later than the first Monday in February of each year” by the Budget Enforcement Act of 1990 (104 Stat. 1388).

Likewise, the requirements of Section 201 concerning contents of the budget submission have been amended on several occasions, most notably by the Budget and Accounting Procedures Act of 1950, the Legislative Reorganization Act of 1970, the Congressional Budget and Impoundment Control Act of 1974, and the Balanced Budget and Emergency Deficit Control Act of 1985. These are currently codified in Section 1105 of Title 31, U.S.C.¹³¹

The general authority of the President over the preparation and submission of the budget was reiterated and clarified in the Budget and Accounting Procedures Act of 1950.

¹³¹ For a listing of the requirements see U.S. General Accounting Office. *The President’s Budget Submission*, AFMD-90-35, 1990, pp. 13-18 (Appendix II: Budget Information Required by Statute).

Section 201 was amended by Section 221 of the Legislative Reorganization Act of 1970 to require a supplemental summary of the budget for the ensuing fiscal year to be submitted by June 1 of each year. This was further amended by the Congressional Budget Act to read “on or before July 15.”

Section 201 was amended by Section 603 of the Congressional Budget Act of 1974 to require that budget projections be extended from the ensuing fiscal year to “the four fiscal years following the ensuing fiscal year.”

Section 201 was amended by Section 605 of the Congressional Budget Act of 1974 to require the President to submit to Congress by November 11 of each year an estimate of budget outlays and proposed budget authority that would be included in the budget for the following year “if programs and activities of the United States Government were carried on during that year at the same level as the current fiscal year without a change in policy.”

The Bureau of the Budget. Sections 207-217 of the Budget and Accounting Act established the Bureau of the Budget and delineated its powers and duties. Section 201 formally created the Bureau within the Treasury Department, provided for a director and assistant director, and stated that the Bureau, “under such rules and regulations as the President may prescribe, shall prepare for him the Budget, the alternative Budget, and any supplemental or deficiency estimates, and to this end shall have the authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments.” The newly created Bureau of the Budget went beyond these limited duties under the activist vision of its first director, Charles Dawes. In particular, it used the pre-existing apportionment process as a mechanism to extend its control over agency spending levels by means of administrative regulation.¹³² By taking a hand in overseeing the execution of spending actions, as well as in the preparation of budget requests, the Bureau of the Budget exercised management functions from the beginning, and gave the President a strengthened capacity to administer the executive branch.

In 1939, the Bureau was made part of the newly created Executive Office of the President,¹³³ and in 1970 was reconstituted as the Office of Management and Budget.¹³⁴ The Chief Financial Officers Act of 1990 (104 Stat. 2838) initiated additional organizational changes within OMB. In particular, it created a new structure within OMB for federal financial management, headed by a new deputy

¹³² The apportionment process was mandated under the Antideficiency Act of 1905 (P.L. 58-217; 33 Stat. 1257-1258) to prevent deficiencies caused by disproportionate spending rates.

¹³³ U.S. President (Franklin Roosevelt), “Reorganization of the Executive Office of the President, Executive Order 8248, September 8, 1939,” *Public Papers and Addresses of Franklin Roosevelt, 1939 volume, War — and Neutrality*, vol. 8, (New York: Macmillan, 1941), p. 490.

¹³⁴ U.S. President (Nixon), “Prescribing the Duties of The Office of Management and Budget and the Domestic Council in the Executive Office of the President,” Executive Order 11541, 3 C.F.R. 1966-1970 Comp. (Washington: GPO, 1971), p. 939. For an overview of OMB, see CRS Report RS21665, *Office of Management and Budget: A Brief Overview*, by Clinton T. Brass.

director for management to serve as the federal government's chief financial officer. In addition, it included provisions intended to improve financial management practices generally.

The General Accounting Office. The third major provision of the Budget and Accounting Act was the establishment of the General Accounting Office.¹³⁵ The Treasury Act of 1789 established the Treasury Department with a Secretary, comptroller, auditor, treasurer, and register. Among his other duties, the comptroller was responsible for examining the accounts settled by the auditor. As part of the Budget and Accounting Act, Congress sought to establish an office to perform this examination function independent of the Department of the Treasury or the President. Title III abolished the office of comptroller of the Treasury and established the positions of Comptroller General and assistant comptroller general in its place. These new officers would be appointed by the President, with the advice and consent of the Senate, for 15-year terms, and could be removed from office only by joint resolution of Congress. The law transferred from the Treasury not only all powers and duties of the comptroller, but also the auditors, and the Division of Bookkeeping and Warrants, as well as their personnel, offices, and furniture.

In addition to independence, the act also granted substantial authority and responsibility to the Comptroller General. Section 312 provided that he shall investigate "all matters relating to the receipt, disbursement, and application of public funds, and shall make ... recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable." The Comptroller General was further required to make such investigations and reports as ordered by either chamber of Congress or any committee, and to report to Congress on expenditures or contracts made in violation of law, and the adequacy and effectiveness of executive department fiscal practices.

Significant additions were made to the duties and authority of the General Accounting Office by the Legislative Reorganization Act of 1970 (84 Stat. 1140). Section 204 provided that the Comptroller General's responsibilities would include review and analysis of the results of government programs "including the making of cost benefit studies." Section 231 requires the General Accounting Office to provide any necessary assistance to congressional committees. Sections 232, 233, and 234 provide for the dissemination of reports to congressional committees and required notice that reports have been prepared. Section 235 limits the availability of General Accounting Office personnel to congressional committees. Section 236 requires that whenever the General Accounting Office makes a report which contains recommendations to the head of federal agency, the agency must respond to Congress with respect to the recommendations.

¹³⁵ For an overview of GAO, see CRS Report RL30349, *General Accounting Office and Comptroller General: A Brief Overview*, by Frederick M. Kaiser.

Discussion

There has been a continuous stream of interest in reforming the budget process in recent years, but the basic framework established by the Budget and Accounting Act of 1921 has been largely excluded from this deliberation. The role of the President and OMB in preparing budget requests, and the role of GAO in auditing expenditures, have not been seriously questioned, although there have been incremental changes and additions over the years. Rather, it has been in relation to financial management and administration that the act has been part of debates about reform. Notwithstanding the fact that the Chief Financial Officers Act of 1990 created a deputy director for management within OMB, the conflict between management and budgeting responsibilities has given rise to further proposals to divide these duties by creating an entirely new agency.

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James Saturno

C. Budget and Accounting Procedures Act of 1950

Statutory Intent and History

The Budget and Accounting Procedures Act of 1950 (64 Stat. 2317) made significant changes to budget procedures within the executive branch and to government accounting and auditing processes. Presidential authority over budget preparation and presentation was expanded (Part I of Title I), principally to allow for performance-type budgeting, and both agency accounting systems and an integrated system for the government as a whole were reformed (Part II of Title I). These provisions are summarized below. The act also made various conforming amendments and provided for the redistribution of appropriations in cases where reorganization of the executive branch transferred authority between departments or agencies (Titles II and III).

The act's budget provisions amended the Budget and Accounting Act of 1921 (42 Stat. 20) and are consistent with the earlier law's purpose. Some provisions were then subsequently amended or otherwise affected by the Legislative Reorganization Act of 1970 (84 Stat. 1140), the Congressional Budget and Impoundment Control Act of 1974 (88 Stat. 297), and the Balanced Budget and Emergency Deficit Control Act of 1985 (99 Stat. 1037).

The act's accounting and audit provisions were enacted as new legislative authority, the Accounting and Auditing Act of 1950. They began with policy declarations that identified the purposes of government accounting — disclosing results of financial operations, informing managers and budget processes, and improving financial controls — in light of the needs and responsibilities of the executive and legislative branches. General Accounting Office audits were to determine the extent to which accounting and financial reporting fulfilled specified purposes, financial transactions complied with legal requirements, and internal control was adequate. Emphasis was placed on the importance of making continual improvements.

The accounting and auditing provisions have been amended numerous times. The most important changes required agencies to maintain accounts on an accrual basis (70 Stat. 782), establish internal accounting and administrative controls (96 Stat. 2467), and perform or undertake audits of the financial statements as required by the Chief Financial Officers Act (104 Stat. 2838). The Federal Financial Management Improvement Act of 1996 (enacted as part of the Omnibus Consolidated Appropriations for Fiscal Year 1997; P.L. 104-208; 110 Stat. 3009-389) strengthened reporting and compliance requirements for financial management systems.

In 1982, both the budget and the accounting and auditing provisions were recodified in Title 31 of the *United States Code* (96 Stat. 877).

Major Provisions

Part I of Title I of the Budget and Accounting Procedures Act expanded the President's authority over budget preparation and presentation. It provided that the

budget must conform to requirements and contain estimates in the form and detail that the President determines. When there is a basic change in budget format, the President is to transmit to Congress explanatory notes and tables needed to show where items included in prior budgets are contained in the current budget. The Bureau of the Budget (since 1970, the Office of Management and Budget (OMB)) prepares the budget according to these rules and regulations. Department heads prepare budget requests and submit them to the President. In addition, the President develops programs and regulations for improving statistical information in the executive branch and improved plans for the administration of executive branch agencies. For the Department of Homeland Security, separate detailed analyses by budget function, agency, and initiative area are required beginning with the FY2005 budget submission (Homeland Security Act of 2002, P.L. 107-296, Section 889).

Part II of Title I, the Accounting and Auditing Act, reformed government accounting and auditing processes. Its provisions apply generally to departments and independent establishments in the executive branch, with some exceptions.

The Accounting and Auditing Act specified new responsibilities for the Comptroller General, the Secretary of the Treasury, and agency heads. The Comptroller General prescribes accounting principles, standards, and related requirements for each executive agency. They must enable agencies to meet their responsibilities under the act while providing for (1) integration of agency and Treasury Department accounting processes; (2) full disclosure of the results of agency operations; and (3) financial information and controls needed by Congress and the President. In addition, the Comptroller General helps agencies develop their accounting systems. He approves systems that are adequate and conform to his prescriptions, while continuing to review them from time to time.

The Secretary of the Treasury develops coordinated financial accounting and reporting systems that enable integration of accounting results within the Treasury Department and consolidation with the accounting results of other executive agencies. To accomplish these ends, the Secretary is authorized to establish facilities, reorganize accounting functions, and install, revise, or eliminate accounting procedures and reporting. In addition, the Secretary prepares reports on the results of financial operations of the government. The reports include financial data required by OMB for budget preparation and other purposes.

Together, the Comptroller General and the Secretary of the Treasury may issue regulations waiving requirements for warrants pertaining to public moneys and trust funds and for the requisition and advancement of funds. Joint regulations may also allow authorized disbursing agents to pay vouchers by means of checks issued against the general account of the Treasury.

The head of each executive agency establishes and maintains accounting and internal control systems designed to provide (1) full disclosure of financial results of the agency's activities; (2) adequate financial information for agency management; (3) effective control over and accountability for all funds, property, and other assets; (4) reliable accounting results to serve as the basis for agency budget requests and execution; and (5) integration with the Department of the Treasury's central accounting and reporting system.

In addition, the Accounting and Auditing Act states that the General Accounting Office (except as specifically provided by law) shall audit financial transactions of each executive, legislative, and judicial agency in accordance with principles and procedures prescribed by the Comptroller General. In determining these auditing procedures, the Comptroller General must give due regard to generally accepted principles of auditing, including consideration of the effectiveness of agencies' accounting organizations and systems, internal audit and control, and related administrative practices.

Discussion

The Budget and Accounting Procedures Act of 1950 formally increased centralization of the budget process in the executive branch. It strengthened the authority of the President to determine the methods for preparing budget estimates and the way the budget would be presented to Congress. The principal goal was to allow for the development of performance-type budgets, as had been recommended by the Commission on Organization of the Executive Branch of the Government (the first Hoover Commission). However, the legislation probably had greater effect in furthering the development of budgets that are vehicles for expressing policy priorities and influencing the economy.

The Accounting and Auditing Act also increased centralization in the executive branch by directing that the results of agency accounting systems be integrated with a consolidated system within the Department of the Treasury. Perhaps more important, the act also required agency accounting systems to use standards that served broader ends than simply tracking expenditures, such as providing better information to Congress and the President. A further step was taken in this direction in 1956 with the requirement that agencies maintain their accounts on an accrual basis.

The most important legacy of the act may have been congressional encouragement that the government's top three financial managers — the Comptroller General, the Secretary of the Treasury, and the Director of OMB — work together in continually improving government accounting systems. Cooperative steps toward accounting reform eventually led to enactment of the Federal Managers' Financial Integrity Act of 1982, the Chief Financial Officers (CFO) Act, and the Federal Financial Management Improvement Act, all of which are summarized elsewhere in this compendium.

In 1990, the Comptroller General, the Secretary of the Treasury, and the Director of OMB jointly established the Federal Accounting Standards Advisory Board (FASAB) to recommend comprehensive accounting principles specifically for the federal government. A new memorandum of understanding was signed in May, 2003. By the end of 2003, the FASAB had issued 4 financial accounting concepts (concerning the objectives of federal financial reporting, entity and display issues, management discussion and analysis, and the intended audience and qualitative characteristics of the government's consolidated financial report) and 25 financial accounting standards (concerning the treatment of particular assets and liabilities, inventory, direct loans, etc.). In October 1999, the American Institute of Certified Public Accountants (AICPA) recognized the FASAB as the designated entity for

establishing generally accepted accounting principles for the federal government. The AICPA action raised the status of FASAB statements and other pronouncements, though it has been criticized by some who question whether the FASAB is sufficiently independent of the federal agencies for which it is developing standards.

Improvements in federal accounting have occurred, but more work remains. GAO found that material weaknesses related to financial systems, fundamental record-keeping and financial reporting, and incomplete documentation have prevented it from expressing an opinion on the government's consolidated financial statements.¹³⁶ While 21 of the 24 CFO Act agencies received unqualified opinions for FY2002, GAO noted that most obtained clean audits only after extraordinary, labor-intensive efforts. Major problems included the government's inability to properly account for and report property, plant, and equipment; reasonably estimate and support amounts reported for environmental and other liabilities; support major portions of determinations for the net cost of government operations; fully account for and reconcile intragovernmental activities and balances; and properly prepare all aspects of financial statements. The most notable of these problems were in the Department of Defense. GAO also found material weaknesses in internal control, including problems relating to loans and receivables, improper payments, tax collection, and information security management.

Improved federal accounting systems likely result in savings from better cash management, more effective control of property, and a wider recognition of future obligations. However, improvements are not without cost. Continual progress in the future will depend upon adequate funding and managerial initiative, both of which could be diverted to other priorities. Greater use of expense budgeting, instead of (or in addition to) the obligation accounting now used in the appropriations process, might also help, though this would change long-standing practice.¹³⁷ The extent to which financial accounting reforms should be continued is an issue for Congress to consider.

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Bob Lyke

¹³⁸ PCIE is the President's Council on Integrity and Efficiency.

D. Balanced Budget and Emergency Deficit Control Act

Statutory Intent and History

After a decade of experience with the Congressional Budget Act of 1974, Congress and the President faced persistent high deficits and increasing budgetary deadlock. In 1985, legislation aimed at bringing the federal budget into balance by the early 1990s was enacted. That legislation, the Balanced Budget and Emergency Deficit Control Act of 1985, was included as Title II in a measure raising the public debt limit.¹³⁹ President Reagan signed the measure into law on December 12 as P.L. 99-177 (2 U.S.C. § 901; 99 Stat. 1037-1101). It is commonly referred to as the 1985 Balanced Budget Act or as the Gramm-Rudman-Hollings (GRH) Act, after its three primary sponsors in the Senate — Senators Phil Gramm, Warren Rudman, and Ernest Hollings.

The 1985 Balanced Budget Act was the first of several major laws intended to ensure that the deficit is reduced and spending is controlled, even if Congress and the President fail to achieve these goals through the regular legislative process (see the entry on the Budget Enforcement Acts of 1990 and 1997, elsewhere in this compendium). The act established new procedures involving deficit targets and sequestration to further these purposes. Under sequestration, across-the-board spending cuts would be made automatically early in the fiscal year if needed to keep the estimated deficit within allowed limits. Because implementation of a required sequester was automatic under these procedures, and perceived to be drastic action, many regarded it as providing a strong incentive for Congress and the President to reach agreement through the regular process of legislation meeting the established budgetary goals.

Specifically, the 1985 Balanced Budget Act required the federal budget to be in balance by FY1991. In addition, the act also made extensive changes in the 1974 Congressional Budget Act, largely to incorporate informal changes in practice made in prior years.

Several lawsuits contesting the constitutionality of the 1985 Balanced Budget Act were filed immediately. On February 7, 1986, a special three-judge panel of the U.S. District Court declared that the procedure for triggering sequestration under the act was unconstitutional on the ground that it vested executive power in an officer removable by Congress. (Sequestration would have been triggered pursuant to a report prepared by the Comptroller General, head of the General Accounting Office.) Further, the Court declared that a sequestration order for FY1986, issued on February 1, 1986, was “without legal force and effect,” but stayed its judgment (as required by Section 274(e) of the act) pending appeal to the Supreme Court.

¹³⁹ For a more detailed explanation of the 1985 Balanced Budget Act, see CRS Report 85-1130 GOV, *Explanation of the Balanced Budget and Emergency Deficit Control Act of 1985 — Public Law 99-177 (The Gramm-Rudman-Hollings Act)*, by Allen Schick (1985); and CRS Report 86-713 GOV, *Changes in the Congressional Budget Process Made by the 1985 Balanced Budget Act (P.L. 99-177)*, by Robert Keith (1986). (These reports are archived and available from the author of this entry in the compendium.)

The Supreme Court heard arguments in the case, *Bowsher v. Synar* (478 U.S. 714), on April 23, 1986, and issued its ruling later that year on July 7. Affirming the ruling of the District Court by a vote of 7 to 2, the Supreme Court noted:

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.... It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch.

Anticipating the possibility of invalidation by the courts, Congress had included “fallback procedures” in the act, under which a presidential sequestration order could be triggered upon the enactment of a joint resolution, reported by a Temporary Joint Committee on Deficit Reduction, setting forth the contents of a joint report of the directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO). The Supreme Court stayed its judgment for 60 days in order to allow Congress time to implement sequestration for FY1986 under the fallback procedures, which Congress did.

Invalidation by the courts of the automatic triggering mechanism for sequestration and the size of the estimated deficit excess for FY1988 (more than \$50 billion above the deficit target of \$108 billion, according to CBO) prompted calls in 1987 for revision of the 1985 Balanced Budget Act. Major revisions to the act were enacted in 1987, again as a title in a measure raising the public debt limit. President Reagan signed the measure into law on September 29 as P.L. 100-119 (101 Stat. 754-788). Title I of this law is referred to as the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987.¹⁴⁰ The main purposes of the 1987 Balanced Budget Reaffirmation Act were to restore the automatic triggering feature of sequestration in a constitutionally acceptable manner (which it did by vesting that authority in the OMB Director) and to extend the time frame for achieving a balanced budget by two years, until FY1993.

During the interim between the enactment of the 1985 Balanced Budget Act and its significant revision in 1987, Congress enacted several measures that modified the sequestration process, for the most part exempting programs from the reductions. Most notably, the Omnibus Budget Reconciliation Act of 1986 (100 Stat. 1874) exempted from sequestration the cost-of-living adjustments (COLAs) of all federal civilian and military retirement and disability programs so that they would be treated in the same manner as Social Security.

Following enactment of the 1987 Balanced Budget Reaffirmation Act (and before significant changes made in 1990), Congress enacted several measures that further modified the sequestration process. In particular, the Omnibus Budget

¹⁴⁰ For a more detailed explanation of the 1987 Balanced Budget Reaffirmation Act, see CRS Rept. 87-865 GOV, *Debt-Limit Increase and 1985 Balanced Budget Act Reaffirmation: Summary of Public Law 100-119 (H.J.Res. 324)*, by Edward Davis and Robert Keith (1987). (This report is archived and is available from the author of this entry in the compendium.)

Reconciliation Act of 1987 (101 Stat. 1330) made several technical changes in the 1985 Balanced Budget Act, and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (103 Stat. 183) exempted certain federal financial entities from sequestration.

Major Provisions

Deficit Targets and Sequestration Procedures. In order to accomplish the goal of balancing the budget, the act established a series of declining deficit targets, referred to in the act as “maximum deficit amounts.”¹⁴¹ The series began with a deficit target of \$171.9 billion for FY1986, which declined after the first year by increments of \$36 billion until reaching zero in FY1991.

The deficit targets were enforced by a new set of procedures, referred to as “sequestration.” As originally framed, sequestration involved the issuance of a presidential order to permanently cancel annual appropriations and other budgetary resources (except for special funds and trust funds) for the purpose of achieving a required amount of outlay savings in order to reduce the deficit. Any required sequestration reductions would occur toward the beginning of the fiscal year, based upon budget estimates made at that time.

As mentioned above, the Comptroller General was charged with responsibility under the act for determining whether a sequester was necessary each year and, if so, the amount of reductions that would have to be made in individual accounts and programs. His findings regarding the estimated deficit, the amount of any required sequester, the base levels for accounts from which reductions would be made, and the reduction amounts to be presented in annual sequestration reports issued twice each year. An interval of less than two months between the issuance of the two reports in late August and early October provided Congress and the President an opportunity to enact legislation preventing or minimizing a sequester. The Comptroller General was required to take into consideration sequestration reports issued jointly in August and October by the OMB and CBO directors.

If the Comptroller General found a sequester necessary, the President was required to issue a sequestration order putting into effect the reductions determined by the Comptroller General in his sequestration report. The President did not have discretion under the act to alter the Comptroller General’s determinations.

In any year in which a deficit sequester occurred, the entire amount of the deficit excess (the amount by which the estimated deficit exceeded the applicable deficit target) would have to be eliminated. Sequestration could occur for FY1987-FY1990 only if the deficit excess for the year were greater than \$10 billion. The \$10 billion margin-of-error amount did not apply to FY1986, in which sequestration was capped at \$11.7 billion, nor to FY1991, when the budget was required to be balanced.

¹⁴¹ Although they were used chiefly for purposes of sequestration, the deficit targets also affected the budget resolution process, and therefore were made part of the 1974 Congressional Budget Act.

A formula set forth in the act mandated that half the required outlay reductions be made in defense programs, programs in the National Defense (050) functional category, and half in non-defense programs. In general, sequestration reductions were made uniformly across the range of accounts covered by the process, and were applied uniformly to programs, projects, and activities within these accounts.

Many accounts, involving roughly two-thirds of federal outlays, were exempt from sequestration. For certain programs, the reductions were made under special rules. Medicare, for example, could not be cut more than 2%.

The act provided that the sequestration procedures would not apply during time of war and set forth a means to suspend them in the event of a recession. Finally, the act included procedures by which the President could propose, or Congress could initiate, modifications in a sequestration order.

The 1987 Balanced Budget Reaffirmation Act extended the timetable for achieving a balanced budget by two fiscal years to FY1993, restored the automatic triggering mechanism for sequestration, and made numerous adjustments to the sequestration procedures.

The deficit targets, as revised in 1987, maintained the \$36 billion year-to-year decrease, except for FY1989 (when the target was reduced by \$8 billion from the prior year) and FY1993 (when the target was reduced by \$28 billion from the prior year). The \$10 billion margin-of-error amount was retained for this period, except that sequestration reductions were capped at \$23 billion for FY1988 and \$36 billion for FY1989; no margin-of-error amount was allowed for FY1993, when the budget was expected to be balanced.

The automatic procedure for triggering sequestration was restored by placing it in the hands of the OMB Director. However, the director's authority to estimate and calculate sequestration amounts was carefully circumscribed by various provisions in the act. In particular, the procedures for making baseline estimates were delineated in the act. The new baseline-construction rules approximated more closely the concepts used by OMB in making "current services estimates" and by CBO in making "baseline budget projections." The new rules had the effect of minimizing differences in the estimates and projections of the two agencies, compared to earlier years.

Under the restored automatic procedure, an initial or final sequestration order would be triggered by an initial or revised sequestration report from the OMB Director. The OMB Director was required to give due regard in his report to an advisory sequestration report issued earlier by the CBO director. The Comptroller General was not assigned a role in the triggering process.

The 1987 Balanced Budget Reaffirmation Act retained the basic formula for determining sequestration reductions, but modified the procedures for crediting reductions in programs covered by special rules, such as student loans, foster care, and specified health programs. Additionally, the act authorized the President to exempt all or some military personnel accounts from sequestration, provided timely

notice was given to Congress. (This authority previously had been given to the President only for FY1986.)

With regard to the modification of a sequestration order, the 1987 Balanced Budget Reaffirmation Act established two new mechanisms involving the enactment of a joint resolution under expedited procedures. Under the first, the President was authorized to submit to Congress a report proposing changes in the reductions in defense programs so that some programs could be spared cuts if others were cut more deeply (in order to retain the overall level of required reductions). Second, the majority leaders of the House or Senate could initiate legislation that would modify a sequestration order (even effectively canceling it). Both mechanisms would require the enactment of legislation in order to be effective.

Other Budget Process Changes. In addition to establishing the sequestration procedures, the 1985 Balanced Budget Act made other changes in the federal budget process. These other changes mainly involved modifications of the congressional budget process under the 1974 Congressional Budget Act (discussed more fully elsewhere in this compendium).

First, the timetable for congressional budget actions was accelerated. Most notably, the deadline for adoption of the annual budget resolution was advanced one month to April 15. Second, certain practices used by Congress for several years were formally incorporated into the 1974 Congressional Budget Act, including the expansion of budget resolutions to cover three fiscal years and authority to initiate reconciliation procedures in the April budget resolution. Third, enforcement procedures were tightened, including new restrictions on legislation linked to committee spending allocations under the budget resolution and a requirement that the recommended deficit in the budget resolution not exceed the applicable deficit target. Fourth, the reconciliation process was modified in several ways, including a ban against using reconciliation to make changes in the Social Security program and requirements in the House and Senate that amendments to reconciliation measures be deficit neutral.

In addition to these and many other changes in congressional budgeting made by the act, it also required the President to submit an annual budget consistent with the deficit targets, placed existing off-budget entities on the budget, and placed the Social Security program off budget (except for calculating the deficit for purposes of sequestration).

The law which contained the 1987 Balanced Budget Reaffirmation Act (101 Stat. 754) also included related provisions (in Title II) that affected the congressional budget process, the impoundment control process, and other matters. With respect to the congressional budget process, the 1974 Congressional Budget Act was amended to clarify the application of time limits for the consideration of conference reports on budget resolutions and reconciliation measures, to require the House and Senate to use common economic and technical assumptions, to extend CBO duties under the State and Local Government Cost Estimate Act of 1981 indefinitely, and for other purposes.

The Impoundment Control Act of 1974 was amended to codify the Appeals Court decision in *City of New Haven v. United States* regarding restrictions on the President's deferral authority and to prohibit the resubmittal of rescission proposals that had been previously rejected by Congress.

Finally, the 1987 Balanced Budget Reaffirmation Act encouraged Congress to experiment with biennial budgeting and required CBO to prepare a report on federal credit programs.

Discussion

The 1985 Balanced Budget Act, as amended, was critically viewed by some for its failure to achieve its principal objective, deficit reduction. During the period covering FY1986 through FY1990, the actual deficit exceeded the deficit target every year. The overage ranged from about \$5 billion to \$205 billion and was greatest in the later years, despite the revision of the targets in 1987. Further, the manner in which the sequestration process operated and the stringency of the goals generally were perceived as fostering budgetary gimmickry and disruption in the legislative process.

As a result of these concerns, the sequestration process was fundamentally restructured by the Budget Enforcement Act of 1990 (discussed elsewhere in this compendium).

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Robert Keith

E. Budget Enforcement Acts of 1990 and 1997

Statutory Intent and History

The Budget Enforcement Act (BEA) of 1990 made numerous and significant changes in the federal budget process by amending several laws, primarily the Balanced Budget and Emergency Deficit Control Act of 1985 (described elsewhere in this compendium).¹⁴² (The BEA of 1990 also amended the 1974 Congressional Budget Act; changes in the 1974 act are discussed in another section of this compendium.) The chief focus of these changes was to revise fundamentally the sequestration process established by the 1985 act, but other important facets of the budget process were affected as well. With respect to sequestration, the BEA changed the focus from deficit targets to limits on discretionary spending (i.e., spending controlled through the annual appropriations process) and a “pay-as-you-go” (PAYGO) requirement on new legislative initiatives affecting revenues and direct spending (i.e., spending controlled outside the annual appropriations process). The main purpose of these changes was to ensure that the substantial deficit savings of several measures enacted in 1990, particularly the Omnibus Budget Reconciliation Act (OBRA) of 1990, were maintained over the five-year time frame of the legislation (covering FY1991-FY1995).

The BEA was enacted as Title XIII of OBRA of 1990 (104 Stat. 1388, 1-630). Although the BEA was formally developed as part of the 1990 reconciliation law, it can be traced to the budget summit negotiations between congressional and administration negotiators that began in early May of 1990 and concluded on September 30 of that year. On June 26, 1990, President George H.W. Bush issued a statement that he and congressional negotiators concurred that any bipartisan budget agreement should include budget process reform “to assure that any Bipartisan agreement is enforceable and that the deficit problem is brought under responsible control.”

The sequestration procedures established under the 1985 act, as modified by the BEA of 1990, have been further modified and extended by several other laws, mainly to preserve budget savings made under agreements reached by Congress and the President in 1993 and 1997 and to establish new program categories for enforcement. In 1993, Congress and the President extended the procedures for three more fiscal years, through FY1998. The extension was included as Title XIV of the Omnibus Budget Reconciliation Act of 1993 (107 Stat. 312). In 1994, separate sequestration procedures for programs funded by the Violent Crime Reduction Trust Fund were added to the 1985 act by Title XXXI of the Violent Crime Control and Law Enforcement Act of 1994 (108 Stat. 3009).

Significant modifications to the sequestration process were made by the Budget Enforcement Act (BEA) of 1997, which was included as Title X of one of two reconciliation measures enacted into law that year, the Balanced Budget Act of 1997

¹⁴² For a more detailed discussion of the BEA of 1990 and other budget process laws, see CRS Report 98-720 GOV, *Manual on the Federal Budget Process*, by Robert Keith and Allen Schick (1998).

(111 Stat. 251). The BEA of 1997 extended the discretionary spending limits and pay-as-you-go requirement through FY2002, modified their application, and made various “housekeeping” and technical changes. In 1998, the discretionary spending limits and associated sequestration procedures were changed again, in this instance by the Transportation Equity Act for the 21st Century (TEA-21; P.L. 105-178), in order to establish separate discretionary spending limits for highway and mass transit programs. In 2000, the Interior Appropriations Act for FY2001 (P.L. 106-291), established separate discretionary spending limits for conservation spending.

Finally, in the last few years under the BEA, Congress and the President modified the enforcement mechanisms in order to avoid a sequestration.¹⁴³ In 2000 and 2001, the Foreign Operations Appropriations Act for FY2001, P.L. 106-429, raised the FY2001 discretionary spending limits, and the Defense Appropriations Act for FY2002, P.L. 107-117, raised the FY2002 discretionary spending limits. In 1999, 2000, 2001, and 2002, legislation enacted into law required the OMB Director to change the balance on the PAYGO scorecard for certain years to zero. In particular, in 2002, the PAYGO scorecard was set at zero for FY2003 and each year thereafter through FY2006, thereby preventing any future PAYGO sequestration due to legislation enacted before October 1, 2002.

In the absence of any action by Congress and the President to extend the discretionary spending limits and the PAYGO requirement by the end of FY2002, budget legislation is no longer subject to these budget mechanisms.

Major Provisions

Revised Sequestration Procedures. The BEA of 1990, and later laws, changed the sequestration process substantially. While the BEA of 1990 extended the deficit targets in the 1985 Balanced Budget Act through FY1995 (although the budget was not expected to be in balance by this time), it made them adjustable rather than fixed. More importantly, the BEA of 1990 effectively replaced the deficit targets with two new budget enforcement procedures. First, adjustable limits were established for separate categories of discretionary spending. Second, “pay-as-you-go” (PAYGO) procedures were created to require that increases in direct spending or decreases in revenues due to legislative action be offset so that there would be no net increase in the deficit (or reduction of the surplus). Further, the BEA of 1990 retained the exemption of Social Security from cuts under sequestration, but removed the trust fund surpluses from the deficit estimates and other calculations as well.

The revised deficit targets, as initially set by the BEA of 1990, were substantially larger than earlier targets because they excluded the surpluses of the Social Security trust funds and reflected revised economic and technical assumptions. For example, the deficit target for FY1991 was set at \$327 billion, and the deficit target for FY1995 was set at \$83 billion. The President was required to adjust the deficit targets for FY1991-FY1995, to reflect updated economic and technical assumptions and changes in budgetary concepts and definitions, as applicable, in his

¹⁴³ For more detailed information on these modifications, see CRS Report RL31155, *Techniques for Preventing a Budget Sequester*, by Robert Keith.

annual budget for FY1992 and FY1993. Further, he was authorized to adjust the deficit targets for FY1994 and FY1995, to reflect updated economic and technical assumptions, when he submitted his budget for these fiscal years. (President Clinton chose to use this authority, and made such adjustments in the deficit targets.)

The BEA kept the procedures for a deficit sequester. As under the earlier procedures, half of the required outlays savings would be from defense programs and half from nondefense programs. The margin-of-error amount was set at zero for FY1992 and FY1993 and at \$15 billion for FY1994 and FY1995. Sequestration tied to enforcement of the deficit targets would have occurred only if a deficit excess had remained after the other two types of sequestration had been implemented. However, the operation of the other two types of sequestration, together with the adjustability of the deficit targets, effectively made a deficit sequester impossible.

The BEA of 1990 retained sequestration as the means of enforcing the discretionary spending limits and the PAYGO requirement. Like the earlier deficit sequestration procedures, the new sequestration procedures were automatic and were triggered by a report from the OMB Director. For sequestration purposes generally, only one triggering report was issued each year (just after the end of the congressional session). However, OMB reports triggering a sequester in one or more categories of discretionary spending might have been issued during the following session if legislative developments so warranted (i.e., the enactment of a supplemental appropriations measure that violated the limit for one or more discretionary spending categories). The CBO director was required to provide advisory sequestration reports several days before the OMB Director's reports were due.

The discretionary spending limits established by the BEA of 1990 varied in type over the period covered. For FY1991 through FY1993, separate limits were set for new budget authority and outlays for three different categories — defense, international, and domestic. For FY1994-FY1995, the limits on new budget authority and outlays were established for a single category — total discretionary spending. The Omnibus Budget Reconciliation Act of 1993 retained the existing limits for FY1994 and FY1995 without change, and added new limits on total discretionary spending for FY1996-FY1998. In 1994, the Violent Crime Control Act established separate sequestration procedures for spending from the Violent Crime Reduction Trust Fund through FY2000.

The BEA of 1997 revised the discretionary spending limits again and extended them through FY2002. New categories were established for defense and nondefense spending for FY1998 and FY1999; for FY2000-FY2002, all discretionary spending was merged into a single, general purpose category (except for the separate Violent Crime Reduction category in effect through FY2000). In 1998, TEA-21 established separate outlay limits for two new categories, highways and mass transit, through FY2003. Finally, in 2000, Section 801(a) of the Interior Appropriations Act for FY2001 established separate discretionary spending limits for FY2002-FY2006 under a new category for conservation spending and six related subcategories.

The discretionary spending limits were adjusted periodically — when the President submitted his annual budget and when OMB issued sequestration reports

— for various factors, including changes in budgetary concepts and definitions, emergency requirements, and special allowances. Factors upon which adjustments were based changed from time to time. For example, the BEA of 1990 provided for an adjustment due to changes in inflation, but this adjustment was removed by the BEA of 1997.

A sequester under the discretionary spending limits would occur only within the category in which a breach occurred, except that a breach of the highway or mass transit limits would trigger a sequester in the nondefense or total discretionary spending category, as appropriate. If a sequester under this process was required at the end of a session, it was required to occur on the same day as any sequestration tied to enforcement of the PAYGO procedures. During the following session, the enactment of legislation causing a breach in the spending limits would trigger sequestration after 15 days. However, any such enactment occurring during the last quarter of the fiscal year (i.e., between July 1 and September 30) would instead cause the appropriate discretionary spending limits for the next fiscal year to be reduced by the amount of the breach.

Under the PAYGO process created by the BEA of 1990, the multi-year budget effects of legislation proposing new direct spending, or legislation decreasing revenues, were recorded on a rolling PAYGO “scorecard.” After the end of each congressional session, any balance on the PAYGO scorecard for the new fiscal year was required to be eliminated through a special sequestration procedure. If a sequester under this process was required, it was required to occur within 15 calendar days after Congress adjourned at the end of a session and on the same day as any sequestration tied to enforcement of the discretionary spending limits (or, in earlier years, the deficit targets). Emergency direct spending and revenue legislation, so designated by the President and in statute, was not covered by the PAYGO sequestration process.

The enforcement procedures for the PAYGO requirement, on the one hand, and the discretionary spending limits, on the other, were separated by a “firewall.” Savings made on one side of the firewall could not be used to the advantage of programs on the other side. For example, the cost of tax-cut legislation could not be offset by reductions in annual appropriations acts in order to avoid a PAYGO sequester.

OMB and CBO were each required to prepare annually three different types of sequestration reports, as discussed below. The CBO reports (which are advisory only) preceded the OMB reports by several days, as was the case under prior sequestration procedures. In all three types of reports, OMB was required to explain any differences between its estimates and those of CBO.

If the President was required to issue a sequestration order in any year, the order was to be issued on the same day that the final OMB sequestration report was issued and the order was required to implement without change all of the reductions identified in the OMB report. There was no initial order, unlike under earlier procedures.

Early in the session, OMB and CBO issued sequestration preview reports. The reports provided estimates of the discretionary spending limits, with the adjustments prescribed by law. Also, the reports provided estimates of any net change in the balances on the PAYGO scorecard caused by the enactment of direct spending or revenue legislation subject to the PAYGO process. The OMB preview report contained the same information as the CBO preview report and explained any differences between its estimates and those of CBO.

In August, OMB and CBO issued sequestration update reports to reflect the impact of legislation enacted in the interim. Finally, OMB and CBO issued final sequestration reports shortly after Congress adjourned to end the session. Both reports were required to reflect any pertinent legislation enacted since the update reports were issued. The final reports were required to indicate the baseline amount of budgetary resources and the amount and percentage of the reduction for each account subject to sequestration.

In preparing its update and final sequestration reports, OMB was required to use the economic and technical assumptions that were used in the earlier preview report. (Previously, OMB could determine in late summer the economic and technical assumptions that it would use for sequestration in October.)

During the course of the session, OMB was required to provide Congress with cost estimates of budgetary legislation within seven days of its enactment, so that compliance with the discretionary spending limits and PAYGO requirements could be monitored. The cost estimates were required to be based on the economic and technical assumptions used in the President's most recent budget.

Several other special reports were associated with the sequestration process.

Other Budget Process Changes. The BEA of 1990 and 1997 made other changes in the federal budget process, including (1) moving the deadline for submission of the President's annual budget from the first Monday after January 3 to the first Monday in February; (2) excluding Social Security trust funds from deficit calculations made under the 1985 Balanced Budget Act (and reaffirming of their off-budget status), coupled with establishing separate House and Senate procedures to protect the trust fund balances; (3) enacting the Federal Credit Reform Act of 1990, as a new Title V in the 1974 Congressional Budget Act; and (4) requiring that budget resolutions cover, and be enforced for, at least five fiscal years. Additionally, the BEA included provisions requiring studies and legislative recommendations regarding government-sponsored enterprises, revising the Senate's "Byrd Rule" prohibiting extraneous matter in reconciliation legislation and incorporating it into the 1974 Congressional Budget Act as Section 313, and dealing with various other issues.

Discussion

The BEA of 1990, and the related laws that followed it, generally are regarded as having been more successful than the 1985 Balanced Budget Act (as amended by the 1987 Balanced Budget Reaffirmation Act) in controlling aggregate budget levels. During the period that the discretionary spending limits and PAYGO requirement

were in effect, the status of the federal budget changed from the largest deficit recorded in history (\$290 billion in FY1992) to unprecedented surpluses (\$237 billion in FY2000). Although this dramatic change was due to many factors, the procedures under the BEA were regarded by many as important contributing factors to this accomplishment.

During the 106th Congress, criticisms of the BEA procedures began to mount. While the threat of sequestration was viewed initially as giving the President and Congress a strong incentive to reach agreement on their budgetary goals, thereby avoiding the legislative deadlock that characterized the early 1980s, some Members began to regard the BEA procedures as an impediment to implementing desired budget policy in an era of large surpluses. These Members argued that the BEA procedures should be eliminated, or at least substantially modified, so that Congress and the President could “use” part of the surplus for tax cuts and other actions that otherwise would have been prohibited. Further, some Members asserted that discretionary spending limits for FY2000-FY2002 were unrealistically low, thereby promoting the use of budget “gimmicks,” such as the excessive designation of emergency spending, to evade their constraints. More recently, during the 107th Congress, the procedures under the BEA were set aside to respond to the terrorist attacks on September 11, 2001, and the 2001 recession. Subsequently, as noted above, the BEA procedures were allowed to expire on September 30, 2002.

For the foreseeable future, Congress faces an unfavorable budget outlook, exacerbated by an uncertain economic and geopolitical environment. According to OMB and CBO, current budget projections under existing law, without any legislative changes, show annual deficits in the unified budget (i.e., including federal funds and trust funds) in each of the next few fiscal years.¹⁴⁴ When various proposed spending increases and tax cuts are taken into account, the projections indicate annual deficits for the foreseeable future. For example, OMB projects that if President Bush’s FY2004 budget policy proposals are enacted into law, annual unified budget deficits, ranging from \$178 billion to \$307 billion, will continue through FY2008.

In addition, the economy continues to put a damper on federal revenues. Also, the spending for the war on terrorism and homeland security, and for military and reconstruction operations in Iraq and Afghanistan, could increase the scarcity of current and future federal government resources. Such factors potentially could worsen the already unfavorable budget outlook.¹⁴⁵ Accordingly, the 108th Congress is faced with the issue of whether the expired BEA procedures should be restored,

¹⁴⁴ See U.S. Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2004* (Washington: GPO, 2003), table S-1, p. 311 (for projections with President George W. Bush’s budget proposals included) and table S-13, p. 330 (for projections under existing law); and U.S. Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2004-2013*, Jan. 2003, table 1.1, p. 2 (for CBO’s budget baseline projections, under existing law).

¹⁴⁵ For more detailed information on the FY2004 budget throughout the year, see CRS Report RL31784, *The Budget for Fiscal Year 2004*, by Philip D. Winters.

new budget constraints should be enacted, or the existing budget procedures associated with the Congressional Budget Act are sufficient.

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Robert Keith
Bill Heniff Jr.

F. Congressional Budget and Impoundment Control Act

Statutory Intent and History

The Congressional Budget and Impoundment Control Act of 1974 (88 Stat. 302) established the basic framework which is used today for congressional consideration of budget and fiscal policy. The concurrent resolution on the budget, the House and Senate Budget Committees, and the Congressional Budget Office are all provided for in this legislation. In addition, the President's impoundment authority was codified for the first time in Title X, also known as the Impoundment Control Act.

The Congressional Budget Act built upon the knowledge gained in earlier attempts to create a legislative budget, but it chiefly grew out of the combination of several separate movements for congressional reform in the 1960s and 1970s and a series of confrontations with the President over the budget. There were various calls for structural reforms within Congress, and concurrently a desire to make Congress, as a whole, better able to assert its budget priorities more effectively vis-à-vis the President's.

The issue of federal spending approached a crisis in the late 1960s and early 1970s. Increased spending for programs initiated or expanded under the banner of President Lyndon Johnson's "Great Society," combined with that to support military efforts in Vietnam, accelerated concern over budget deficits. A series of spending ceilings were enacted by Congress between 1967 and 1970, but these proved to be largely ineffective. Even so, President Richard Nixon kept the controversy over such ceilings alive during the 1972 presidential campaign by asking for authority to cut federal spending at his own discretion to stay under a proposed \$250 billion ceiling in FY1973. Congress declined to approve such an open-ended grant of authority, and while no further spending ceilings were enacted, the crisis over presidential authority to withhold funds escalated.

In response to this battle with President Nixon, Congress established a Joint Study Committee on Budget Control in 1973 which recommended a legislative process to "improve the opportunity for the Congress to examine the budget from an overall point of view, together with a congressional system of deciding priorities." These recommendations were reviewed by committees with legislative jurisdiction in the House and Senate,¹⁴⁶ and eventually enacted as the Congressional Budget and Impoundment Control Act of 1974 (88 Stat. 302).

The intent behind the 1974 Budget Act is still a subject for debate. The act made a number of changes in the way Congress operated, but one thing it did not do was to centralize budget decision making. The budget resolution was a mechanism for deciding the broad outlines of budgetary decision making, but the details about the composition of revenue and spending remained within the jurisdiction of the same committees that had exercised jurisdiction prior to the act. The new budget

¹⁴⁶ In the House, H.R. 7130 was referred to the Rules Committee; in the Senate, S. 1541 was referred to the Government Operations Committee and subsequently to the Rules and Administration Committee.

process built on existing congressional procedures, but did not supersede them. To some, this indicated that the purpose of the Budget Act was merely to create a mechanism for coordinating congressional decision making and for providing budgetary information. Others, however, feel that the Budget Act was created to deal with the problem of structural deficits that arose in the 1970s. One result was that the Budget Act has been the focus of numerous reform proposals over the years, a number of which have been enacted. The most extensive changes occurred as a consequence of the Balanced Budget and Emergency Deficit Control Act of 1985, and the Budget Enforcement Act of 1990 (discussed elsewhere in this compendium).

Major Provisions

Titles I through IX of the Budget Act are collectively known as the Congressional Budget Act of 1974, and Title X is known as the Impoundment Control Act of 1974. Title V, as amended in 1990, is now known as the Federal Credit Reform Act of 1990.

The most salient aspect of the Congressional Budget Act is that it established a congressional budget process. As originally enacted, the Budget Act provided for two budget resolutions, the first to provide planning levels and to be adopted by May 15, and a second to provide binding levels (that is, subjecting legislation that breached these totals to points of order) to be adopted by September 15. This division proved to be impracticable, and for fiscal years 1983-1986, Congress did not adopt a second budget resolution. Instead, the first budget resolution for each of these years included a provision that made the spending and revenue totals in the first resolution binding as of the beginning of the fiscal year (October 1). In 1985, Congress amended the Budget Act to provide that, beginning with FY1987, the spending and revenue totals in a single budget resolution (to be adopted by April 15) would be immediately binding.

As enacted, the Budget Act also required that committees report all authorizing legislation prior to May 15. This requirement tended to create a bottleneck of legislation that made it difficult to complete floor action on authorizing measures prior to consideration of appropriation bills, and was eliminated in 1985.

Currently, Title III requires that Congress approve a concurrent resolution on the budget by April 15 (Section 300), that must be adopted before other budgetary legislation can be considered (although the House may consider appropriation bills after May 15 regardless of the status of the budget resolution) (Section 303). Amounts agreed to in the budget resolution are “cross walked” to each committee with jurisdiction over spending under Section 302.

Title III also contains provisions concerning special procedures for consideration of budget resolutions and reconciliation bills. Debate in the Senate on budget resolutions is limited to 50 hours (Section 305) and on reconciliation bills to 20 hours (Section 310). The amending process is also limited. A germaneness requirement is imposed in the Senate for amendments to both budget resolutions (Section 305) and reconciliation bills (Section 310); amendments to reconciliation bills in either chamber must be deficit neutral (Section 310); and amendments in the Senate to reconciliations must not be extraneous (Section 313).

Section 306 specifically protects the jurisdiction of the Budget Committees. It prohibits floor action on any bill or amendment dealing with matters within the jurisdiction of the Budget Committee not reported by the Budget Committee (or an amendment to a bill reported by the Budget Committee). In addition to jurisdiction over budget resolutions and reconciliation bills, House Rule X, clauses (e)(1)(2) and (3) grant the House Budget Committee jurisdiction over “the congressional budget process, generally” and the “establishment, extension, and enforcement of special controls over the Federal budget, including the budgetary treatment of off-budget Federal agencies and measures providing exemption from reduction under any [sequester order].” In the Senate, a standing order of August 4, 1977, provides that jurisdiction over legislation concerning the budget process be jointly referred to the Senate Budget and Governmental Affairs Committees.

Title IV establishes additional limits on the consideration of certain measures.

For example, although changes can be made in the formulae for entitlement programs which can increase the projected level of expenditures, Section 401(b) of the Congressional Budget Act is designed to limit such increases. Section 401(b)(1) requires that increases in entitlement spending not become effective during the current fiscal year. Section 401(b)(2) further provides that increases that will become effective during a fiscal year be limited to the level allocated under Section 302(b) in connection with the most recent budget resolution or be subject to referral to the Appropriations Committee (for a period not to exceed 15 days).

Title IV also provides that contract authority and debt authority do not exist outside the budget process as a means of financing federal programs. Section 401(a) of the Congressional Budget Act requires that bills that provide authority “to enter into contracts under which the United States is obligated to make outlays” or “to incur indebtedness ... for the repayment of which the United States or new credit authority be effective for any fiscal year only to the extent provided in appropriation Acts.”

Finally, the Unfunded Mandates Reform Act of 1995 (discussed elsewhere in this compendium) added Sections 421-428 to the Congressional Budget Act. These sections limit the consideration of unfunded federal mandates to the states.

In addition to establishing the congressional budget process, the Budget Act contains provisions dealing with numerous other aspects of federal fiscal management. Title I established the House and Senate Budget Committees.

Title V, also known as the Federal Credit Reform Act of 1990 (discussed elsewhere in this compendium), was added as a part of the Budget Enforcement Act.¹⁴⁷ The Federal Credit Reform Act specifies the budgetary treatment of federal

¹⁴⁷ As originally enacted, Title V provided for a change in the fiscal year of the federal government. Prior to the Congressional Budget Act, the fiscal year began on July 1 of the preceding calendar year. Since FY1976, the fiscal year has begun on October 1 of the preceding calendar year. This provision and several others in Titles V, VI, VII, and VIII (continued...)

credit programs, and provides that only the cost to the government of such programs should be on budget, other associated outlays being treated as a means of financing the programs.

Title II created a new congressional agency and outlined its responsibilities. The Congressional Budget Office (CBO) was charged with providing information to Congress. This basic function has not changed, but the nature of the information required by Congress has expanded over time.

These duties are further specified in Section 308 of the Budget Act, which requires that reports for bills providing new spending authority, new budget authority, new credit authority, or changing revenues or tax expenditures include a cost estimate prepared “after consultation with the Director of the Congressional Budget Office.” In addition, Section 403 of the act requires the Director of the Congressional Budget Office “to the extent practicable, [to] prepare [a cost estimate] for each bill or resolution of a public character reported by any committee”.

Section 424, added by the Unfunded Mandates Reform Act of 1995, placed additional responsibilities on CBO by requiring that it prepare and submit an estimate of the direct cost of all federal intergovernmental mandates contained in each bill reported in the House and Senate.

Title X, the Impoundment Control Act, codifies presidential authority to withhold federal funds which have been appropriated. The act defines such authority as rescissions and deferrals.

Rescission authority established under the Impoundment Control Act allows the President to propose cancellation of funds and to withhold those funds for a 45 day period pending congressional action. If Congress does not approve the rescission request (or takes no action), the funds must be released at the end of that period. Section 207 of the Balanced Budget and Emergency Deficit Reaffirmation Act of 1987 further codified this authority to allow the President to submit a rescission request only once.

Deferral authority allows the President to withhold funds temporarily, but deferrals may not extend beyond the end of the fiscal year. The Impoundment Control Act originally provided for a one-house veto of any proposed deferral, but this power was negated by the Supreme Court in *I.N.S. v. Chadha* (103 S.Ct. 715, (1983)). Subsequently, the U.S. Court of Appeals ruled in *City of New Haven, Conn. v. United States* (809 F.2d 900 (D.C. Cir. 1987)) that the one-house veto provision was not severable from the President’s expanded authority in the 1974 law for policy based deferrals. Language clarifying this narrowed base for deferrals was incorporated into the Impoundment Control Act by the Balanced Budget and Emergency Deficit Reaffirmation Act of 1987.

¹⁴⁷ (...continued)

were repealed in 1982 by P.L. 97-258 (96 Stat. 877), An Act to Revise, Codify, and Enact Without Substantive Change Certain General and Permanent Laws, Related to Money and Finance, as Title 31, *United States Code*, “Money and Finance.”

In 1996, Congress enacted provisions to grant the President enhanced rescission authority. Known as the Line Item Veto Act of 1996 (110 Stat. 1200; Sections 1021-1027 of the Impoundment Control Act; 2 U.S.C. §621), these provisions inverted the existing relationship between Congress and the President regarding proposals for rescissions. Rather than requiring congressional support for a resolution approving the President's proposal, the new law required the enactment of a bill or joint resolution of disapproval to prevent a proposed rescission from becoming effective. A resolution of disapproval would be subject to a presidential veto, so a two-thirds vote in each House would be necessary to override and prevent a rescission. The Line Item Veto Act also expanded the scope of rescission authority. The act provided that in addition to discretionary spending, whenever the President signs a bill into law, he may cancel any item of new direct spending (i.e. entitlements), or certain limited tax benefits.¹⁴⁸

In 1998, the Supreme Court struck down the act as unconstitutional (*Clinton v. City of New York*, 524 U.S. 417). It ruled that the Item Veto Act effectively allowed the President to repeal parts of a statute in violation of Article I of the Constitution.

Discussion

The Congressional Budget Act has been judged harshly by its critics despite achieving a significant measure of success. Its enactment resulted in greater control of impoundments, led to a resurgence of Congress's role in setting budget priorities, and increased the attention of Congress to the whole budget. It has not, however, resulted in the orderly process that some had hoped for. Deadlines for adopting budget resolutions and for enacting spending legislation have routinely been missed; the Budget Committees have sometimes been the source of conflict, in part because authority was not significantly redistributed by the act; there is also a perceived redundancy in debating the outlines of budget priorities on the budget resolution and then later debating the details in authorizations and appropriations.

Perhaps because of these shortcomings, Congress has continued to debate the budget process and possible reforms virtually since the Budget Act was signed into law. Reform proposals have generally focused on one of two areas: (1) spending or deficit control mechanisms, as in the Balanced Budget and Emergency Deficit Control Act of 1985, and the Budget Enforcement Act of 1990; and (2) streamlining the decision making process, usually by eliminating one group of decision makers from the process or reducing the frequency of decisions (as with biennial budgeting).

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¹⁴⁸ Defined as any revenue-losing provision that provides a federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries and any federal tax provision to provide temporary or permanent transitional relief for 10 or fewer beneficiaries.

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James Saturno

G. Chief Financial Officers Act of 1990

Statutory Intent and History

The Chief Financial Officers (CFO) Act of 1990 (104 Stat. 2838)¹⁴⁹ constitutes a significant legislative effort to improve financial management in the federal government. Its passage shortly before the adjournment of the 101st Congress reflected a bipartisan effort stretching over a period of five years. The new CFO Act was heralded by many persons as the most important financial management legislation since the Budget and Accounting Procedures Act of 1950 (64 Stat. 832).

Title I of the CFO Act, “General Provisions,” offers congressional findings regarding federal financial management, including identification of some existing weaknesses. Three purposes of the act are set forth:

- improvement of financial management practices by creating a new leadership structure for federal financial management (consisting of two new positions within the Office of Management and Budget (OMB)), and CFOs for the major executive departments and agencies;
- improvement of agency systems of accounting, financial management, and internal controls to assure the issuance of reliable financial information and to deter fraud, waste, and abuse of government resources; and
- production of complete, reliable, timely, and consistent financial information for use by both the executive branch and Congress in the financing, management, and evaluation of federal programs.

When the Social Security Independence and Program Improvements Act of 1994 (108 Stat. 1467) established the Social Security Administration (SSA) as an independent agency and created a new CFO position, the original number of 23 CFO agencies was increased to the current total of 24.¹⁵⁰

¹⁴⁹ Codified as amended at 31 U.S.C., Chapters 5, 9, 11, and 35; also 5 U.S.C. §§ 5313-5315, 38 U.S.C. § 201 nt, and 42 U.S.C. § 3533.

¹⁵⁰ Of the 24 CFO positions, those in the 14 cabinet-level departments (the Department of Homeland Security is not covered by the CFO Act), the Environmental Protection Agency, and the National Aeronautics and Space Administration are filled by presidential appointees confirmed by the Senate. The remaining eight CFO positions (for the Agency for International Development, Federal Emergency Management Agency, General Services Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and Social Security Administration), along with all 24 deputy CFO positions, are career slots, filled by agency head appointment. See following “Discussion” section for more on creation of additional CFO positions.

Major Provisions

Title II, “Establishment of Chief Financial Officers,” creates a new leadership structure for federal financial management. A new deputy director for management within OMB, appointed by the President and confirmed by the Senate, serves as the federal government’s chief financial officer. His functions with respect to financial management include leadership, policy setting, implementation, and operations, as well as responsibility to carry out the full range of general management duties.

The deputy director for management also performs important coordinating functions within the federal financial management structure, including links to both agency personnel and operations in this area.

Title II also establishes an Office of Federal Financial Management (OFFM) within OMB, funded by a separate line item in OMB’s budget and headed by a controller appointed by the President, subject to Senate confirmation. The incumbent, who must have “demonstrated ability” and “extensive practical experience” in financial management, serves as the principal advisor on financial management to the deputy director for management.

The act stipulates qualifications for both the agency CFOs and deputy CFOs. Each of the 24 agency CFOs reports directly to the agency head and is responsible for all agency financial management operations, activities, and personnel. *Financial management* is broadly defined, with agency CFOs assigned a variety of functions, including producing financial information, establishing an integrated financial management system, developing cost information, and developing systems that provide for systematic performance measurement. The Government Performance and Results Act of 1993 (107 Stat. 285) augmented performance measurement requirements, extending the initial language in the CFO Act regarding “systematic measurement of performance” for selected activities.

The 24 CFOs also are responsible for preparing annual management reports for their agencies, addressed to the agency head and to the OMB Director, within 60 days after the audit report (described below). The OMB Director then transmits the reports to the Senate Committee on Governmental Affairs and the House Committee on Government Reform. Each report contains an analysis of the financial management status of the agency, its financial statements and audit report, and a summary of material weaknesses pursuant to the Federal Managers’ Financial Integrity Act of 1982 (96 Stat. 814), as well as other information.¹⁵¹

Title III, “Enhancement of Federal Financial Management Activities,” covers a variety of subjects. One section requires the Director of OMB to prepare and submit a financial management status report and a government-wide five-year financial management plan to the appropriate committees of Congress. The report

¹⁵¹ In 2001 the OMB Director, pursuant to authority provided in the Reports Consolidation Act of 2000 (P.L. 106-531), required that agencies combine their annual performance reports with the financial statements and other materials required by the CFO Act, into a consolidated Performance and Accountability Report.

details the activities the Director, the controller, and agency CFOs plan to undertake, over the next five years, to improve financial management.¹⁵² Another section establishes the Chief Financial Officers Council, chaired by OMB's deputy director for management; other members include the controller, the Fiscal Assistant Secretary of Treasury, and the 24 agency CFOs.¹⁵³ The Council meets periodically and serves as an interagency coordinating body.

The original requirements in the CFO Act for audited financial statements were substantially expanded by provisions in the Government Management Reform Act of 1994 (GMRA; 108 Stat. 3410). Initially, Sections 303 and 304 of the CFO Act provided that all covered agency heads would prepare and submit to OMB audited financial statements for each revolving and trust fund and for accounts that performed substantial commercial functions. In addition, a three-year pilot project (eventually involving 10 of the original 23 agencies) commenced, requiring preparation of audited financial statements for all agency accounts.

GMRA extended the requirement for audited financial statements covering all accounts to include all 24 CFO agencies. Beginning on March 1, 1997, and in each year thereafter, the agency head submits to the OMB Director "an audited financial statement for the preceding fiscal year, covering all accounts and associated activities of each office, bureau, and activity of the agency." Further, not later than March 31, 1998, and in each succeeding year, the Secretary of the Treasury, in coordination with OMB, is to submit to the President and Congress an audited financial statement covering all federal executive branch agencies for the preceding fiscal year. Finally, Sections 305 and 306 revised the mandate and general procedures for financial audits and management reports of government corporations.

The Federal Financial Management Improvement Act (FFMIA) of 1996¹⁵⁴ established a general requirement for CFO agencies to "implement and maintain financial management systems that comply substantially with federal financial management system requirements, applicable federal accounting standards, and the United States Government Standard General Ledger at the transaction level" (FFMIA is further discussed elsewhere in the compendium). The Accountability of Tax Dollars Act of 2002¹⁵⁵ further amended the CFO Act and extended the coverage of the requirements for preparation of audited financial statements to most executive branch agencies (see further discussion of this law elsewhere in this compendium).

¹⁵² The 2003 financial management status report and five-year plan was issued in August 2003. See Office of Management and Budget, *2003 Federal Financial Management Report*, Washington, Aug. 2003, available at: [http://www.whitehouse.gov/omb/financial/2003_report_final.pdf], visited Jan. 22, 2004.

¹⁵³ The CFO Council charter also includes the statutory deputy CFOs as members.

¹⁵⁴ The FFMIA was enacted as Title VIII in the Omnibus Consolidated Appropriations Act for FY1997; 110 Stat. 3009-389; 31 U.S.C. § 3512 note.

¹⁵⁵ P.L. 107-289, 116 Stat. 2049.

Discussion

The CFO Act provided a new framework for financial management in the executive branch. However, implementation of the various requirements in the act is an ongoing process. For example, the legislation requires that the 24 covered agencies have two financial statements prepared and audited each year: a statement of financial position, and a statement of results of operations. Described simply, the statement of financial position is a balance sheet that shows assets, liabilities, and the aggregate difference (or net position). The statement of results of operations shows revenues and other financing sources, expenses, and the resulting change in net position.

The financial statements are different from agency reports that are used to monitor and control budgetary resources; thus, they provide supplementary information that may be useful to the President, Congress, the Department of the Treasury, GAO, agency managers, and other interested parties. The additional information, however, may not be as important as the discipline that agencies must develop in order to produce it. In order to obtain unqualified audit opinions, agencies not only must improve and integrate their accounting systems, but must also strengthen their managerial control over resources and activities at all levels.

The OMB Director prescribes the form and content of the financial statements. In 2001, the OMB Director required that agencies combine annual performance reports pursuant to the Government Performance and Results Act with the CFO Act financial statements into a consolidated Performance and Accountability Report.¹⁵⁶ At the same time, a schedule of accelerated deadlines was established, with the reports covering FY2002 due February 1, 2003, and FY2003 due January 30, 2004; and beginning with FY2004, the performance and accountability reports are due November 15th.¹⁵⁷

Evidence indicates steady improvement in compliance with the audited financial statements requirements, as more agencies receive clean, or unqualified, opinions. By FY2001, 18 CFO Act agencies had received a clean opinion, but OMB noted that agencies have achieved this record of unqualified opinions despite major problems with their financial systems, “by expending significant resources and making extensive manual adjustments after the end of the fiscal year.”¹⁵⁸ Some, including GAO, have expressed concern about agencies’ capabilities to meet the accelerated deadlines.¹⁵⁹ In August 2003, OMB offered a decidedly upbeat assessment of

¹⁵⁶ Pursuant to authority provided in the Reports Consolidation Act of 2000 (P. L. 106-531; 114 Stat. 2537).

¹⁵⁷ U.S. Office of Management and Budget, *Form and Content of Agency Financial Statements*, Bulletin No. 01-09, Sept. 25, 2001.

¹⁵⁸ U.S. Office of Management and Budget, *2002 Federal Financial Management Report* (Washington, May 1, 2002), p. 11, available at: [http://www.whitehouse.gov/omb/financial/2002_report.pdf, visited Dec. 18, 2003].

¹⁵⁹ U.S. General Accounting Office, *Financial Management: Sustained Efforts Needed to* (continued...)

experiences with the FY2002 financial statements, which were due February 1, 2003, nearly a month earlier than previously:

Not only did all 24 agencies subject to the CFO Act meet this new, shorter deadline, but a record 21 of 24 major departments and agencies received unqualified, or clean, opinions on their 2002 audits. In addition, the agencies combined their financial statements with their performance reports to provide information about agency finances and program performance in one document. Just two weeks later, all agencies met the February 15 deadline for producing for the first time quarterly financial statements.¹⁶⁰

The growing number of agency financial statements receiving clean opinions may partially reflect increased attention in the executive branch. The Bush Administration in 2001 designated improving financial performance as one of five government-wide initiatives in the *President's Management Agenda*. In 2002, OMB devised a management scorecard to grade agencies on their progress; one of the core criteria for financial performance is achieving unqualified and timely opinions of the annual financial statements.¹⁶¹ Obtaining an unqualified opinion on the government-wide financial statements has yet to be achieved, however. In March 2003, the General Accounting Office, for the sixth straight year, issued a disclaimer of opinion following its audit of the government-wide consolidated statements for FY2002.¹⁶²

Three new CFO positions have been created. These additions, however, are not identical to the other 24 CFO positions previously established.¹⁶³ In 1993, the law creating the Corporation for National and Community Service (CNCS) provided for a chief financial officer, to be appointed by the President, with advice and consent of the Senate; the listing of duties for the CFO includes some language identical to that found in 31 USC § 902, but other provisions are not the same.¹⁶⁴ Another CFO position came into being early in 2001. A provision in the Treasury and General Government Appropriations Act, 2000, established a new CFO position within the

¹⁵⁹ (...continued)

Achieve FFMI Accountability, GAO-03-1062, Sept. 2003, p. 16.

¹⁶⁰ U.S. Office of Management and Budget, *2003 Federal Financial Management Report* (Washington, Aug. 2003), p. 16, available at: [http://www.whitehouse.gov/omb/financial/2003_report_final.pdf], visited Dec. 18, 2003.

¹⁶¹ See CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry; and U.S. Office of Management and Budget, *Fiscal Year 2004 Budget of the U.S. Government, Performance and Management Assessments* (Washington: GPO, 2003), pp. 1-7.

¹⁶² U.S. General Accounting Office, *Fiscal Year 2002 U.S. Government Financial Statements: Sustained Leadership and Oversight Needed for Effective Implementation of Financial Management Reform*, GAO-03-572T, Apr. 8, 2003.

¹⁶³ For more detailed consideration of differences among CFO positions, see CRS Report RL31965, *Financial Management in the Federal Government: Efforts to Improve Performance*, by Virginia A. McMurtry, pp. 4-5.

¹⁶⁴ P. L. 103-82; 107 Stat. 882, 42 U.S.C. § 12651f.

Executive Office of the President (EOP).¹⁶⁵ The CFO for the EOP generally is to “have the same authority and perform the same functions” as other agency CFOs. However, the President may determine that certain statutory provisions applicable to other agency CFOs shall not apply to the new position; Congress must be notified of any such exemptions.

The Homeland Security Act of 2002 provided for a third new CFO position.¹⁶⁶ The law makes no reference to the CFO Act or to Chapter 9 of Title 31. The CFO in the Department of Homeland Security (DHS) is appointed by the President with no Senate confirmation requirement. In addition, unlike all the other CFOs, who report directly to the agency head, the CFO for DHS may report to the Secretary, or to “another official of the Department, as the Secretary may direct.”¹⁶⁷ Measures received action in the first session of the 108th Congress to bring the CFO in DHS directly under the CFO Act.¹⁶⁸

Careful oversight of ongoing activities in the executive branch to improve financial management in the federal government, particularly developments relating to consolidated financial statements, remains an important concern for Congress. With enactment of the Accountability of Tax Dollars Act of 2002, 78 more agencies are required to prepare annual audited financial statements. The ultimate issue may be whether or not the availability of such statements eventually contributes to different and better decisions.

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Peters, Katherine McIntire. “Making Change.” *Government Executive*, vol. 32 (June 2000), pp. 70-78.

¹⁶⁵ P. L. 106-58, Sept. 29, 1999; 113 Stat. 430. The provisions relating to the new CFO position are contained in Sec. 638; 113 Stat. 475.

¹⁶⁶ P. L. 107-296, Sec. 103; 116 Stat. 2145.

¹⁶⁷ *Ibid.*, Sec. 702, 116 Stat. 2219.

¹⁶⁸ On Nov. 21, 2003, S. 1567, as amended, passed the Senate by unanimous consent, and on Nov. 25, 2003, S. 1567 was held at the desk in the House, in preparation for floor action. Previously, two House committees ordered reported a companion measure, H.R. 2886. The legislation also deletes the Federal Emergency Management Agency from the listing of CFO agencies, so that FEMA, now moved to the Department of Homeland Security, is not required to prepare separate financial statements.

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Virginia McMurtry

H. Government Management Reform Act of 1994

Statutory Intent and History

The Government Management Reform Act (GMRA) of 1994 (108 Stat. 3410)¹⁶⁹ incorporated “reinventing government” principles from the National Performance Review (NPR)¹⁷⁰ to pursue needed reforms, particularly with regard to federal personnel and general and financial management. Based upon a six-month study, the NPR Final Report offered over 380 major recommendations for creating “a government that works better and costs less.”¹⁷¹ Several of the NPR recommendations were implemented by executive action, but others required statutory change. The Clinton Administration forwarded a wide-ranging draft measure incorporating the needed legislative provisions, which was introduced in the House on October 28, 1993, as the “Government Reform and Savings Act” (H.R. 3400). An amended version passed the House on November 23, 1993.

Although H.R. 3400 had been jointly referred to 17 House committees having jurisdiction over particular provisions in the measure (11 of which took some action on the measure and six of which were discharged of it), the situation was different in the Senate. Under Senate rules, bill referral goes to the committee that has jurisdiction over the subject matter that predominates in the text; multiple referrals are less common than in the House, since they require unanimous consent of the Senate. So, when the House-passed version of H.R. 3400 was submitted to the Senate, it was referred only to the Governmental Affairs Committee because of its scope as an omnibus government reform bill. Following action by this committee, it was expected that other Senate committees would consider those sections falling within their jurisdictions. Eventually, the Governmental Affairs Committee reported a new bill, S. 2170, much narrower in scope than the original H.R. 3400, and containing only those provisions falling under the committee’s jurisdiction, since no other committee took up the House-passed measure.¹⁷² During floor consideration in the Senate, additional provisions were dropped, including enhanced federal debt collection procedures.

On October 13, 1994, President Clinton signed S. 2170 into law, “An Act to provide a more effective, efficient, and responsive Government.” In his signing

¹⁶⁹ Codified at 31 U.S.C. § 331, § 501nt, § 1113 nt, prec. § 3301, § 3301 nt, § 3332, § 3515, and § 3521. Also at 2 U.S.C. § 31, § 31 nt; 3 U.S.C. § 104; 5 U.S.C. § 5318, § 6304 and nt; and 28 U.S.C. § 461.

¹⁷⁰ On March 3, 1993, President Bill Clinton announced a six-month performance review of the federal government, under the leadership of Vice President Al Gore. The NPR focused primarily on process, how to make the government function more efficiently and effectively.

¹⁷¹ U.S. Executive Office of the President, *From Red Tape to Results: Creating a Government That Works Better & Costs Less*, National Performance Review (Washington: GPO, 1993), pp. 134-153, 160-168.

¹⁷² See U.S. Congress, Senate Committee on Governmental Affairs, *Government Management Reform Act of 1994*, S.Rept. 103-281, 103rd Cong., 2nd sess. (Washington: GPO, 1993).

statement, the President noted that, in passing the measure, “[T]he Congress has helped ensure that the Federal Government’s managers will have the financial information and flexibility they need to make sound policy decisions and manage resources.” He also praised provisions in the GMRA contributing to improved federal financial accountability as well as cutting costs.¹⁷³

Major Provisions

Title I of the Government Management Reform Act of 1994, “Limitation on Pay,” requires that automatic cost of living raises for Members of Congress, the Executive Schedule, and the judiciary not exceed those given to General Schedule (GS) federal employees. Title II, “Human Resource Management,” limits the number of annual leave days that Senior Executive Service (SES) employees may accrue.

Title III, “Streamlining Management Control,” strives to improve the efficiency of federal agencies in meeting statutory requirements for reports to Congress. It allows the Director of the Office of Management and Budget, in his annual budget submission, to publish recommendations to eliminate or consolidate duplicative or obsolete reporting requirements and to adjust deadlines to achieve a more efficient workload distribution or improve the quality of reports.

Title IV contains the “Federal Financial Management Act of 1994,” covering a variety of issues, including electronic funds transfer, franchise funds, reporting requirements, and audited financial statements.

Section 402 aids federal agencies in the conversion to electronic delivery of government payments. The section states that all federal wage, salary, and retirement payments shall be paid to recipients by electronic funds transfer, starting on January 1, 1995, for new employees or recipients. Recipients may have the requirement waived by written request. The Secretary of the Treasury may waive the requirement for a group of recipients upon request by the head of an agency, based on standards prescribed by Treasury.

Section 403 authorizes the establishment of franchise funds in six executive agencies on a pilot program basis for five years. The franchising concept draws from the reinventing government principles of competition and the injection of market mechanisms into government operations. Franchise programs would offer administrative support services, such as payroll operations and accounting services, to the participating agency and to other federal agencies on a reimbursable basis. The monopoly of internal service providers within federal agencies would be eliminated because office managers would be free to buy from the best provider. Franchise programs will expand or decline with the demand for their services.

Section 404 provided flexibility for the OMB Director in the timing and presentation of statutorily required financial management reports from executive branch agencies to OMB or the President, and from agencies or OMB to Congress.

¹⁷³ U.S. Executive Office of the President, *Weekly Compilation of Presidential Documents*, vol. 30 (Oct. 17, 1994), pp. 2006-2007.

Flexibility was provided to improve the efficiency of executive branch performance in financial management reporting. This authority initially was limited, however, to reports required by statute to be submitted between January 1, 1995, and September 30, 1997. Adjustments in reporting were made only after consultation with the chairman of the Senate Committee on Governmental Affairs and the chairman of the House Committee on Government Reform and Oversight; written notification to Congress must follow.

Section 405 expands requirements for executive branch agency financial statements contained in Section 303(a) of the Chief Financial Officers Act of 1990 (see discussion elsewhere in this compendium). Section 405(a) requires all 24 agencies covered under the CFO Act to have agency-wide audited financial statements, beginning with FY1996. The annual statements, initially due February 28, 1997, must cover all accounts and associated activities. The requirement is intended to contribute to cost-effective improvements in government operations. The OMB Director is authorized to require additional audited financial statements for components of CFO Act agencies. The OMB Director is also given authority to prescribe the form and content of financial statements.

Section 405(b) provides that for each audited financial statement required from the agency, the person who audits the statement (the inspector general or an independent external auditor) must submit a report on the audit to the head of the agency. This report is to be prepared in accordance with generally accepted government auditing standards.

Section 405(c) of the GMRA further requires that a consolidated audited financial statement for all accounts and associated activities in the executive branch be prepared by the Secretary of the Treasury, in coordination with the OMB Director, and be audited by the Comptroller General.¹⁷⁴ The first such statement, covering FY1997, was submitted to the President and Congress on March 31, 1998. This financial statement is intended to reflect the overall financial position of the executive branch, including assets, liabilities, and results of operations of the executive branch. The specific form and contents of the financial statement are determined by the OMB Director. This financial statement is intended to provide Congress, the President, and the American public with more accurate and useful financial information on the workings of the government.

Discussion

As mentioned previously, most of the provisions in the GMRA reflect recommendations contained in the report of the National Performance Review. For example, the NPR report endorsed the idea of “franchising” internal services; the GMRA provides for a pilot program embracing the approach. Originally, it was

¹⁷⁴ Although all accounts and activities of the executive branch were included in the government-wide financial statement, only CFO Act-covered accounts were audited. Because accounts not covered by the CFO Act constitute only a small portion of executive branch activities, these accounts did not have a significant effect on the government-wide financial statement.

anticipated that the pilots would be designated in the spring of 1995, operate for four years and terminate on October 1, 1999. However, delays occurred, with the six pilots not fully in operation until FY1997. In September of 1996, a provision was included in P. L. 104-208, the Omnibus Consolidated Appropriations Act of 1997, extending the pilot program through FY2001. The GMRA required that a report evaluating the franchise funds in the pilot program was due to Congress “within 6 months after the end of fiscal year 1997.” A report, addressing the elements specified in the law, was submitted on schedule in March 1998, but as an interim progress report, rather than a final evaluation of the experiences with the six franchise funds included in the pilot program.¹⁷⁵

The NPR report also called for eliminating unnecessary reports and simplifying the reporting process. The GMRA encouraged weeding out where possible and otherwise consolidating existing reports in an ongoing effort to simplify reporting requirements and to maximize the usefulness of executive branch reports to Congress. Provisions in the Reports Consolidation Act of 2000 (P. L. 106-531; 114 Stat. 2537) restored and enhanced the consolidation authority for financial and performance management reports initially given to the OMB Director in GMRA and, moreover, made the authority permanent. In 2001, the OMB Director required that agencies combine annual performance reports pursuant to the Government Performance and Results Act with the CFO Act financial statements into a consolidated Performance and Accountability Report. At the same time, a schedule of accelerated deadlines was established, with the reports covering FY2003 due by January 30, 2004; beginning with FY2004, the performance and accountability reports are due by November 15th.¹⁷⁶

Another major recommendation in the NPR report was to use the Chief Financial Officers Act of 1990 to improve financial services. The provisions in GMRA relating to annual audited financial statements for federal agencies embody this approach, as discussed.¹⁷⁷

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¹⁷⁵ See *The Franchise Fund Pilot Program: An Interim Progress Report*. Report to Congress [Washington, 1998]. This interim report was prepared jointly by the Office of Management and Budget, the Entrepreneurial Government Committee of the Chief Financial Officers Council, and the six franchise fund pilots.

¹⁷⁶ OMB, *Form and Content of Agency Financial Statements*, Bulletin No. 01-09, Sept. 25, 2001.

¹⁷⁷ See “Discussion” section relating to Chief Financial Officers Act elsewhere in this compendium for perspective on the CFO Act amendments contained in GMRA providing for the audited financial statements.

———. *Reports Consolidation Act of 2000*. Report to accompany S. 2712. S.Rept. 106-337. 106th Congress, 2nd session. Washington: GPO, 2000.

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Virginia McMurtry

I. Accountability of Tax Dollars Act of 2002

Statutory Intent and History

The Accountability of Tax Dollars Act (ATDA) of 2002 (P.L. 107-289; 116 Stat. 2049) was intended “to expand the types of Federal agencies that are required to prepare audited financial statements to all executive branch agencies in the federal government.”¹⁷⁸

Testifying in support of the legislation, Representative Pat Toomey stated that he first introduced the measure in the 106th Congress (H.R. 5521) “as a good government measure to combat waste, fraud, and abuse at Federal agencies.... I decided to introduce legislation when I learned, to my surprise, that many Federal agencies are simply not required by law to prepare audited financial statements, even though this is a fundamental part of good management and oversight.”¹⁷⁹

In the 107th Congress, H.R. 4685 was introduced on May 8, 2002, by Representative Toomey, with bipartisan cosponsors, and referred to the House Committee on Government Reform. On May 14, 2002, the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations held a hearing, and on June 18, 2002, approved the bill, as amended, by unanimous consent. On October 7, 2002, H.R. 4685 was considered in the House under suspension of the rules and passed, as amended, by voice vote.

A companion bill, S. 2644, was introduced in the Senate on June 19, 2002, and referred to the Committee on Governmental Affairs. Markup was held on October 16, 2002, and S. 2644, with a substitute amendment, was reported favorably by a vote of 9-0. On the following day, the Senate passed H.R. 4685 by unanimous consent. The measure was signed into law on November 7, 2002, with the first audited statements pursuant to the act due on March 1, 2003.

Major Provisions

The Accountability of Tax Dollars Act amends Title 31, *United States Code*, to bring almost all executive branch agencies under the requirement for preparation of annual audited financial statements that previously applied only to the 24 major departments and agencies covered by the Chief Financial Officers (CFO) Act.¹⁸⁰ Specifically, Section 2(a) changes the list of agencies covered by the audited annual financial statements requirement in 31 U.S.C. § 3515 by deleting the cross-reference to CFO Act agencies and inserting “each covered executive agency.” In addition, the

¹⁷⁸ U.S. Congress, Senate Committee on Governmental Affairs, *Accountability of Tax Dollars Act of 2002*, S.Rept. 107-331, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 1.

¹⁷⁹ U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *H.R. 4865, the Accountability of Tax Dollars Act of 2002*, hearing, 107th Cong., 2nd sess. (Washington: GPO, 2003), p. 8.

¹⁸⁰ 104 Stat. 2838. See discussion of the CFO Act elsewhere in this compendium.

new law changed the initial due date for the audited financial statements from March 1, 1997, to March 1, 2003.

The new law further amends Section 3515 by adding two new subsections. Subsection 3515(e) allows the Director of OMB to exempt an agency from the requirement to prepare an annual audited financial statement in a fiscal year under certain circumstances. OMB discretion is possible when the agency budget does not exceed \$25 million, and the OMB Director determines the exercise is unwarranted due to the absence of risks associated with the agency's operations, the agency's demonstrated performance, or other relevant factors. If OMB grants such exemptions, the director is to notify the House Committee on Government Reform and the Senate Committee on Governmental Affairs annually of the agencies involved and the reasons for each exemption. Subsection 3515(f) defines the term "covered executive agency" to mean any other executive agency not required by another provision of law to prepare and submit annually to Congress and OMB an audited financial statement. Specifically excluded are bodies subject to Chapter 91 of Title 31 (mainly government corporations).

Section 2(b) of ADTA provides waiver authority for the OMB Director during a transition period under the new law. Specifically, the OMB Director may waive the application of the new law to any non-CFO Act agency for two years following enactment.

Discussion

The Accountability of Tax Dollars Act amends Title 31, *United States Code*, to expand the types of federal agencies that are required to prepare audited financial statements each year. Prior to its enactment, the 24 major departments and agencies covered by the CFO Act were required to prepare annual financial statements to be audited by their Offices of Inspector General (IG) or outside contractors designated by the IGs. A few agencies, such as the U.S. Postal Service, were required by agency-specific legislation to prepare audited financial statements. Over 20 entities were also previously required to prepare annual financial statements and have them audited pursuant to the Government Corporation Control Act (Chapter 91 of Title 31, described elsewhere in this compendium). Several independent agencies, such as the Federal Communications Commission and the Federal Trade Commission, voluntarily prepared audited financial statements.¹⁸¹

As noted, the ATDA was passed with virtually no opposition in the 107th Congress, both in committee and during House and Senate floor consideration. The language relating to coverage did evolve during the legislative process, however. Both the House and Senate bills, as introduced, provided a blanket exemption for agencies with budget authority for the fiscal year of less than \$25 million. Testimony

¹⁸¹ U.S. General Accounting Office, "Survey Results of Selected Non-CFO Act Agencies' Views on Having Audited Financial Statements," briefing to the Honorable Patrick J. Toomey, House of Representatives, Nov. 30, 2001, p. 15. Reprinted in hearing on H.R. 4685, p. 27.

received during a hearing on H.R. 4685 may have proved important in this regard, when an official from the Federal Elections Commission suggested:

Agency operations and the types of programs administered by an agency should be more important than the size of budget in determining the need for audited financial statements. For example, an agency with a budget less than \$25 million that has fiduciary responsibility for a trust fund, administers a grant program, or operates revenue-generating programs may be the type of agency that should prepare audited financial statements ...¹⁸²

As enacted, the ATDA allows the OMB Director to exempt agencies with budgets under \$25 million from the audited statements requirement under certain circumstances, but the exemption is not automatic.

With respect to agencies subject to the new law, it is interesting to note that 49 agencies were included as coming under the expanded requirements (before any possible OMB exemptions) in the Senate report accompanying S. 2644.¹⁸³ A month later, after the bill was signed into law, a memorandum from the OMB Director listed 78 agencies affected by ATDA.¹⁸⁴

The OMB Director also exercised the provision in the law to waive the requirement during an initial transition period, allowing agencies not having prepared audited financial statements in the past to have an exemption for FY2002 for the annual financial statements. In the same December 2002 memorandum, the director noted that the newly covered agencies, along with the 24 CFO agencies, are all subject to the provisions of OMB Bulletin 01-09, *Form and Content of Agency Financial Statements*, beginning with FY2003.¹⁸⁵ This bulletin requires agencies to consolidate their audited financial statements and other financial and performance reports into combined Performance and Accountability Reports and accelerates the deadlines for submission.¹⁸⁶ OMB subsequently waived the requirement in Bulletin

¹⁸² Hearing on H.R. 4685, p. 85.

¹⁸³ S. Rept. 107-331, pp. 3-4.

¹⁸⁴ U.S. Office of Management and Budget, "Requirements of the Accountability of Tax Dollars Act of 2002," Memorandum for Heads of Selected Executive Agencies from Mitchell E. Daniels Jr., Dec. 6, 2002. There may be further modifications to the list of agencies coming under ATDA's expanded requirement for financial statements, because of possible uncertainty with the statutory definition of *covered agency*, as described above.

¹⁸⁵ U.S. Office of Management and Budget, *Form and Content of Agency Financial Statements*, Bulletin No. 01-09, Sept. 25, 2001.

¹⁸⁶ Previously, CFO agencies had a deadline of 150 days after the end of the fiscal year (i.e., early March) to submit the reports, but the due date for the combined FY2002 reports was moved up to February 1, 2003; for FY2003, to January 30, 2004; and beginning with FY2004, to November 15, just six weeks after the close of the fiscal year. (See discussion of the CFO Act elsewhere in this compendium.)

01-09 for preparation and submission to OMB of quarterly unaudited financial statements for FY2003 for the agencies covered by ATDA.¹⁸⁷

An issue that may be revisited is whether the ATDA agencies should be subject to the additional requirements of the Federal Financial Management Act (FFMIA), as are the 24 CFO Act agencies. The FFMIA requires covered agencies to implement and maintain financial management systems that comply substantially with federal financial management system requirements, applicable federal accounting standards, and the United States General Ledger at the transaction level.¹⁸⁸ H.R. 4685, as reported out of subcommittee, apparently contained language bringing ATDA agencies under the accounting standards provisions of FFMIA.¹⁸⁹ Opposition from the Bush Administration resulted in deletion of the FFMIA provisions prior to floor consideration. As Representative Janice Schakowsky commented during House floor debate:

Unfortunately, the bill we have on the floor today is not the bill we have passed out of our subcommittee [House Subcommittee Government Efficiency, Financial Management and Intergovernmental Relations]. The bill we have passed included a section that required the agencies covered under this bill to conform to the accounting standards set out in the Federal Financial Management Improvement Act of 1996. The administration insisted that those [FFMIA] provisions be stripped from the bill, or it would block the bill from coming before the House today.... I am afraid that the administration's opposition to the accounting standards that were in this bill is just one more attempt to make sure that OMB, and not Congress, sets the standards by which agencies are judged.¹⁹⁰

As one of five government-wide initiatives under the rubric of the *President's Management Agenda*,¹⁹¹ improved financial performance in executive branch agencies has received considerable attention and emphasis from OMB recently. Improving financial management in the federal government remains an important concern for Congress as well. With enactment of ATDA, 78 more agencies are required to prepare annual audited financial statements. Congressional scrutiny of the initial round of audited financial statements prepared by agencies subject to ATDA might prove an informative focus for oversight. The ultimate question may be whether the availability of audited financial statements improves the quality of

¹⁸⁷ U.S. Office of Management and Budget, "Accountability of Tax Dollars Act of 2002 — Implementation Guidance and Executive Forum March 31," Memorandum to Heads of Executive Agencies Subject to Provisions of the Accountability of Tax Dollars Act of 2002, from Mark W. Everson, Mar. 20, 2003.

¹⁸⁸ 110 Stat. 3009-389; 31 U.S.C. § 3512 note. For further background on FFMIA, see discussion elsewhere in this compendium.

¹⁸⁹ There was no written report to accompany H.R. 4685.

¹⁹⁰ Rep. Janice Schakowsky, remarks in the House, *Congressional Record*, daily edition, vol. 148, Oct. 7, 2002, p. H7043.

¹⁹¹ See U.S. Office of Management and Budget, *The President's Management Agenda — FY2002* (Washington: OMB, 2001). For an overview of the PMA, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry.

decisionmaking in the federal government and furthers accountability to the American taxpayers, as envisaged in the ATDA.

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Virginia McMurtry

J. Federal Managers' Financial Integrity Act of 1982

Statutory Intent and History

The Federal Managers' Financial Integrity Act (FMFIA) of 1982,¹⁹² which amended the Accounting and Auditing Act of 1950, was designed to improve the government's ability to manage its programs. It emerged in the early 1980s and is often seen as the opening to other attempts along this line, including the Chief Financial Officers Act of 1990, the Federal Financial Management Improvement Act of 1996, and the Accountability of Tax Dollars Act of 2002.¹⁹³ Adoption of FMFIA followed the conclusions of a number of studies — from congressional committees, the General Accounting Office (GAO), inspectors general, and the executive agencies themselves — that documented significant weaknesses in internal financial and management controls, including inadequate and inaccurate accounting systems and financial reports. These weaknesses, in turn, were seen as contributing to wasteful spending, poor management, ineffective programs, fraud, and billions of dollars in losses.

FMFIA recognized that strong internal controls and accounting systems would help to ensure the proper use of funds and resources, compliance with statutes and regulations, and preparation of reliable financial reports for oversight and policymaking. The enactment, consequently, provides for ongoing evaluations of the internal control and accounting systems that protect federal programs against fraud, waste, abuse, and mismanagement. FMFIA further mandates that the heads of federal agencies report annually to the President and Congress on the condition of these systems and on their actions to correct any material weaknesses which the reports identified. Regulations implementing FMFIA's requirements for financial management systems are contained in Office of Management and Budget (OMB) Circular No. A-127, dealing with management accountability and control.

Major Provisions

Purposes and Objectives. The act requires the head of each executive agency to establish internal accounting and administrative controls, consistent with standards the Comptroller General prescribes, that reasonably ensure three principal objectives:

- that obligations and costs comply with applicable law;
- that all assets are safeguarded against waste, loss, unauthorized use, and misappropriation; and
- that revenues and expenditures applicable to agency operations are recorded and accounted for properly, so that accounts and reliable

¹⁹² P.L. 97-255, 96 Stat. 814-815; codified at 31 U.S.C. § 3512.

¹⁹³ For an overview of these and related efforts, see CRS Report RL31965, *Financial Management in the Federal Government: Efforts to Improve Performance*, by Virginia A. McMurtry.

financial and statistical reports can be prepared and accountability of the assets maintained.

The standards prescribed by the Comptroller General specifically include those designed to ensure the prompt resolution of all audit findings.

Guidelines. To meet these requirements, FMFIA instructed the Director of OMB, in consultation with the Comptroller General, to establish guidelines that the head of each agency must follow in evaluating the internal accounting and administrative control system of the agency. The OMB Director, however, is authorized to change a guideline when considered necessary.

Required Statements and Reports. By December 31 of each year (beginning in 1983), the head of each executive agency, based on such evaluations, prepares a statement on whether or not the systems of the agency comply with the criteria cited above. If the systems do not comply, then the head issues a report identifying any material weaknesses in the systems and describing the plans and schedule for correcting the weaknesses. Section 4 of the act provides that a separate report state whether the accounting system of the agency conforms to the principles, standards, and requirements of the Comptroller General.

The reports and statements are signed by the head of the agency and submitted to the President and Congress. These products in their entirety are also made available to the public, with an exception, however, for certain sensitive or classified information: i.e., information is deleted if it is specifically prohibited by law or required by executive order to be kept secret in the interest of national security.

The Reports Consolidation Act (RCA) of 2000 (P.L. 106-531; 114 Stat. 2537), approved at the end of the 106th Congress, has implications for FMFIA reports. The new statute is intended to overcome the duplication of effort and lack of coordination among the multiple financial and performance management reporting requirements within an agency. To do so, RCA authorizes the consolidation of such reports into a single annual report from each agency to achieve several purposes: enhance efficiency and coordination among the reporting entities; improve the quality of the information; and provide it in a more meaningful and useful format for Congress, the President, and the public.

Provisions Affecting Offices of Inspectors General. FMFIA also affects offices of inspector general (OIGs), created earlier by the Inspector General Act of 1978 (92 Stat. 1101). Section 3 of the act requires that the President include in the supporting detail of his budget submission the amounts of appropriations he requested for each OIG. Congressional committees are authorized to solicit from the IG additional information concerning the amount of appropriations he or she requested when the request was originally submitted to agency management or OMB. This provision was designed to help protect the independence of IG offices and ensure their adequate funding. Along these same lines, the Inspector General Act Amendments of 1988 (102 Stat. 2529) provided for a separate appropriations account for each office of inspector general in a federal establishment (i.e., all the cabinet departments and the larger agencies).

Reference in the Chief Financial Officers Act. The Chief Financial Officers (CFO) Act of 1990 (104 Stat. 2847) is connected to the Federal Managers' Financial Integrity Act requirements. The CFO Act calls upon the Director of OMB to submit a financial management status report to appropriate committees of Congress. Part of this report is to be a summary of reports on internal accounting and administrative control systems submitted to the President and Congress as required by FMFIA.

Discussion

Passage of the Federal Managers' Financial Integrity Act in 1982 built upon some of the same concerns that had prompted enactment of the Inspector General Act four years before. FMFIA was boosted at the time by its incorporation as a top priority in Reform '88; these were the Reagan Administration initiatives begun in 1982, which were intended to strengthen management controls in the federal government. The statute was later enhanced by provisions in the Chief Financial Officers Act of 1990 and now plays a role in the President's Management Agenda, initiated by President George W. Bush in 2001.¹⁹⁴ FMFIA continues to provide a framework for strengthening, standardizing, and evaluating internal control and accounting systems as well as for reporting on relevant findings and corrective action. These developments paved the way for high expectations for ferreting out the root causes of waste, fraud, and mismanagement; providing federal managers with specifics about what is wrong and how to correct it; and informing Congress and the public about the underlying problems and their remedies.

FMFIA has received mixed reviews over the years. Initially, it was seen as not reaching its high expectations, according to some commentators who asserted that the law had been ignored or improperly and too narrowly implemented. This occurred, critics contended, because of an over-concern with the process rather than a focus on the objectives of the legislation, confusion or misunderstanding over the law's terminology, and restrictive interpretations of some of its provisions. FMFIA's failure to produce the results intended by Congress, in part, led to the later passage of other laws (discussed elsewhere in this compendium) designed to improve the general and financial management of the government. These included the Chief Financial Officers Act of 1990, the Government Management Reform Act of 1994, and the Federal Financial Management Improvement Act of 1996.

Since then, however, FMFIA and the related statutes have received more favorable reviews and, evidently, have had a more beneficial impact on federal agencies. According to an OMB study, for instance, "from 2001 to 2002, the number of FMFIA material weaknesses and nonconformances [found] dropped by 22 percent

¹⁹⁴ U.S. Office of Management and Budget, *The President's Management Agenda — FY2002* (Washington: OMB, 2001); and *Fiscal Year 2004 Budget of the U.S. Government, Performance and Management Assessments* (Washington: GPO, 2003), pp. 1-7. For an overview and other citations, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry.

....”¹⁹⁵ Nonetheless, FMFIA and its statutory partners have significant challenges to meet in developing a healthy financial system for the U.S. government across the board.¹⁹⁶

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¹⁹⁶ *Ibid.*

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Frederick M. Kaiser

K. Federal Financial Management Improvement Act of 1996

Statutory Intent and History

The Federal Financial Management Improvement Act of 1996 (110 Stat. 3009-389; 31 U.S.C. § 3512 note) incorporates in statute certain financial management system requirements already established as executive branch policy. The law also requires auditors to report on agency compliance with these requirements, and agency heads and management to correct deficiencies within certain time periods.

The act has seven purposes:

- provide for consistency in agency accounting from year to year, and for uniform accounting standards throughout the federal government;
- require federal financial management systems to support full disclosure of financial data so that programs and activities can be considered on their full costs and merit;
- increase accountability and credibility of federal financial management;
- improve performance, productivity, and efficiency of federal financial management;
- establish financial management systems that support controlling the cost of the federal government;
- build upon and complement the Chief Financial Officers Act, the Government Performance and Results Act, and the Government Management Reform Act; and
- increase the capability of agencies to monitor budget execution through reports that compare spending of resources to results of activities.

Enactment of the Federal Financial Management Improvement Act of 1996 (FFMIA) reflects an ongoing effort to reform financial management in the federal government. The 1996 law builds upon prior legislation, including the Chief Financial Officers Act of 1990, the Government Performance and Results Act of 1993, and the Government Management Reform Act of 1994. (See separate entries in this compendium for overviews of these laws.)

The FFMIA also follows up on the work of the Federal Accounting Standards Advisory Board (FASAB). Created pursuant to a 1990 Memorandum of Understanding among the Comptroller General of the United States (who heads the General Accounting office, or GAO), the Director of the Office of Management and Budget (OMB), and the Secretary of the Treasury, FASAB was charged with developing and recommending accounting standards for the federal government.

Once reviewed and adopted by the three principals, the standards are published by OMB and GAO and go into effect. According to the Senate report which accompanied the measure, FFMIA seeks to shift the focus of reform efforts to implementation of the agreed-upon federal accounting standards. The report further noted: “While development of the accounting standards is an enormous accomplishment, however, the Committee wishes to emphasize that the benefits of good financial management will flow from the implementation of these standards and not simply their promulgation.”¹⁹⁷

After a rather complicated legislative history, the Federal Financial Management Improvement Act was enacted as a part of the Omnibus Consolidated Appropriations Act for FY1997 (P.L. 104-208; 110 Stat. 3009, at 3009-389). Originally introduced as S. 1130 in the summer of 1995 by Senator Hank Brown, the bill was the subject of a Senate Governmental Affairs Committee hearing in December of 1995; the committee then favorably reported a substitute version offered by Senator Brown the following May, and filed a written report on July 30, 1996 (S.Rept. 104-339). The Senate passed S. 1130, as amended by the committee substitute, by unanimous consent on August 2, 1996. Companion measures to S. 1130 were introduced in the House in September (H.R. 4061 and H.R. 4319), but no further action occurred on these bills. Ultimately, both the House and the Senate agreed to the FFMIA provisions under the rubric of the conference agreement.¹⁹⁸ President Clinton signed H.R. 3610 into law on September 30, 1996.

Major Provisions

The Federal Financial Management Improvement Act requires federal agencies to implement and maintain financial management systems that comply substantially with federal financial management system requirements, applicable federal accounting standards, and the United States Government Standard General Ledger (SGL) at the transaction level.

The act requires auditors to report on compliance with these requirements in their financial statement audits. When noncompliance is discovered, auditors shall include in their report: (1) the entity or organization responsible for the financial management systems; (2) facts pertaining to the failure to comply (including the

¹⁹⁷ U.S. Congress, Senate Committee on Governmental Affairs, *Federal Financial Management Improvement Act of 1996*, S.Rept. 104-339, 104th Cong., 2nd sess. (Washington: GPO, 1996), p. 6.

¹⁹⁸ Specifically, the text of S. 1130 was approved as Amendment No. 5255 to H.R. 3756, the Treasury Postal Service Appropriations, 1997, bill by the Senate on September 11, 1996. In offering the floor amendment, Senator Brown explained that, given the shortness of time left in the session, attaching the measure previously approved by the Senate (S. 1130) to the appropriations measure provided the “best hope for enacting these important reforms into law this year.” The following day, however, Senate Majority Leader Trent Lott pulled the Treasury Postal Service bill from the Senate floor when it appeared hopelessly bogged down with other add-ons. Subsequently, the conference report accompanying H.R. 3610, providing for 1997 omnibus consolidated appropriations (H.Rept. 104-863), included the text of the Federal Financial Management Improvement Act as a part of the Treasury Postal Service Appropriations (as added during Senate floor consideration of H.R.3756).

nature and extent of noncompliance, the primary reason or cause of noncompliance, the entity or organization responsible for the noncompliance, and relevant comments from responsible officers and employees); and (3) a statement of recommended remedial actions and time frames for implementing them.

The head of each agency is also required to determine whether agency financial management systems are in compliance. The determination is based on the report on the agency-wide audited financial statements and other information the head considers relevant and appropriate. If the head agrees that the systems are not in compliance, the head (in consultation with the Director of OMB) establishes a remedial plan that includes resources, remedies, and intermediate target dates necessary to bring about substantial compliance within three years after the auditor's determination. If the agency (with concurrence of the director) determines that more than three years are needed, the remedial plan specifies the most feasible date and designates an official responsible for bringing the systems into compliance. If the head disagrees with the auditor's findings, the Director of OMB shall review the determinations and report on the findings to the appropriate committees of Congress.

The act also requires the Director of OMB and the Comptroller General to make annual reports to Congress. The latter reports on compliance with the financial management system requirements and on the adequacy of applicable accounting standards for the federal government. In addition, inspectors general report to Congress instances and reasons when an agency has not met the intermediate target dates specified in remedial plans.

The act became effective for FY1997.

Discussion

The Federal Financial Management Improvement Act put into statutory law financial management requirements that the executive branch by and large had already established. Thus, its immediate effects were likely minimal, though the requirements for expanded auditor reports and agency remedial plans, including target dates, in cases of noncompliance ought not be underestimated. Supporters of the legislation hoped that an explicit statutory basis for financial management requirements might give them greater visibility and importance, and increase the likelihood that remedial plans would receive higher priority within the agencies and OMB, as well as in annual appropriations.

In its review of FFMIA for FY1997, GAO observed that "it will take time and concerted effort to raise government financial management systems to the level of quality and reliability envisioned in FFMIA."¹⁹⁹ Two years later, in commenting on the draft of the GAO report for FY1999, the Office of Management and Budget agreed with the assessment of FFMIA's compliance requirements, but contended that the report "does not give credit for progress made or improvement efforts

¹⁹⁹ U.S. General Accounting Office, *Financial Management: Federal Financial Management Improvement Act Results for Fiscal Year 1997*, GAO/AIMD-98-268, Sept. 30, 1998, p. 2.

underway by agencies.” It also expressed concern that “as currently written in OMB guidance, compliance requirements were black and white — meaning an agency was either compliant or non compliant.” GAO agreed that it is important to measure progress and acknowledged that “the agencies are moving in the right direction.”²⁰⁰

The number of CFO agencies receiving unqualified audit opinions on their financial statements increased steadily, from 11 in FY1997 to 21 in FY2002. Nonetheless, in reviewing the annual audit reports, GAO continued to find that most of the 24 CFO agencies did not comply substantially with FFMIA requirements. In FY2002, auditors reported that 17 agencies were noncompliant with FFMIA systems requirements, 13 were noncompliant with applicable federal accounting standards, and 9 were noncompliant with the Standard General Ledger. After six years of reporting years under FFMIA, only 3 of the 24 CFO agencies complied substantially with all FFMIA requirements, while 8 agencies were reported still not to be in substantial compliance with any of the requirements.²⁰¹

The matter of addressing fundamental problems with agency financial systems has received increased attention in the executive branch. The Bush Administration in 2001 designated improving financial performance as one of five government-wide initiatives in the *President’s Management Agenda* (PMA). In 2002, OMB devised a management scorecard to grade agencies on their progress; one of the core criteria in the financial performance initiative is for agencies to have financial management systems meeting federal financial systems requirements and applicable federal accounting and transaction standards as reported by the agency head (i.e., be in compliance with the FFMIA requirements).²⁰²

Despite steady agency improvement with the audited financial statements requirements, serious problems remain. While praising the accomplishment of agencies in earning unqualified audit opinions on their financial statements, OMB offered this qualification in a 2002 report: agencies have achieved this record of unqualified opinions despite major problems with their financial systems “only by expending significant resources and making extensive manual adjustments after the end of the fiscal year.”²⁰³ As a reflection of the depth of agency difficulties with

²⁰⁰ U.S. General Accounting Office, *Financial Management: Federal Financial Management Improvement Act Results for Fiscal Year 1999*, GAO/AIMD-00-307, Sept. 2000, pp. 14, 43.

²⁰¹ U.S. General Accounting Office, *Financial Management: Sustained Efforts Needed to Achieve FFMIA Accountability*, GAO-03-1062, Sept. 2003, pp. 13-14.

²⁰² See CRS Report RS21416, *The President’s Management Agenda: A Brief Introduction*, by Virginia A. McMurtry; and U.S. Office of Management and Budget, *Fiscal Year 2004 Budget of the U.S. Government, Performance and Management Assessments* (Washington: GPO, 2003), pp. 1-7. As of Sept. 30, 2003, three agencies have received a green mark on the scorecard, indicating that they have met all the core criteria for success on the financial management initiative.

²⁰³ U.S. Office of Management and Budget, *2002 Federal Financial Management Report* (Washington: May 1, 2002), p. 11, available at: [http://www.whitehouse.gov/omb/financial/2002_report.pdf], visited Dec. 11, 2003.

FFMIA, as of September 30, 2002, 17 of the 24 agencies reported to GAO²⁰⁴ that they were planning to or were in the process of implementing new core financial systems.²⁰⁵

In its report on FFMIA compliance in 2003, GAO cautioned about an “expectation gap,” given the improvements on the financial statements coupled with the relative lack of success in achieving compliance with FFMIA: “When more agencies receive clean opinions, expectations are raised that the government has sound financial management and can produce reliable, useful, and timely information on demand throughout the year, whereas FFMIA assessments offer a different perspective.”²⁰⁶ On the other hand, the PMA, along with efforts of the Joint Financial Management Improvement Program (JFMIP) Principals,²⁰⁷ provide impetus for addressing the challenges of FFMIA. According to GAO, during FY2002, the JFMIP Principals “continued the series of regular, deliberative meetings that focused on key financial management reform issues.”²⁰⁸

Congressional oversight also remains an important prod for agencies to focus on financial management reform. In his opening statement at an oversight hearing on FFMIA in 2002, Subcommittee Chairman Stephen Horn observed, “We recognize that there are long-standing problems with agency financial management systems. We also recognize that correcting these deficiencies will take time. However, the requirements of this Act must be taken seriously.”²⁰⁹ Since FFMIA does not impose penalties for agencies that are noncompliant, as an early version of the legislation would have authorized, its effectiveness may ultimately depend upon congressional oversight and OMB insistence that agencies comply with relevant standards.

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²⁰⁴ U.S. General Accounting Office, *Core Financial Systems at the 24 Chief Financial Officers Act Agencies*, GAO-03-903R, June 27, 2003, p. 5.

²⁰⁵ JFMIP defines “core financial systems” to include managing general ledger, funding, payments, receivables, and certain basic cost functions. See Joint Financial Management Improvement Program (JFMIP), *Core Financial Systems Requirements*, SR-02-01 (Washington: JFMIP, 2001).

²⁰⁶ U.S. General Accounting Office, GAO-03-1062, p. 16.

²⁰⁷ The JFMIP Principals are the Secretary of the Treasury, the Directors of OMB and the Office of Personnel Management, and the Comptroller General of the United States. Officially recognized in 1948, JFMIP is a cooperative effort of the principals, working with federal agencies, to improve financial management practices throughout the government.

²⁰⁸ U.S. General Accounting Office, GAO-03-1062, p. 7.

²⁰⁹ U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *The Federal Financial Management Improvement Act of 1996: Are Agencies Meeting the Challenge?*, hearing, 107th Cong., 2nd sess., June 6, 2002 (Washington: GPO, 2003), p. 9.

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Bob Lyke
Virginia McMurtry

L. Federal Credit Reform Act of 1990

Statutory Intent and History

In March 1967, the President's Commission on Budget Concepts was created and instructed to make "a thorough and objective review of budgetary concepts."²¹⁰ In October 1967, the commission produced a comprehensive report with detailed recommendations on implementing a unified budget. In its report, the commission stated that the two basic functions of the federal budget are resource allocation and macroeconomic stabilization. For resource allocation, the commission believed that the budget should "provide the integrated framework for information and analyses from which the best possible choices can be made in allocating the public's money among competing claims."²¹¹ This function of resource allocation should include comparisons among government programs and between the public and private sectors. For macroeconomic stabilization, the commission maintained that the budget should contain detailed and accurate information in order to evaluate the effects of federal fiscal activities. Furthermore, the budget should include data necessary to undertake discretionary countercyclical fiscal policy. Thus, the commission recommended a unified budget that would include all federal activities.

In the FY1969 budget, the Johnson Administration adopted the unified budget concept, but with some structural differences from the proposal of the commission. From FY1969 until the implementation of credit reform in FY1992, the federal budget recorded federal credit activity on a cash flow basis. Federal credit consists of federal direct loans and federal loan guarantees. In a given fiscal year, the budgetary cost of a particular loan program was net cash flow, which equaled new loans made plus any administrative expenses associated with these loans (rarely recognized in the loan accounts) less any loan fees, repayments of principal, and payments of interest. The federal acceptance of a contingent liability when a loan guarantee was provided was not included in the federal budget, because no cash flow occurred. Some guarantee programs charge fees to the recipient, and these fees were considered offsetting collections. Federal outlays were necessary to compensate lenders for any federal guaranteed loan defaults, but these outlays were not shown in the budget until they were actually paid.

On November 5, 1990, the Omnibus Budget Reconciliation Act of 1990 (OBRA90; 88 Stat. 304) was signed into law. It added a new title, Title V, to the Congressional Budget Act. Title V is also called "the Federal Credit Reform Act of 1990" (FCRA; 101 Stat. 1388; 2 U.S.C. § 621 note). Beginning with FY1992 (October 1, 1991), FCRA changed the budgetary treatment of federal direct loans and federal loan guarantees by requiring that the budgetary cost of a credit program be the subsidy cost at the time the credit is provided.

²¹⁰ U.S. President's Commission on Budget Concepts, *Report* (Washington: GPO, 1967), p. 105.

²¹¹ *Ibid.*, p.16.

Major Provisions

The four stated purposes of FCRA are to:

- measure more accurately the costs of federal programs;
- place the cost of credit programs on a budgetary basis equivalent to other federal spending;
- encourage the delivery of benefits in the form most appropriate to the needs of beneficiaries; and
- improve the allocation of resources among credit programs and other spending (Section 501 of FCRA).

FCRA never uses the word *subsidy*; nevertheless, the true budgetary and economic cost of a federal credit program is the subsidy value at the time the credit is provided. FCRA defines the [subsidy] cost as “the estimated long-term cost to the government of a direct loan or loan guarantee, calculated on net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays” [Section 502(5A)]. The discount rate used to calculate subsidy costs in terms of present value is the “average interest rate on marketable Treasury securities of similar maturity” [Section 502(5E)].²¹² Hence, the subsidy cost of a program is determined by the amount of credit provided and the discount rate used to calculate the net present value of this credit.

Any government action that changes the estimated present value of an outstanding federal credit program is counted in the budget in the year in which the change occurs as a change in the subsidy cost of this program (Section 502(5D)). For example, the federal government could partially forgive the repayment of principal for low income borrowers from a particular credit program which would increase the subsidy cost of the program.

The Director of the Office of Management and Budget (OMB) is responsible for coordinating the estimation of subsidy costs. “The Director may delegate to agencies authority to make estimates of costs” (Section 503(a)). But these agencies must use written guidelines from the Director, which are developed after consultation with the Director of the Congressional Budget Office (CBO). The Director of OMB and the Director of CBO are responsible for developing more accurate historical data on credit programs which are used to estimate subsidy costs (Section 503). The President’s budget includes “the planned level of new direct loan obligations and new loan guarantee commitments associated with each appropriations request” (Section 504).

Beginning in the FY1992 budget cycle, discretionary programs providing new direct loan obligations and new loan guarantee commitments required appropriations of budget authority equal to their estimated subsidy costs. Credit entitlements (for

²¹² The derivation of the discount rate was revised by the Balanced Budget Act of 1997.

example, guaranteed student loans) and existing credit programs of the Commodity Credit Corporation have indefinite budget authority (Section 505(a-c)) and do not need an annual appropriation.

Appropriations for the annual subsidy cost of each credit program go to a budget account called a *credit program account*. Funding for the subsidy costs of discretionary credit programs is provided in appropriations acts and must compete with other discretionary programs for funding available under the constraints of the budget resolution. Most mandatory credit programs receive automatic funding for the amount of credit needed to meet the demand by beneficiaries. Mandatory programs are generally entitlement programs for which the amount of funding depends on eligibility and benefits rules contained in substantive law. The subsidy cost of federal credit for both direct loans and guaranteed loans is scored as an outlay in the fiscal year in which the credit is disbursed by either the federal government or a private lender (504d). For mandatory credit programs, any additional cost from the annual reestimates of subsidies for a credit program is covered by permanent indefinite budget authority. This additional cost is displayed in a subaccount in the credit program account.

Also, beginning in FY1992, a nonbudget *financing account* was created for each credit program. These financing accounts receive an outlay at the time loans are made in the amount of the subsidy value of new direct or guaranteed loans from their associated credit programs. These accounts also record the government's loan programs' actual cash transactions, both disbursements and receipts, to and from the public. Each loan program gets funds for disbursement to the public by borrowing from the Treasury (Section 502(5E6-7)). Because they are nonbudget, the cash flows into and out of these accounts are not reflected in total outlay, receipts, or surplus/deficit. The budget authority of a credit program provides the means for the credit program account to pay to the financing account an amount equal to that program's estimated subsidy costs.

Another special account, the *liquidating account*, includes all ongoing cash flows of each credit program resulting from credit advanced prior to October 1, 1991 (Section 502(5E8)). However, the new budgetary procedures under FCRA would apply to modifications made by the U.S. government to credit terms on credit provided before FY1992.²¹³

FCRA does not apply to the credit activities of the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Resolution Trust Corporation, national flood insurance, the National Insurance Development Fund, crop insurance, or the Tennessee Valley Authority (Section 506).

²¹³ U.S. Executive Office of the President, Office of Management and Budget, *The Budget System and Concepts, Budget of the United States Government, Fiscal Year 2003* (Washington: GPO, 2002), p. 15.

Discussion

The Federal Credit Reform Act of 1990 was brief; it covered only five and one-half pages of the *U.S. Code and Administrative News*.²¹⁴ Numerous details necessary to make the act completely operational were absent. Furthermore, many federal agencies had inadequate financial and accounting systems to implement credit reform.²¹⁵

On July 2, 1992, OMB issued a revised circular which improved and clarified instructions for credit budget formulation.²¹⁶ Furthermore, OMB simplified its credit subsidy model to make it easier for agencies to estimate direct loan and loan guarantee subsidies.²¹⁷ On January 11, 1993, OMB updated Circular No. A-129 concerning the budgetary treatment of federal credit programs.²¹⁸ OMB also revised Circular No. A-11 to include federal credit reform procedures. In Circular No. A-11, OMB explains to agencies how they should fill out credit schedules in preparing their budget requests.²¹⁹ Federal agencies working with OMB have steadily improved their compliance with credit reform standards.

Since the passage of the FCRA, OMB has continued to assist agencies in upgrading the quality of subsidy estimates. Beginning with the FY1993 budget, agencies have recorded reestimates of the cost of their credit programs. Aggregate subsidy estimates were adjusted downward for FY1994, upward for FY1995 and FY1996, downward for FY1997, upward for FY1998 and FY1999, and downward for FY2000, FY2001, FY2002, and FY2003.²²⁰ In the aggregate, downward subsidy reestimates of \$13.8 billion were largely offset by upward subsidy reestimates of \$11.9 billion.²²¹

The trend for the subsidy reestimates has been for the magnitude, either up or down, to increase. In May 2001, CBO stated that it lacked any methodology to

²¹⁴ *U.S. Code, Congressional and Administrative News*, 101st Cong., 2nd sess., vol. 6 (St. Paul, MN: West Publishing Co., 1991), pp. 610-615.

²¹⁵ David B. Pariser, "Implementing Federal Credit Reform: Challenges Facing Public Sector Financial Manager," *Public Budgeting & Finance*, vol. 12, no. 4 (winter 1992), p. 28.

²¹⁶ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1994* (Washington: GPO, 1993), p. 49.

²¹⁷ *Ibid.*

²¹⁸ U.S. Executive Office of the President, Office of Management and Budget, *Policies for Federal Credit Programs and Non-Tax Receivables*, Circular No. A-129 (Washington: continually updated), p. 27.

²¹⁹ OMB's Circular Nos. A-11 and No. A-129 may be obtained from OMB's website, [<http://www.whitehouse.gov/omb/index.html>], visited Jan. 22, 2004.

²²⁰ U.S. Executive Office of the President, Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2004* (Washington: GPO, 2003), p. 217.

²²¹ *Ibid.*

forecast the direction or size of future reestimates.²²² FCRA provided for permanent indefinite authority so that new appropriations are not needed to cover the cost of reestimates. Agencies are required to incorporate improved knowledge into their subsidy estimates for future direct loan obligations and loan guarantee commitments.²²³

The General Accounting Office (GAO) examined subsidy estimates for 10 credit programs in five agencies for the period of fiscal years 1992 through 1998. GAO found problems with supporting documentation for subsidy estimates and the reliability of subsidy rate estimates and reestimates in each agency.²²⁴ But GAO concluded that agencies showed improvement over the period in documenting estimates in each agency.²²⁵

CBO examined credit subsidy reestimates for the period of FY1993 through FY1999. CBO concluded that

Projecting the losses and costs from federal credit assistance is difficult, and errors are inevitable. Although various incentives may exist for agencies to underestimate credit subsidies, the Congressional Budget Office's analysis of corrected reestimates does not reveal any pattern of bias in initial subsidy estimates. However, another problem was uncovered: the reestimates reported in the president's budget are in such disorder that analysts cannot rely on them. A few modest changes in current practice could reduce agencies' errors in preparing, reporting, and accounting for estimates and reestimates.²²⁶

OMB established on-budget credit program receipt accounts to receive payments of earnings from the financing accounts in those unusual cases when federal credit programs are estimated to produce net income, that is, have negative subsidies.²²⁷ Usually payments into a program's receipt account are recorded in the Treasury's general fund as offsetting receipts.²²⁸ "In a few cases, the receipts are

²²² U.S. Congressional Budget Office, *An Analysis of the President's Budgetary Proposals for Fiscal Year 2002* (Washington: May 2002), p. 4.

²²³ U.S. Executive Office of the President, Office of Management and Budget, *Federal Credit Supplement, Budget of the United States Government, Fiscal Year 1997* (Washington: GPO, 1996), pp. 48-49.

²²⁴ U.S. General Accounting Office, *Credit Reform: Greater Effort Needed to Overcome Persistent Cost Estimation Problems*, GAO/AIMD-98-14, Mar. 1998, pp. 9-10.

²²⁵ *Ibid.*, p. 11.

²²⁶ David Torregrosa, "Credit Subsidy Reestimates, 1993-99," *Public Budgeting & Finance*, vol. 21, no. 2 (summer 2001), p. 114.

²²⁷ Marvin Phaup, "Credit Reform, Negative Subsidies, and FHA," *Public Budgeting & Finance*, vol. 16, no. 1 (spring 1996), p. 24.

²²⁸ U.S. Executive Office of the President, Office of Management and Budget, *The Budget System and Concepts, Budget of the United States Government, Fiscal Year 2003*, p. 14.

earmarked in a special fund established for the program and are available for appropriation for the program.”²²⁹

In October 1990, the Secretary of the Treasury, the Director of OMB, and the Comptroller General established the Federal Accounting Standards Advisory Board (FASAB) to consider and recommend accounting principles for the federal government. On September 15, 1992, the board issued an exposure draft recommending accounting standards for federal credit programs on a basis consistent with credit reform. The board received numerous substantive comments that were considered in revising its exposure draft, and on August 23, 1993, OMB issued the board’s revised report titled *Accounting for Direct Loans and Loan Guarantees*.²³⁰ This report provided extensive detail, including numerous arithmetic examples, clarifying credit reform practices.²³¹ It further required that federal agencies’ use of present value accounting for federal credit programs be consistent with the Federal Credit Reform Act of 1990.²³² Thus, for their credit programs, agencies’ accounting procedures are now required to be consistent with their budgetary procedures.

On August 5, 1997, the Balanced Budget Act of 1997 (P.L. 105-33) was enacted.²³³ This law (BBA97) amended the Federal Credit Reform Act of 1990 to make some technical changes, including codifying several OMB guidelines. Important changes were:

First, agencies are required to use the same discount rate to calculate the subsidy when they obligate budget authority for direct loans and loan guarantees and when submitting the agency’s budget justification for the President’s budget.²³⁴ Thus, the dollar value of loans for a specific credit program is known when Congress considers subsidy appropriations for that program. Prior to this change, agencies had used

²²⁹ Ibid.

²³⁰ For a discussion of the board’s conclusions on issues raised by these comments, see U.S. Executive Office of the President, Office of Management and Budget, *Accounting for Direct Loans and Loan Guarantees: Statement of the Federal Financial Accounting Standards*, no. 2 (Washington: Aug. 23, 1993), pp. 21-42.

²³¹ For a detailed example of the estimation of credit subsidies, see U.S. General Accounting Office, *Credit Subsidy Estimates for the Sections 7(a) and 504 Business Loan Programs*, GAO/T-RCED-97-197, July 16, 1997, p. 19.

²³² U.S. Executive Office of the President, Office of Management and Budget, *Accounting for Direct Loans and Loan Guarantees: Statement of the Federal Financial Accounting Standards* (Washington: GPO, 1993), pp. 21-42.

²³³ For an explanation of the contents of the Budget Enforcement Act of 1997, see CRS Report 97-931, *Budget Enforcement Act of 1997: Summary and Legislative History*, by Robert Keith, p. 23 (1997).

²³⁴ U.S. Executive Office of the President, Office of Management and Budget, *Analytical Perspectives, Budget of the United States, Fiscal Year 1999* (Washington: GPO, 1998), p. 170.

interest rates from the preceding calendar quarter to calculate the subsidy at the time a direct loan was advanced or a loan guarantee was obligated.²³⁵

Second, agencies are required to use the same forecast assumptions (for example, default and recovery rates) to calculate subsidy rates when they obligate credit and when preparing the President's budget.²³⁶

Third, agencies are required to transfer end-of-year unobligated balances in liquidating accounts (revolving funds for direct loans and loan guarantees made prior to the effective date of FCRA) to the general fund as soon as practicable after the close of the fiscal year.²³⁷

Fourth, the same interest rate must be used on financing account debt (which generates interest payments to the Treasury), financing account balances, and the discount rate used to calculate subsidy costs.²³⁸

Fifth, the definition of the term *cost* is modified so that the discount rate is based on the timing of cash flows instead of on the term of the loan. Under this new approach, in the President's budget, a series of different rates would be used to calculate the present value of cost flows over a multi-year period. For example, for a 10-year direct loan (or loan guarantee), costs in the first year would be discounted using the interest rate on a one-year Treasury bill, costs in the second year would be discounted using the interest rate on a two-year Treasury note, etc. Under the prior approach, the interest rate of a 10-year Treasury note would have been used as the discount rate. This prior method proved to be inferior because the flow of semiannual interest payments and the repayment of full principal on the last payment date did not match up well with yearly cost flows.²³⁹

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U.S. Congressional Budget Office. *Credit Budget Reestimates, 1993-1999*. Washington: CBO, 2000.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ U.S. Congress, Conference Committee, *Balanced Budget Act of 1997, Conference Report to Accompany H.R. 2015*, H.Rept. 105-217, 105th Cong., 1st sess. (Washington: July 30, 1997), pp. 996-997.

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James M. Bickley

M. Federal Claims Collection Act of 1966

Statutory Intent and History

The Federal Claims Collection Act of 1966 (P.L. 89-508; 80 Stat. 308; 31 § 3711(a)-(c)(1)) originated agency authority to collect claims. It was intended to authorize agency heads to attempt collection of all claims of the United States, to compromise certain claims, or to terminate collection action in certain circumstances. Formerly, only a few agencies had been granted these authorities.

Major Provisions

The act defines *agency* as any department, office, commission, board, service, government corporation, instrumentality, or other establishment in either the executive or legislative branch of the federal government. It defines *head of an agency* to include, where applicable, commission, board, or other group of individuals having the decisionmaking responsibility of an agency.

The act directs the head of an agency or designee, pursuant to regulations prescribed and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, to attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, the agency.

For such claims of the United States that have not been referred to another agency, including the General Accounting Office (GAO), for further collection action that do not exceed \$20,000, exclusive of interest, the head of an agency or designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, may (1) compromise any such claim, or (2) terminate or suspend collection action on any such claim where it appears that no person liable on the claim has the present or prospective financial ability to pay any significant sum thereon or that the cost of collecting the claim is likely to exceed the amount of recovery.

The Comptroller General or his designee has the same authority for claims referred to GAO by another agency for further collection action. The head of an agency or designee shall not exercise authority over claims as to which there is an indication of fraud. The presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be considered a violation of the antitrust laws. The head of an agency, other than the Comptroller General, does not have authority to compromise a claim that arises from an exception made by GAO in the account of an accountable officer.

A compromise effected under the act is final and conclusive on the debtor and on all officials, agencies, and courts of the United States, unless procured by fraud, misrepresentation, the presentation of a false claim, or mutual mistake of fact. No accountable officer is liable for any amount paid or for the value of property lost, damaged, or destroyed, where the recovery of such amount or value may not be had because of a compromise with a person primarily responsible under the act.

Nothing in the act increases or diminishes existing authority of the head of an agency to litigate claims or diminish existing authority to settle, compromise, or close claims.

Discussion

When Congress enacted the Federal Claims Collection Act of 1966, it removed inflexibility in the law and responded to recurrent agency appeals to Congress for relief. If they could not collect amounts they believed due the federal government, agencies that formerly did not have authorities that the act granted had to refer claims to the General Accounting Office for collection. Only a few agencies had authority to compromise claims, i.e., accept a lesser amount in full settlement. Similarly, few agencies could terminate or suspend efforts to collect a claim even when the effort was futile. A compromise settlement was not possible until the matter was referred to the Department of Justice. The \$20,000 limit on the amount of a claim that the Federal Claims Collection Act of 1966 granted agency heads to compromise and to terminate collecting subsequently was raised to \$100,000. Authority of the Comptroller General to exercise the same authority as an agency head for claims referred to the General Accounting Office subsequently was repealed.

In 1997, GAO published the results of an evaluation of debt collection in some agencies with programs covering about two-thirds of the federal government's delinquent debt. GAO found that each agency it reviewed had a high percentage of debt in bankruptcy, foreclosure, or adjudication, and did not have a uniform method of documenting debt collection. GAO recommended, among other things, improved and standardized reporting requirements to collect debt. A subcommittee of the House Committee on Government Reform (the Subcommittee on Government Management, Information, and Technology, now renamed as the Subcommittee on Government Efficiency and Financial Management) held several oversight hearings on implementing improved debt collection practices. (See the entry for the Debt Collection Improvement Act of 1996, elsewhere in this compendium, which amended the Federal Claims Collection Act of 1966, for subsequent developments and selected source readings relating to collection of claims.)

Selected Source Reading

U.S. Congress. House. Committee on the Judiciary. *Federal Claims Collection Act of 1966*. S.Rept. 89-1533. 89th Congress, 2nd session. Washington: GPO, 1966.

U.S. Congress. Senate. Committee on the Judiciary. *Federal Claims Collection Act of 1966*. S.Rept. 89-1331. 89th Congress, 2nd session. Washington: GPO, 1966.

U.S. General Accounting Office. *Principles of Federal Appropriations Law*, Chapter 13 (Debt Collection) vol. III (2nd ed.). OGC-94-33. November 1994.

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Thomas Nicola

N. Debt Collection Act of 1982

Statutory Intent and History

The Debt Collection Act of 1982 (P.L. 97-365; 96 Stat. 1749; 31 § 3711 et seq.) amended the Federal Claims Collection Act of 1966. The intent was to enable agencies to disclose information to consumer reporting agencies, authorize administrative offsets, charge minimum annual rates of interest and penalties on indebtedness to the United States, require annual agency reports summarizing the status of loans and accounts receivable, and permit contracts for collection services.

In addition, the act amended the Privacy Act (described elsewhere in this compendium) to clarify the status of consumer collection agencies. It also amended the Internal Revenue Code to authorize certain disclosures of information, Title 5 of the *United States Code* to authorize salary offsets, Title 18 of the *United States Code* to protect federal debt collectors, and Title 28 of the *United States Code* to change the statute of limitations for administrative offsets.

Major Provisions

Amendments to the Federal Claims Collection Act of 1966.

Disclosure of Information. The act authorizes the head of an agency, whenever attempting to collect a claim, to disclose to a consumer reporting agency information from a system of records under certain circumstances. It defines *consumer reporting agency*, *system of records*, and *head of an agency*.

Administrative Offset. The act authorizes the head of an agency, after attempting to collect a claim, to collect it by means of administrative offset, i.e., withholding money payable to or held by the United States, except that such authority may not be exercised against claims that have been outstanding for more than 10 years. It describes claims eligible for administrative offset and prescribes procedures for it.

Interest and Penalty on Indebtedness. The act requires the head of an agency or designee to charge a minimum annual interest rate on outstanding debts that is equal to the average investment rate for the Department of the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year. The Secretary or designee is required to publish the rate annually by October 31 and may revise it quarterly if the average investment for the 12-month period ending that quarter is greater or less than the existing published rate by 2%.

With some exceptions, the act requires the head of an agency or designee to assess charges to cover costs of processing and handling delinquent claims and to assess a penalty charge, not to exceed 6%, for failure to pay any portion of a debt more than 90 days past due.

Report on Agency Debt Collection Activities. The Director of the Office of Management and Budget, in consultation with the Secretary of the Treasury and Comptroller General of the United States, is directed to establish regulations

requiring each agency with outstanding debts annually to prepare and transmit to the Director and the Secretary a report summarizing the status of loans and accounts receivable managed by each agency. The act specifies information that the report must contain. The Director is required to analyze the reports received and report annually to Congress on the management of agency debt collection activities.

Contracts for Collection Services. The act authorizes the head of an agency or designee to enter into a contract with any person or organization, under terms considered appropriate for collection services, to recover indebtedness owed the United States. Any such contract must include provisions specifying that the agency head or designee retains authority to resolve disputes, compromise claims, terminate collection action, and refer the matter to the Attorney General to initiate legal action, and that the contractor is subject to the Privacy Act (5 U.S.C. § 552a), to the extent provided in Subsection (m) of the act, and subject to federal and state laws that pertain to debt collection practices.

Claim for purposes of the Debt Collection Act is defined to include amounts owing on account of loans insured or guaranteed by the United States and all other amounts due the United States from such things as fees, leases, rents, royalties, sales of real or personal property, fines, penalties, taxes, and other sources.

Amendments to Title 5 of the United States Code.

Privacy Act. The act permits disclosure of any record in an agency system of records to a consumer reporting agency without consent of the individual to whom the record pertains, thereby exempting such disclosure from the Privacy Act requirement of prior consent. It exempts a consumer reporting agency from the Privacy Act provision that directs an agency to apply the Debt Collection Act's requirements to a system of records operated by contractors on behalf of an agency.

Salary Offset. The act authorizes the head of an agency or designee to deduct from the current pay account of an employee, member of the Armed Services or Reserve of the Armed Forces the amount of indebtedness owed to the United States, not to exceed 15% of disposable pay. The deductions may be made in monthly installments, or at established intervals, when the agency head or designee determines that the individual is indebted to the United States for debts to which the United States is entitled to be repaid or is notified by the head of another or designee. It grants an individual procedural protections, such as at least 30 days written notice, and opportunities to establish a repayment schedule and receive a hearing if timely requested.

The collection of any amount must be in accordance with standards in the Federal Claims Collection Act of 1966 or with any other statutory authority for collection of claims under any other statutory authority.

Amendments to the Internal Revenue Code.

Requirement That Applicant Furnish Taxpayer Identification Number. The act directs each agency administering an included loan program to require any

person applying for a loan under such program to furnish the person's taxpayer identification number.

Screening Potential Debtors. The Secretary of the Treasury is authorized, upon written request, to disclose to the head of any included federal loan program whether an applicant for a loan under such program has a tax delinquent account. The disclosure shall be made only for the purpose of, and to the extent necessary in, determining the creditworthiness of the applicant.

Included federal program for purposes of the paragraph means any program for which the United States makes, guarantees, or insures loans, and with respect to which there is in effect a determination made by the Director of the Office of Management and Budget (which has been published in the *Federal Register*) that applying this requirement to such program substantially would prevent or reduce future delinquencies in it.

Disclosure of Mailing Address to Third Parties for Purposes of Collecting Federal Claims. The act generally authorizes the Secretary of the Treasury, upon written request, to disclose the mailing address of a taxpayer for use by officers, employees, or agents of a federal agency for purposes of locating such taxpayer to collect or compromise a claim against the taxpayer.

In the case of an agent of a federal agency which is a consumer reporting agency (within the meaning of the Fair Credit Reporting Act), the mailing address may be disclosed only for the purpose of allowing the agent to prepare a commercial credit report. Statutory safeguards apply to these disclosures.

Protection of Federal Debt Collectors. The Debt Collection Act includes any officer or employee of the United States or any agency thereof designated to collect or compromise a federal claim in accordance with the act in the statute that prescribes punishments for killing or attempting to kill certain officials.

Discussion

Authorities granted by the Debt Collection Act of 1982 enhanced the ability of the government to collect delinquent debts by providing some tools that were available to the private sector.

In June 1997, the General Accounting Office (GAO) published results of an evaluation of debt collection at some agencies whose programs accounted for about two-thirds of delinquent debt owed to the federal government. GAO found that each agency had a high percentage of bankruptcy, foreclosure, or adjudication and did not have a standard method of documenting debt collection. (See the entry for the Debt Collection Improvement Act of 1966, elsewhere in this compendium, which amended the Federal Debt Collection Act of 1982, for subsequent developments and selected source reading on debt collection.)

Selected Source Reading

U.S. Congress. House. Committee on Ways and Means. *The Debt Collection Act of 1982*. H.Rept. 97-496. 97th Congress, 2nd session. Washington: GPO, 1982.

U.S. Congress. Senate. Committee on Governmental Affairs. *The Debt Collection Act of 1982*. S.Rept. 97-378. 97th Congress, 2nd session. Washington: GPO, 1982.

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U.S. General Accounting Office. *Debt Collection, Improved Reporting Needed on Billions of Dollars in Delinquent Debt and Agency Collection Performance*. GAO/AIMD-97-48. June 1997.

U.S. General Accounting Office. *Principles of Federal Appropriations Law*, Chapter 13 (Debt Collection) vol. III (2nd ed.). OGC-94-33. November 1994.

Thomas Nicola

O. Federal Debt Collection Procedures Act of 1990

Statutory Intent and History

The Federal Debt Collection Procedures Act, (P.L. 101-647; 104 Stat. 4789; 28 U.S.C. § 3001), Title XXXVI of the Crime Control Act of 1990, amends Title 28 of the *United States Code* to provide general civil procedures for collecting debts. The intent is to provide the exclusive civil procedures to recover a judgment on a debt or to obtain, before judgment on a claim for a debt, a remedy in connection with the claim, except where other federal law specifies procedures for recovering on a claim. Subchapters include general provisions, prejudgment and postjudgment remedies, fraudulent transfers involving debt, and amendments to other provisions of law.

Major Provisions

General Provisions. The act prescribes procedures for service of process, enforcement, and notice to the debtor and any person whom the United States, after due diligence, believes has possession, custody, or control of property. The act does not apply with respect to a judgment on a debt if the judgment was entered more than 10 years before the effective date of the act.

Remedies available to the United States may be enforced against property which is co-owned by a debtor and any other person only to the extent allowed by the law of the state where the property is located. Any right or interest of a debtor or co-owner in a retirement for federal military or civilian personnel established by the United States or any agency thereof or in a qualified retirement arrangement, however, is not so limited.

A court may modify enforcement procedures. In an action or proceeding under the act, an individual debtor may elect to exempt certain property. The United States or a debtor may request a hearing on the applicability of any exemption claimed by the debtor. Asserting an exemption prevents the United States from selling or otherwise disposing of the property for which the exemption is claimed until a court determines that the debtor has a substantial nonexempt interest in the property.

Prejudgment Remedies. The act authorizes prejudgment remedies of attachment of property (except earnings), appointment of a receiver, garnishment against property (excluding earnings), and sequestration of income from property. It specifies procedures for the United States to apply for such a remedy, the grounds on which one may be sought, the content of an affidavit supporting the application and notice to the debtor, and hearing requirements.

A court may grant a prejudgment remedy if the United States shows reasonable cause to believe, among other things, that a debtor, with the effect of hindering the United States in its effort to recover a debt (1) is about to leave the jurisdiction of the United States; (2) has or is about to assign, dispose of, remove, conceal, ill treat, waste, or destroy property; (3) has or is about to convert the debtor's property into money, securities, or evidence of debt in a manner prejudicial to the United States; or (4) has evaded service of process by concealing himself, or has temporarily withdrawn from the jurisdiction of the United States. A prejudgment remedy also

may be granted if required to obtain jurisdiction within the United States and the remedy would result in obtaining such jurisdiction.

Any property in the possession, custody, or control of a debtor and in which a debtor has a substantial nonexempt interest, except earnings, may be attached pursuant to a writ of attachment. The act authorizes a court to appoint a receiver for property in which a debtor has a substantial interest if procedural requirements are met and the United States shows reasonable cause to believe that there is a substantial danger that property will be removed from the jurisdiction of the court, lost, concealed, materially injured or damaged, or mismanaged. The act specifies the duration, reporting requirements, priority, and compensation of receivers.

The act describes procedures for issuing a writ of garnishment against property (excluding earnings) in which a debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor to satisfy a claim for a debt. Co-owned property is subject to garnishment to the same extent as it is subject to garnishment under the law of the state where the property is located.

The act provides procedures for issuing a writ of sequestration of income from property in which the debtor has a nonexempt interest as security (and interest and costs) as the United States may recover on a claim for a debt. Such a writ may be issued in an action on a contract in certain circumstances, in an action against the debtor for damages in tort, if the debtor resides outside the jurisdiction of the United States, or in an action to recover a fine, penalty, or tax.

Postjudgment Remedies. The act also addresses postjudgment remedies including judgment lien, enforcement of judgment, execution, installation payment order, garnishment, and discharge.

A judgment in a civil action creates a lien on all real property of a judgment debtor on filing a certified copy of an abstract of a judgment in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of Section 6323(f) of the Internal Revenue Code of 1986. A lien is effective, unless satisfied, for a period of 20 years, but, if a renewal request is filed before that period expires, may be renewed for an additional 20 years with court approval.

A debtor who has a judgment lien against his property is not eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States government. Such a debtor also is not eligible to receive funds directly from the federal government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full. The agency responsible for such grants and loans may promulgate regulations to allow for a waiver of eligibility.

On proper application, a court may order the United States to sell, in accordance with sections 2001 and 2002 of Title 28 of the *United States Code*, any real property subject to a judgment lien. This authorization, however, does not preclude the United States from using an execution sale pursuant to Section 3203(g) to sell real property subject to a judgment lien.

A judgment may be enforced by any remedy set forth in the subchapter relating to postjudgment remedies, as well as any other writ pursuant to Section 1651 of Title 28, as necessary to support such remedies, subject to rule 81(b) of the Federal Rules of Civil Procedure.

The act prescribes procedures for execution. All property in which a judgment debtor has a substantial nonexempt interest is subject to levy pursuant to a writ of execution. A debtor's earnings are not subject to execution while in the possession, custody, or control of the debtor's employer. Co-owned property is subject to execution to the same extent that it is so subject under the law of the state where the property is located.

The act authorizes a court to order a judgment debtor to make specified installment payments to the United States if it is shown that he is receiving or will receive substantial nonexempt disposable earnings from self employment that are not subject to garnishment or is diverting or concealing substantial earnings from any source or property received in lieu of earnings.

A court may issue a writ of garnishment against property (including nonexempt disposable earnings) in which a debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor to satisfy a judgment against a debtor. Co-owned property is subject to garnishment under the law of the state where the property is located. The act also prescribes the general requirements for a writ of garnishment and procedures applicable to it.

Fraudulent Transfers Involving Debts and Miscellaneous. The act defines various terms including *asset*, *creditor*, and *lien*, and describes insolvency, value for transfer or obligation, and fraudulent transfers. It also sets out remedies of the United States and defenses, liability, and protection of transfers.

Discussion

By creating a uniform federal framework for collecting federal debts in the federal courts, the act improved efficiency and expedited collections. The uniform framework overcame obstacles presented by differences and conflicts in various provisions of state law which formerly determined the nature, availability, and timing of executing various collection remedies.

Selected Source Reading

U.S. Congress. House of Representatives. Committee on the Judiciary. *Federal Debt Collection Procedures Act of 1990*. H.Rept. 101-736. 101st Congress, 2nd session. Washington: GPO, 1990.

U.S. Congress. House. Committee on Government Reform and Oversight, Subcommittee on Government Management, Information, and Technology. *Federal Debt Collection Practices*. Hearing. 105th Congress, 1st session. Washington: GPO, 1998.

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Thomas Nicola

P. Debt Collection Improvement Act of 1996

Statutory Intent and History

The Debt Collection Improvement Act of 1996 (DCIA; P.L. 104-134; 110 Stat. 1321-358; 31 U.S.C. §§ 3711 et seq.), Section 31001 of the Omnibus Appropriations Act, FY1996, amends several sections of Title 31 that were enacted in the Federal Claims Collection Act of 1966 and the Federal Debt Collection Act of 1982, as well as some sections of Titles 5, 26, 28, and 42 of the *United States Code*.²⁴⁰ It is intended to enhance authorities for administrative, salary, and tax refund offsets and collections, as well as to increase delinquent debt collections, limit costs of collecting debts, and reduce losses from debt management activities.

Major Provisions

Coverage. The act extends authorities relating to claims of the United States and claims against the United States to judicial agencies and instrumentalities, to make the judicial branch consistent with the executive and legislative branches. It also adds administrative offset authority and requirements for charging interest and penalties to debts owed to the United States by states and units of local governments.

Administrative Offset Authority. The act enhances administrative offset authority by requiring its use except when a statute explicitly prohibits using it. With some exceptions, a disbursing official of the Department of the Treasury, Department of Defense, the United States Postal Service, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, is required to offset at least annually the amount of a payment that a that certifying agency has certified to an official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary.

The act gives the Secretary of the Treasury discretion to apply administrative offset authority to any past-due, legally enforceable debt owed to a state if the appropriate state disbursing official requests an offset and there is a reciprocal agreement with a state that meets certain requirements.

Salary Offset Authority. The act requires agencies to which debts are owed and which have outstanding delinquent debts to participate at least annually in a computer match of their delinquent debt records with records of federal employees to identify those employees who are delinquent in repaying these debts. The computer match requirement does not apply to debts under the Internal Revenue Code.

²⁴⁰ The act was originally introduced in H.R. 2234 in 1995. An earlier version passed the House in the Seven Year Balanced Budget Reconciliation Act of 1995, H.R. 2491, as amended by the substitute of the House Committee on the Budget, H.R. 2517. (*Congressional Record*, daily edition, vol. 141 (Oct. 26, 1995), part II, pp. H10995, H11031-H11040). The act did not appear in the conference report on the Reconciliation Act, H.Rept. 347, 104th Cong., 1st sess., 1995 (*Congressional Record*, daily edition, vol. 141 (Nov. 15, 1995), part II, p. 12509).

Taxpayer Identifying Numbers. The act directs the head of each federal agency to require each person doing business with the agency to furnish it with the person's taxpayer identifying number. It defines *doing business with a federal agency* and requires each agency to disclose its intent to use the identifying number for purposes of collecting and reporting on any delinquent amounts arising out of the person's relationship with the government. Creditor agencies are authorized to match their debtor records with records of the Department of Health and Human Services and Department of Labor records. Taxpayer identifying records may be disclosed only if disclosure is not otherwise prohibited by the Internal Revenue Code. It amends the definition of *included federal program* in the Internal Revenue Code.

Barring Delinquent Federal Debtors from Federal Loans, Loan Insurance, or Loan Guarantees. Unless the head of an agency or delegatee, i.e. the chief financial officer or deputy chief financial officer, waives this authority, a person who has an outstanding debt (other than a debt under the Internal Revenue Code) in delinquent status with any federal agency may not obtain a loan (other than a disaster loan) or loan insurance or loan guarantee administered by the agency. Such person may obtain additional loans or loan guarantees only after the delinquency is resolved. At the request of an agency, the Secretary of the Treasury may exempt any class of claims. An amendment excludes, in addition to disaster loans, a marketing assistance loan or loan deficiency payment under Subtitle C of the Agricultural Market Transition Act (7 U.S.C. §§ 7231 et seq.).

Disclosures to Consumer Reporting Agencies and Commercial Reporting Agencies. The head of an agency must require, as a condition for insuring or guaranteeing any loan, financing, or other extension of credit under any law to a person, that the lender provide information relating to the extension of credit to consumer reporting agencies and commercial reporting agencies, as appropriate. Under certain circumstances, the head of an agency may provide information that a claim is current in payment, i.e., not delinquent, to a consumer reporting agency or a commercial reporting agency.

Contracts for Collection Service. Under appropriate conditions, an agency head may enter into a contract with a person for collection service to recover indebtedness owed, or to locate or recover assets, of the United States government. This authority may not be used to locate or recover assets of the United States held by a state government or financial institution unless an agency has established procedures approved by the Secretary of the Treasury to identify and recover such assets.

Cross-Servicing Agreements and Centralization of Debt Collection Activities in the Department of the Treasury. If a nontax debt or claim owed to the United States has been delinquent for 180 days, the head of the agency that administers the program giving rise to the debt or claim is required to transfer it to the Secretary of the Treasury. Upon such transfer, the Secretary is required to take appropriate action to collect or terminate collection actions on the debt or claim. These authorities do not apply to certain categories of debts or claims. The Secretary may designate and withdraw designations of debt collection centers operated by other federal agencies.

Garnishment. The act authorizes the head of an agency, notwithstanding any provision of state law, to garnish the disposable pay of an individual to collect the amount owed, if the individual is not currently making required payment in accordance with an agreement between the agency head and the individual.

Adjustment of Administrative Debt and Dissemination of Information Regarding Identity of Delinquent Debtors. The head of any agency is authorized to increase an administrative claim by a cost of living adjustment instead of charging interest and penalties.

The act authorizes any agency head, with the review of the Secretary of the Treasury, for the purpose of collecting any delinquent nontax debt owed by any person, to publish or otherwise disseminate information regarding the identity of the person and the existence of the nontax debt.

Federal Civil Monetary Penalties Inflation Adjustments and Electronic Funds Transfer. The act amends the Federal Civil Penalties Inflation Adjustment Act of 1990 (P.L. 101-410; 104 Stat. 890; 28 U.S.C. § 2461 nt) to direct the head of each agency, not later than 180 days after the enactment of the Debt Collection Improvement Act, and at least once every four years thereafter, to adjust by regulation each monetary civil penalty provided by law within the jurisdiction of the agency (with some exceptions). The initial increase could not exceed 10%.

The Federal Financial Management Act of 1994 (P.L. 103-356; 108 Stat. 3410, 3412; 31 U.S.C. § 3301 nt) is amended to mandate electronic funds transfer for all payments to a recipient who becomes eligible to receive them more than 90 days after enactment of the Debt Collection Improvement Act of 1996. This requirement may be waived for any individual who does not have an account with a financial institution. All payments made after January 1, 1999, must be made by electronic funds transfer.

Expanding Use of Private Attorneys. The act expands use of private attorneys by amending requirements relating to the number of contracts in each district and repealing termination dates for the pilot program.

Discussion

The Debt Collection Improvement Act of 1996 is intended to improve federal debt collection by, among other things, adding a new administrative offset authority, revising salary offset authority, permitting non-delinquent consumer debt to be reported to credit bureaus, allowing agencies to retain a portion of annual collections of delinquent debts, expanding tax refund offset authority, and requiring electronic disbursements.

Two bills to amend federal debt collection procedures passed the House and one was introduced in the Senate in the 105th Congress. No further action occurred on any of the bills. Among other provisions, H.R. 4243 and H.R. 4857 would have (1) permitted a private collection contractor to verify information about an individual's employer and compensation; (2) denied to individuals with delinquent debt eligibility for the award or renewal of a federal benefit, including access to federal loans;

required agency heads to establish programs to sell nontax debt; and (3) authorized agency heads to accept electronic payments, including debit and credit cards, to satisfy nontax debts. S. 2571 would have permitted agencies administering benefit programs to verify the information provided to them by applicants for these benefits and would have authorized the Secretary of Health and Human Services to disclose information to another agency from the National Directory of New Hires. (Similar provisions were in H.R. 2347 and H.R. 2063 and were discussed during the consideration of H.R. 4243.) Additionally, S. 2571 would have authorized the administrator of the General Services Administration, on behalf of federal agencies, to acquire commercial services to accept electronic payments for grants or loans and electronic claims submissions from the general public.

In the 106th Congress, H.R. 436 and H.R. 1441 passed the House and were referred to the Senate Committee on Governmental Affairs, but no further action occurred. H.R. 436 was identical to H.R. 4857 (105th Congress) and H.R. 1441 was similar to it. During the 106th Congress, H.R. 4181, a bill to prohibit delinquent federal debtors from being able to enter into federal contracts and to amend the Internal Revenue Code to provide for disclosure to federal agencies of certain information to relating to delinquent taxpayers, was considered in committee.

A subcommittee of the House Committee on Government Reform (the Subcommittee on Government Management, Information, and Technology, now renamed the Subcommittee on Government Efficiency and Financial Management) has conducted regular oversight hearings on DCIA since its enactment. Generally, those hearings have found that the DCIA provisions (especially those on administrative offset and cross-servicing) have not been fully implemented in executive agencies, that the amounts of delinquent nontax debts and debts written off remain significant, and that agencies have experienced difficulties in identifying and referring eligible debt to the Department of the Treasury's Financial Management Service (FMS) and in identifying debt that is collectible. Agencies were encouraged to include debt collection as a performance goal for purposes of the Government Performance and Results Act of 1993 (P.L. 103-62; 107 Stat. 285).

General Accounting Office (GAO) evaluations of the implementation of DCIA have focused on many of the issues stated above and have frequently been featured at the House hearings. In its October 2003 evaluation of the cross-servicing program, GAO recommended that the Department of the Treasury help to ensure that debts returned from private collection agencies be examined to make sure that all appropriate collection action has been taken and that the Office of Management and Budget work to improve agency compliance with the standards and policies for writing off and closing out debts. In a December 2001 evaluation, GAO found that the Department of Agriculture (USDA) had not yet fully implemented key provisions of DCIA. An increased commitment by USDA to implement DCIA was reported by GAO in November 2002, but GAO cautioned that a sustained commitment would be necessary to address problems, including those relating to identifying and referring eligible debts to FMS.

The FMS' Fiscal Year 2003 Report to Congress showed that \$70.061 billion of nontax debt was delinquent as of September 30, 2003. Of this total, \$7.780 billion was debt written off, \$55.273 billion was delinquent debt greater than 180 days old

and \$14.916 billion was delinquent debt determined to be currently not collectible. The report also showed that \$18.2 billion of nontax debt has been collected through the Treasury Offset Program and Cross-Servicing Program since the enactment of DCIA; \$3.1 billion was collected through these programs in FY2003. The Departments of Education (\$32.166 billion) and Agriculture (\$6.613 billion) have the most delinquent debt. As of September 30, 2003, private collection agencies under contract with the Departments of Education, Health and Human Services, and Treasury had been referred \$14.375 billion in debt and collected \$546.8 million.

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Thomas Nicola
Barbara L. Schwemle

Q. Improper Payments Information Act of 2002

Statutory Intent and History

Toward the end of the 107th Congress, the Improper Payments Information Act (IPIA) of 2002 was enacted as P.L. 107-300.²⁴¹ The intent of the law is to increase financial accountability in the federal government, and thereby reduce wasteful spending, thus augmenting previous financial management reform laws. The law requires agencies each year to identify programs that are vulnerable to improper payments and to estimate the amount of overpayments or underpayments. As explained in the next section, improper payments generally include any payments by the federal government that should not have been made or were made in an incorrect amount.

Previously, there was no government-wide requirement for agencies to estimate or report in any systematic way on improper payments, although it is generally acknowledged that billions of dollars are involved. For example, after reviewing audited financial statements for the 24 Chief Financial Officers (CFO) Act agencies, GAO concluded that improper payments voluntarily reported by the agencies declined slightly, from \$ 20.7 billion in FY1999 to \$19.6 billion in FY2001.²⁴² In 2003, the Office of Management and Budget (OMB) testified that overpayments for major benefit programs alone were approaching \$35 billion each year.²⁴³

H.R. 4878, to provide for estimates and reports of improper payments by federal agencies, was introduced on June 6, 2002, by Representative Stephen Horn, with a group of bipartisan cosponsors, and referred to the House Committee on Government Reform. The Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations held markup on the measure on June 18, 2002, and approved the bill, as amended, by unanimous voice vote. On July 9, 2002, H.R. 4878 was considered under suspension of the rules and passed the House, as amended, by voice vote. On October 9, 2002, the Senate Committee on Governmental Affairs ordered H.R. 4878 to be reported favorably, with a substitute amendment. On October 17, 2002, the bill, as amended, passed the Senate by unanimous consent, and on November 12, under suspension of the rules, the House agreed to the Senate amendment by voice vote. The President signed H.R. 4868 into law on November 26, 2002 (P.L. 107-300).

The problem of improper payments received attention in previous Congresses. During House floor debate on H.R. 4878, Representative Horn noted that hearings held in the past “clearly demonstrated the need” for such legislation:

²⁴¹ 116 Stat. 2350; 31 U.S.C. § 3321 note.

²⁴² U.S. General Accounting Office, *Financial Management: Coordinated Approach Needed to Address the Government’s Improper Payments Problems*, GAO-02-749, Aug. 2002, p. 11.

²⁴³ Cited in U.S. General Accounting Office, *Financial Management: Challenges Remain in Addressing the Government’s Improper Payments*, GAO-03-750T, May 13, 2003, p. 1.

Since the 104th Congress, the subcommittees I have chaired have held approximately 100 hearings on wasteful spending within the Federal Government. Time and again witnesses from the General Accounting Office and agency inspectors general have told the subcommittee that poor accounting systems and procedures have contributed to the government's serious and long-term problems involving improper payments.²⁴⁴

In the written report of the Senate Committee on Governmental Affairs to accompany H.R. 4878, the measure was also specifically linked to GAO recommendations offered in a best practices guide for agencies in managing improper payments, prepared at the request of the committee chairman, Senator Joseph Lieberman. The guide suggested that determining the nature and extent of risks for improper payments was a key step in the process, and H.R. 4868 would address this by requiring agencies to estimate total improper payments made each year in their programs and also to consider ways to reduce these amounts.²⁴⁵ In August 2002 GAO also provided an update of previous reports on improper payments at the request of the ranking minority member, Senator Fred Thompson.²⁴⁶

Major Provisions

The act directs each executive branch agency, in accordance with OMB guidance, to review all of its programs and activities each year, identify those that may be susceptible to significant improper payments, estimate the amount of improper payments, and report this information to Congress by March 31 of the following applicable year. OMB determines the method of reporting, which is to be used by all agencies.

With respect to any program or activity with estimated annual improper payments exceeding \$10 million, the agency is required to provide along with the estimate a report on agency actions to reduce such improper payments. The report is to discuss the causes of the improper payments and the results of the actions taken to address them, to state whether the agency has information systems and other necessary infrastructure to reduce such payments to minimal cost-effective levels, to describe budgetary resources requested by the agency to accomplish any needed changes in information systems and infrastructure, and to identify steps the agency has taken to ensure that managers are held accountable for reducing improper payments.

Improper payment is defined as any payment that should not have been made or that was made in an incorrect amount. The definition includes payments to ineligible recipients or for ineligible services, duplicate payments, and payments for

²⁴⁴ Rep. Stephen Horn, remarks in the House, *Congressional Record*, daily edition, vol. 148, July 9, 2002, p. H4379.

²⁴⁵ See GAO Report GAO-02-749, issued initially as GAO Report GAO-01-703G [exposure draft] (Washington: May 2001). Cited in U.S. Congress, Senate Committee on Governmental Affairs, *Improper Payments Information Act of 2002*, report to accompany H.R. 4878, 107th Cong., 2nd sess., S.Rept. 107-333 (Washington: GPO, 2002), p. 2.

²⁴⁶ See GAO Report GAO-02-749, Aug. 2002.

services not received or that do not reflect applicable discounts. The act covers payments made by a federal agency, a federal contractor, or a governmental or other organization administering a federal program.

Discussion

IPIA. The IPIA codified and expanded efforts underway in the executive branch to reduce improper payments. The Bush Administration in 2001 designated improving financial performance as one of five government-wide initiatives in the *President's Management Agenda*.²⁴⁷ The establishment of a baseline on the extent of erroneous (improper) payments in major federal benefit programs was a key component of the financial management initiative.²⁴⁸ Agencies were to include available information on erroneous payment rates for benefit and assistance programs over \$2 billion as a part of their FY2003 budget submissions. In July 2001, revisions to OMB Circular No. A-11 in Section 57, implemented this objective, requiring 15 federal agencies to include improper payment information, covering nearly 50 programs, with initial FY2003 budget materials to OMB.²⁴⁹ Enactment of the IPIA extended and augmented the erroneous payment reporting requirements, originally contained in OMB Circular No. A-11 for the 15 agencies designated therein, to all executive branch departments and agencies.

In May of 2003, OMB distributed a guide to instruct agencies on the implementation of the IPIA.²⁵⁰ The guide provides a detailed definition of improper or erroneous payments and of program and activity and then outlines four action steps to be followed by the agencies. First, agencies must systematically review all their programs and activities and identify those which are susceptible to *significant erroneous payments*, defined as “annual erroneous payments in the program exceeding both 2.5 percent of the program payments and \$10 million.” Second, agencies shall determine an annual estimated amount of erroneous payments made in those programs and activities found susceptible to significant errors; this calculation is based on a statistical random sample sufficiently large “to yield an estimate with a 90 percent confidence interval” within 5% precision. The third step is to determine why the particular programs are at risk, and then put in place a plan to reduce the erroneous payments. The last step in implementation for the agency is reporting to the President (via OMB) and Congress on the estimates of the annual amount of erroneous payments in its programs and activities and on progress in reducing them.

²⁴⁷ See U.S. Office of Management and Budget, *The President's Management Agenda — FY2002* (Washington: OMB, 2001), pp. 19-21. For an overview of the PMA, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry.

²⁴⁸ *Ibid.*

²⁴⁹ GAO Report GAO-02-749, pp. 7, 56.

²⁵⁰ OMB, “Improper Payments Information Act of 2002 (Public Law No: 107-300),” Memorandum for Heads of Executive Departments and Agencies from Mitchell E. Daniels Jr., May 21, 2003, M-03-13., available at: [http://www.whitehouse.gov/omb/memoranda/print/m03-13.html], visited Jan. 22, 2004.

The House Subcommittee on Government Efficiency and Financial Management held oversight hearings on improper payments in May and July 2003.²⁵¹ A GAO report to the subcommittee on the initial implementation under the IPIA followed in October 2003.²⁵² There has been some criticism about the OMB guidance to the agencies in implementing the IPIA, particularly about defining “*significant* [emphasis added] improper payments” to include at least 2.5 % of payments, in addition to the estimated improper spending over \$10 million. According to a recent news article, the chairman and ranking minority member of the Senate Finance Committee, in a January 9, 2004, letter to OMB Director Joshua Bolten, stated:

...OMB should not have established the 2.5 percent threshold and should have simply required agencies to report all programs generating estimated improper payments of more than \$10 million. Because of the 2.5 percent threshold, some programs wasting more than \$10 million could slip through the cracks, the senators explained. ‘The improper payments figures that will eventually be reported to the public will look better and feel better than they really are...’ Grassley and Baucus said.²⁵³

Likewise, the chairman and ranking minority member of the House Subcommittee on Government Efficiency and Financial Management, Representative Todd Platts, and Representative Marsha Blackburn, sent a letter to OMB in August 2003, questioning the 2.5 % minimum threshold. OMB’s Controller of the Office of Federal Financial Management, Linda Springer, has defended the guidelines as stringent enough, noting, “We’re [at OMB] certainly not trying to take any steam out of the effort.”²⁵⁴

New estimates from the agencies of improper payments, and of possible ways to reduce them, are due to Congress each year, providing useful oversight information. If dissatisfaction with OMB’s guidelines should linger or increase, language in the IPIA might be revisited. Meanwhile, the control of improper payments remains a priority for OMB as a part of the President’s Management Agenda.

²⁵¹ U.S. Congress, House Committee on Government Reform., Subcommittee on Government Efficiency and Financial Management, *Show Me the Tax Dollars — How Much Is Lost to Improper Payments Each Year?*, hearing, 108th Cong., 1st sess., May 13, 2003, available at [<http://reform.house.gov/GEFM/Hearings/EventSingle.aspx?EventID=385>], visited Jan. 22, 2004; and *Show Me the Tax Dollars Part II — Improper Payments and the TennCare Program*, July 14, 2003, available at: [<http://reform.house.gov/GEFM/Hearings/EventSingle.aspx?EventID=401>], visited Jan. 22, 2004.

²⁵² U.S. General Accounting Office, *Financial Management: Status of the Governmentwide Efforts to Address Improper Payment Problems*, GAO-04-99, Oct. 2003.

²⁵³ Amelia Gruber, “OMB Defends Actions on Improper Payments,” *GovExec.com*, Jan. 14, 2004.

²⁵⁴ Cited *ibid.*

Recovery Auditing. Another provision related to improper payments, enacted in the 107th Congress as Section 831 of the National Defense Authorization Act for FY2002,²⁵⁵ provides a statutory mandate for agencies to identify and recover contract overpayments (one type of improper payments) by using recovery auditing. Recovery auditing is designed to identify and then recoup inadvertent overpayments by reviewing large volumes of purchase and contract records using ongoing, systematic procedures. Originating in the private sector around 1970, recovery auditing came to the federal government via a demonstration program first mandated in the National Defense Authorization Act for FY1996 (P.L. 104-106). The FY1998 Defense Authorization Act (P.L. 105-85) provided for continuation and expansion of the pilot program, and also called for a review of its results by the General Accounting Office (GAO). The GAO report reviewing the demonstration program in recovery auditing undertaken by the Department of Defense at the Defense Supply Center in Philadelphia was issued at the end of 1998²⁵⁶ and provided an impetus for additional legislative attention to recovery auditing in the 106th Congress.

H. R. 1827 (106th Congress) was introduced by Representative Dan Burton on May 17, 1999, and was referred to the Committee on Government Reform. On June 29, 1999, hearings were held by the Subcommittee on Government Management, Information, and Technology.²⁵⁷ On July 21, 1999, subcommittee consideration and markup of the measure occurred, with approval by voice vote, after which the bill, with an amendment in the nature of a substitute, was forwarded to the full committee. On November 10, 1999, the Government Reform Committee considered the measure and, by voice vote, approved the amendment in the nature of a substitute from the subcommittee, as further amended, and ordered that H.R. 1827 be favorably reported. It was reported on November 17, 1999, and placed on the House Calendar.²⁵⁸ On March 8, 2000, H.R. 1827 passed the House by a vote of 375-0. On September 12, 2000, Senator Fred Thompson introduced S. 3030 (106th Congress) as a companion measure to H.R. 1827; the bill was referred to the Committee on Governmental Affairs. On September 27, 2000, the committee, by voice vote ordered S. 3030 reported favorably to the Senate, and the report was filed on October 12, 2000.²⁵⁹ The Senate took no further action on S. 3030 or H.R. 1827 before the 106th Congress ended.

²⁵⁵ P.L. 107-107, Dec. 28, 2001; 115 Stat. 1186.

²⁵⁶ U.S. General Accounting Office, *Contract Management: Recovery Auditing Offers Potential to Identify Overpayments*, GAO/NSIAD-99-12, Dec. 1998.

²⁵⁷ U.S. Congress, House Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, *H.R. 1827, the Government Waste Corrections Act of 1999*, hearing, 106th Cong., 1st sess., June 29, 1999 (Washington: GPO, 2000).

²⁵⁸ U.S. Congress, House Committee on Government Reform, *Government Waste Corrections Act of 1999*, report to accompany H.R. 1827, 106th Cong., 1st sess., H.Rept. 106-474 (Washington: GPO, 1999).

²⁵⁹ U.S. Congress, Senate Committee on Governmental Affairs, *To Amend Title 31, United States Code, to Provide for Executive Agencies to Conduct Annual Recovery Audits and Recovery Activities, and for Other Purposes*, report to accompany S. 3030, 106th Cong., 2nd sess., S.Rept. 106-502 (Washington: GPO, 2000).

In the 107th Congress, Representative Burton introduced H.R. 2547, the Erroneous Payments Recovery Act, “To require certain executive agencies to carry out a cost-effective program for identifying any errors made in paying contractors and for recovering any amounts paid to contractors.” This measure, similar to H.R. 1827 in the 106th Congress, was referred to the House Committee on Government Reform, but no further action occurred on the bill. Provisions relating to recovery auditing, however, were included in H.R. 2586, the National Defense Authorization Act for FY2002, as reported and passed by the House.²⁶⁰ There were no similar provisions in the Senate bill, but the conference version contained the recovery auditing provisions from the House version, with modifications,²⁶¹ as Section 831. The measure was signed into law on December 28, 2001, becoming P.L. 107-107.

Section 831 of P.L. 107-107 amends Chapter 35 of Title 31, *United States Code*, by adding a new Subchapter VI, “Recovery Audits.” Section 3561 directs the head of each executive agency that enters into contracts in excess of \$500 million in a fiscal year to carry out a cost-effective program for identifying any errors made in paying contractors and for recovering amounts erroneously paid. The OMB Director is required to issue guidelines for conducting the recovery audit programs, with specified protections and policies. Section 3562 provides for the disposition of recovered funds. Funds collected under the program may be used to reimburse the actual expenses incurred by the agency in administering the program or to pay contractors for recovery auditing services. Beyond funds needed for these purposes, amounts recovered may be credited to the appropriations from which the erroneous payments were made, or otherwise be deposited in the Treasury as miscellaneous receipts. Section 3563, sources of recovery services, requires each agency head to consider all available resources to carry out the program, including the agency itself, other departments and agencies, or private sector contractors. Section 3564 authorizes each agency head to carry out a program for improving contract payment management processes aimed at reducing payment errors and improving recovery of overpayments. Section 3565 clarifies the relationship of the subchapter to authority of inspectors general. Section 3566 deals with privacy protections. Section 3567 requires the OMB Director to report to the House Committee on Government Reform and the Senate Governmental Affairs Committee on implementation of the recovery auditing program.

In January 2003, OMB issued guidance to the agencies intended to assist them “to successfully implement recovery auditing and recovery activity as part of an overall program of effective internal control over contract payments.” The guidance reiterates that the agencies required by statute to undertake recovery audit programs

²⁶⁰ U.S. Congress, House Committee on Armed Services, *National Defense Authorization Act for Fiscal Year 2002*, H.Rept. 107-195, 107th Cong., 1st sess. (Washington: GPO, 2001), pp. 342-343.

²⁶¹ See U.S. Congress, Conference Committee, *National Defense Authorization Act for Fiscal Year 2002*, H.Rept. 107-333, report to accompany S. 1438, 107th Cong., 1st sess. (Washington: GPO, 2001), p. 691.

must report to OMB by December 31, 2004, on their activities during FY2003 and, likewise, for FY2004 and FY2005.²⁶²

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Virginia McMurtry

²⁶² U.S. Office of Management and Budget, *Programs to Identify and Recover Erroneous Payments to Contractors*, Memorandum to Heads of Executive Departments and Agencies, from Mitchell E. Daniels Jr., Jan. 16, 2003, M-03-07, available at: [<http://www.whitehouse.gov/omb/memoranda/print/m03-07.html>], visited Jan. 22, 2004.

R. Cash Management Improvement Act (CMIA) of 1990

Statutory Intent and History

The Cash Management Improvement Act of 1990 (CMIA; 104 Stat. 1058; 31 U.S.C. § 3335) is intended to ensure greater efficiency, effectiveness, and equity in the exchange of funds between the federal government and the states. Its objective is to minimize the ability of the federal or a state government to engage in cash management practices that allow it to earn interest on cash reserves at the expense of the other.

Passage of the act was preceded by seven years of joint study by federal and state management officials of how federally funded programs were being managed in terms of the actual receipt and expenditure of program funds. The early deliberations of this group resulted in a June 1983 Memorandum of Understanding that stated the intention of each group to find an equitable approach to intergovernmental cash management. Pilot tests of new procedures were conducted in 1984-1985.

Major Provisions

The major provisions of the act mandate (1) that each head of a federal executive agency implement procedures designed to disburse federal funds in a timely manner through cash, checks, electronic funds transfer, or any other means identified by the agency head and that each state establish procedures for minimizing the elapsed time between transfer of funds from the United States Treasury and state expenditure of these funds for the intended federal purpose; (2) a method to calculate the interest owed — to a state when the federal government fails to disburse federal funds in a timely manner, and to the federal government when a state fails to spend federal funds in a timely manner; (3) procedures to net the interest charges each level of government owes to the other and to transfer the net interest owed; and (4) the source of the interest payment when a federal agency must pay interest to a state.

Discussion

This act is a response to both levels of government experiencing instances in which one level of government was perceived to be manipulating cash management practices in a manner designed to hold on to money for a longer period of time than necessary. Such behavior earns interest income on the cash being held, but in effect this interest income is being paid by the other level of government.

The issue is illustrated here with an example about Medicaid payments. A delayed federal Medicaid payment might require a state to utilize its own funds to pay the vendor, thereby causing the state to lose the interest income it could have earned had it been able to hold on to its own cash. The state perceives that the federal government's delay in making the cash payment is motivated by the federal government's desire to earn interest income on its cash (or, equivalently, to delay borrowing the money to make the Medicaid payment, thereby avoiding interest expenses).

A state's drawing cash from a federal account prior to the date the state pays a Medicaid vendor's bill has the effect of reducing the interest income the federal government can earn on this cash. The federal government perceives that the state's early drawdown is motivated by the state's desire to earn interest income on this cash between the date of the drawdown and the date the Medicaid vendor must be paid (or, equivalently, to delay borrowing money for other state expenses, thereby avoiding interest expenses).

In May 2002, the Financial Management Service (FMS), the Bureau within the Department of the Treasury charged with implementing the CMIA, issued new clarifying regulations in the *Federal Register* (31 C.F.R. § 205). The regulations define the federal assistance programs covered by the CMIA and provide guidance on the mechanics of CMIA implementation.²⁶³

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Bruebaker, Gary and Jack Kiley. "Cash Management Improvement Act of 1990." *Government Finance Review*, vol. 8 (October 1992), pp. 29-31.

U.S. General Accounting Office. *Financial Management: Implementation of the Cash Management Improvement Act*. GAO/AIMD-96-4. January 1996.

Steven B. Maguire

²⁶³ FMS's website provides more background information on the CMIA at [<http://fms.treas.gov/cmia/index.html>], visited Dec. 29, 2003.

S. User Fee Act of 1951

Statutory Intent and History

User fees — charges to recipients of goods and services provided by the government — have existed since the earliest days of the republic and, indeed, extend to the colonial period. Payment for mail delivery, use of toll roads, and certain customs services were among the first fees. In the contemporary era, there are several hundred such charges at the federal level, amassing nearly \$158 billion in revenue in FY2002 alone.²⁶⁴ These are authorized under a general user fee statute or, in most cases, agency-specific legislation. Such fees are usually defended as serving one or more purposes: (1) to help make a service or good self-sustaining; (2) to shift the burden of payment from the general taxpayer to an identifiable beneficiary; (3) to enhance revenue for the government; and (4) to regulate access to or determine availability of a good or service.²⁶⁵

Congressional Action. Despite the long heritage of such charges, a general user fee statute was not enacted until August 31, 1951: i.e., Title V of the Independent Offices Appropriations Act (IOAA) for Fiscal Year 1952.²⁶⁶ This short provision, which was slightly modified in its 1982 codification, grants federal agencies the authority to levy charges on identifiable beneficiaries for government-provided goods and services. The law also establishes criteria to be followed in its implementation. Prior to this, an agency could impose fees only if it had specific statutory authority to do so.

In the early 1950s, several congressional panels advanced user fees on a broad scale. In 1950, the Senate Committee on Expenditures in the Executive Departments endorsed user charges for agencies under its jurisdiction and called for the “equitable transfer of many financial burdens from the shoulders of the taxpaying general public to the direct and special beneficiaries.”²⁶⁷ The next year, the House Appropriations

²⁶⁴ U.S. Office of Management and Budget, *Budget of the United States: Analytical Perspectives, Fiscal Year 2004* (Washington: GPO, 2003), p. 93.

²⁶⁵ For background on the general user fee statute and a detailed survey of user charges under various public laws, see U.S. Congressional Budget Office, *The Growth of Federal User Charges: An Update* (Washington: CBO, 1995), along with the initial CBO study: *The Growth of Federal User Charges* (Washington: CBO, 1993). This effort was reinforced by a recommendation from the Representatives on the Joint Committee on the Organization of the Congress, calling upon CBO “to conduct a study of all Federal user fees and the effects of inflation on any user fees since such fees were last adjusted.” U.S. Joint Committee on the Organization of the Congress, *Organization of the Congress: Final Report of the House Members*, H.Rept. 103-413, 103rd Cong., 1st sess. (Washington: GPO, 1993), p. 19. Further information on user charges and their implementation is available in U.S. General Accounting Office, *Federal User Fees: Some Agencies Do Not Comply with Review Requirements*, GGD-98-161, June 30, 1998.

²⁶⁶ 65 Stat. 290. The original language and format of the statute were modified in 1982, when the authority was codified at 31 U.S.C. § 9701, by 96 Stat. 1051-1052.

²⁶⁷ U.S. Congress, Senate Committee on Expenditures in the Executive Departments, *Fees* (continued...)

Subcommittee on Independent Offices followed suit. Representative Yates, a member of the subcommittee, introduced its new legislation:

For the first time, our subcommittee went into a new question, the question as to whether or not there should be charges and fees made by regulatory agencies of the Government for many of the services which they render to those who come within their jurisdiction.²⁶⁸

The subcommittee emphasized that regulatory agencies, such as the Interstate Commerce Commission (ICC) and the Federal Communications Commission (FCC), must meet the expense of hearings, inspections, and other activities related to granting franchises, construction and other permits, and licenses. Continuing, Representative Yates stated:

The taxpayers pay every dollar of the charges and costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities ... that it should pay some of the costs of the hearings.²⁶⁹

The subcommittee agreed and extended the doctrine to all federal agencies, not just the ones under its jurisdiction. To do this, the panel added an amendment to the appropriations bill that would permit each federal agency “to appraise its own operations to see whether or not it would be possible to recapture for the Government some of the costs that the Government incurs in connection with this regulation through the establishment of a schedule of fees.”²⁷⁰ In addition to this goal, Representative Yates noted that one agency official “expressed the viewpoint that such a practice would not only be feasible, but would deter and do away with superfluous applications.”²⁷¹

Executive Guidance. In 1959, the Bureau of the Budget, predecessor to the Office of Management and Budget (OMB), issued guidelines for implementing the user fee statute.²⁷² Circular No. A-25 emphasized that such charges should be assessed only for special benefits provided to identifiable recipients. The circular has been revised in the interim, most recently in 1993.²⁷³ The newest version, which rescinded the original, extended guidance to agencies operating under other statutory

²⁶⁷ (...continued)

for *Special Services*, S.Rept. 2120, 81st Cong., 2nd sess. (Washington: GPO, 1950), p. 15.

²⁶⁸ See statement by Rep. Sidney Yates, *Congressional Record*, vol. 97, May 3, 1951, p. 4809.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² U.S. Bureau of the Budget, “User Charges,” OMB Circular No. A-25, Sept. 23, 1959.

²⁷³ U.S. Office of Management and Budget, “User Charges,” OMB Circular No. A-25, Revised, July 8, 1993.

authority, not just the 1951 user fee statute, and made more explicit the factors that agencies should consider when assessing the government's costs in providing the good or service.

Judicial Interpretation. Federal courts have been involved in interpreting user fee legislation, both the general user fee statute as well as agency-specific authorizations.²⁷⁴ The Supreme Court has determined that such charges are constitutional when they impose a true fee, which must meet certain criteria and standards for fairness and equity, among other things, and when they are an appropriate legislative delegation of authority to the executive (i.e., levying a fee for services rendered, rather than imposing a tax).

According to several Supreme Court decisions,²⁷⁵ user fees are allowable under the 1951 IOAA if they recoup appropriate costs for goods or services rendered to individual beneficiaries; the charges must be based only on the costs of services or goods provided to the individual recipient, as opposed to being based on all costs of goods or services that also benefit the general public. IOAA-authorized user fees must also meet the standards of fairness and equity under the law and must not be arbitrary. Finally, such charges are acceptable if they are consistent with congressional policy and if the agency has not exceeded its authority and has not disregarded the statute's guidelines.

Major Provisions

Purposes. Current general user fee legislation directs that “each service or thing of value provided by an agency ... shall be self-sustaining to the extent possible.” By comparison, the original 1951 version had provided an elaborate list of goods and services for which charges could be levied — “any work, service, publication, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility” — while the 1982 codification reduced it to the generic concept of “each service or thing of value.”

Also, the original enactment called for such services to be “self-sustaining to the full extent possible,” while the codified version omitted the word *full*. No other

²⁷⁴ See CBO, *The Growth of Federal User Charges*, pp. 26-30; and Clayton P. Gillette and Thomas D. Hopkins, “Federal User Fees: A Legal and Economic Analysis,” *Boston University Law Review*, vol. 67 (Nov. 1987), pp. 822-835.

²⁷⁵ See, especially, *Aeronautical Radio, Inc. v. United States*, 379 U.S. 933 (1965). This ruling upheld the FCC fees as a constitutional delegation of authority to the executive. The Court found that they were fair and equitable; they were not arbitrary; they were consistent with congressional policy; and the agency had not exceeded its authority or disregarded the statutory guidelines. A later ruling, *National Cable Television Association v. United States*, 415 U.S. 336 (1974), however, struck down new and higher FCC fees; these charges were based on all costs, both direct and indirect, and were for services that benefitted the general public, not just recipients of certain services. A similar ruling resulted from a companion case, based on annual charges that the Federal Power Commission levied on natural gas companies and electric utilities. Here, the Supreme Court held that the IOAA authorized only specific charges for specific services to identifiable recipients. *Federal Power Commission v. New England Power Company*, 415 U.S. 345 (1974).

purpose — such as redirecting costs away from the general taxpayer and to the beneficiary — is specified in the legislation.

Eligible Agencies. The original 1951 enactment, when granting user fee authority to federal agencies, specifically *included* “wholly owned government corporations as defined in the Government Corporation Control Act of 1945.” By comparison, the 1982 codification struck this language and instead specifically *excluded* mixed-ownership government corporations from federal agencies having authority to impose user fees.

Authority. The general user fee statute grants powers to both the head of the agency as well as to the President with regard to “executive agencies.” The head of each eligible agency is authorized to issue regulations establishing the charge for a service or thing of value. The law adds that regulations issued “by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable.”

Criteria and Standards. The law requires user fees to meet certain criteria and standards. Each charge, importantly, is to be “fair.” The original language read “fair and equitable,” but “equitable” was omitted in the codified version as being redundant and otherwise included in “fair.” In addition to this requirement, the charges are to be based on:

- the costs to the government (with the original version specifying “direct and indirect” costs);
- the value of the service or thing to the recipient;
- public policy or interest served; and
- other relevant facts (with the original version reading “pertinent” facts).

Disposition of the Revenue. Revenue collected under the general user fee statute is paid into the U.S. Treasury as miscellaneous receipts. This is in contrast to some agency-specific user fee statutes, in which the revenue is deposited in dedicated accounts and earmarked to reimburse the collecting agency for certain expenses and activities.

Effect on Other Statutes. The 1951 general user fee statute and its codified current version leave intact other legislation that either proscribes or prescribes user charges. The law insists that nothing contained in it repeals or modifies other statutes prohibiting the collection or fixing of any fee, charge, or price. The enactment also states that the user fee legislation does not affect any law “prescribing bases for determining charges, but a charge may be redetermined under this section consistent with its prescribed bases.”

Discussion

The general user fee statute, enacted in 1951 and modified in 1982, provides a means for standardizing user charges and specifying the basic criteria which should be met. The statute delegates broad authority and substantial discretion and flexibility to agencies to establish fees for goods and services, in order to make them self-sustaining. This legislative initiative, in turn, has been endorsed and supported by the Bureau of the Budget and its successor, the Office of Management and Budget, through regulations, most recently in 1993. Contributing to the 1993 revision of OMB Circular No. A-25, moreover, was an earlier recommendation from the Administrative Conference on the United States (ACUS). Based on a major study of user fees that it had commissioned, in 1987, ACUS recommended general principles to guide the setting and implementation of user fees.²⁷⁶

The general user fee statute, however, has failed to standardize user fees and most of these charges result from specialized grants of authority to particular agencies. Several reasons explain this situation.

One is that the language of the general user fee law is vague, and its provisions have been viewed as inconsistent. Most open-ended, for instance, is the allowance that “other relevant facts” be considered when establishing a charge. In addition, charges that are set to make a service “self-sustaining” may not be “fair” to the parties who must pay. Furthermore, the requirement to consider public policy or other interests might result in costs that differ from the actual costs of providing a good or service. Regulating or reducing the volume of traffic at congested national parks, if that were a public policy goal, for instance, might require higher prices for parking and admission than would otherwise be justified in terms of the actual costs to the government and the value of the service to the recipient.

Other reasons help to explain a reluctance to use the across-the-board authority and instead rely on specific legislation to establish particular charges for goods or services. Operating under the general user fee statute requires an agency to act alone, without the immediate support of Congress for the specific charge. This means that the agency incurs the objections directly and solely from adversely affected parties, that is, the individuals and industries who must pay a new or higher price (for a good or service that they had received previously for free or at a lower price). This development may result in public criticism of the agency’s planned charges, intense opposition to them before Congress as well as other parts of the executive, or in potentially costly court challenges to the fees.²⁷⁷

²⁷⁶ U.S. Administrative Conference of the United States, “User Fees,” Recommendation 87-4, adopted June 12, 1987.

²⁷⁷ See CBO, *The Growth of Federal User Charges*, pp. 15-31; Gillette and Hopkins, “Federal User Fees,” pp. 869-873; Frederick M. Kaiser, “U.S. Customs Service User Fees: A Variety of Charges and Countercharges,” *Public Budgeting & Finance*, vol. 8 (autumn 1988), pp. 78-95; and Roger L. Sperry, “Gold Rush,” *Government Executive*, vol. 30 (Mar. 1998), pp. 13-17.

Besides these disincentives to using the general user fee statute, agencies lack a financial or budgetary incentive to impose fees under the IOAA: its revenue is deposited in the general treasury and is not dedicated for use by the agency itself. In short, the agency would have to do the work (e.g., argue on behalf of a charge, establish the proper fee amount, and collect the revenue) but receive no direct budget benefit. In contrast, some agency-specific user fee statutes establish special accounts in the treasury and earmark the revenue for the agency's own use, for instance, to reimburse it for collection expenses and/or to support certain operations and activities. In addition to determining the disposition of the revenue, specialized user fee statutes, by comparison to the general authority, allow Congress to control virtually all other aspects of such charges. Legislation can be used to erect a fee structure, set the fees themselves, identify and charge particular beneficiaries or recipients of a service, and provide for exemptions among specific recipients and exceptions to certain fees.

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Frederick M. Kaiser

IV. Organization

A. Government Corporation Control Act

Statutory Intent and History

In 1945, partly in response to the proliferation of corporate bodies created during the Depression and World War II, Congress enacted the Government Corporation Control Act (59 Stat. 841; 31 U.S.C. §§ 9101-9110).²⁷⁸ The intent of the act was (1) to establish consistent treatment and appropriate accountability and control of revenue producing business enterprises organized as corporate bodies; and (2) to assure reasonable financial autonomy and flexibility in carrying out authorized programs.²⁷⁹

The Control Act does not define what constitutes a government corporation or how corporations may or may not differ from other categories of agencies. The charter for each federal government corporation is the separate enabling legislation passed by Congress. The Control Act simply lists corporate organizations covered by the act, a list that is subject to occasional additions and deletions.²⁸⁰ The act provides for two types of government corporations: “wholly owned government corporations,” and “mixed-ownership government corporations.” In the absence of a criteria-based definition, the number of government corporations may differ from one source to another. The most commonly used estimates suggest a figure between 22 and 44, both figures derived from General Accounting Office (GAO) reports.²⁸¹

Despite the Control Act’s silence on the matter, a working definition of government corporation has emerged.²⁸² The distinguishing characteristics of a federal government corporation are that it is an agency of government, established by Congress to perform a public purpose, which provides a market-oriented service that produces revenue that meets or approximates its expenditures. Corporations cover the spectrum in size and function from large, well-known corporations, such as the Federal Deposit Insurance Corporation, to small, low-visibility corporate bodies, such as the Federal Prison Industries in the Department of Justice. The absence of a statutory definition has led to some agencies being designated

²⁷⁸ Hereafter, “the Control Act.”

²⁷⁹ In 1982, P.L. 97-258 codified the 1945 act’s provisions as 31 U.S.C. §§ 9101-9110 and technically repealed the 1945 act. These sections of the *United States Code* constitute the basic corporate control law.

²⁸⁰ For example, in 1945 the Control Act listed the Reconstruction Finance Corporation. After this corporation was abolished in 1957, it was removed from the list.

²⁸¹ In a 1988 report, GAO profiled some 44 government corporations. See U.S. General Accounting Office, *Profiles in Existing Government Corporations*, GAO/AFMD-89-43FS, Dec. 1988. In 1995, using a more precise and narrow definition, GAO concluded that there were actually 22 government corporations. U.S. General Accounting Office, *Government Corporations: Profiles of Existing Corporations*, GAO/GGD-96-14, Dec. 1995.

²⁸² National Academy of Public Administration, *Report on Government Corporations* (Washington: NAPA, 1981).

“corporations” although they perform no commercial function (e.g., Legal Services Corporation), and to confusion with “government-sponsored enterprises” (e.g., Federal National Mortgage Association, “Fannie Mae”) that are instrumentalities, not agencies of the United States.

The courts have deemed government corporations to be agencies of the United States (*Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946)) and, therefore, subject to laws generally applicable to agencies, unless otherwise exempted by a general statute or a statute applicable to the individual corporation. In practice, application of government-wide statutes tends to vary widely among the corporations, and it is necessary to review the status of each corporation to appreciate the full scope of the exceptions.

Major Provisions

The major provisions of the Control Act provide for (1) establishing and acquiring of corporations; (2) business type budgeting; (3) audits and management reports; and (4) accounts and obligations, and standards for depository institutions holding government corporation securities.

Some agencies (such as the Department of Agriculture, the National Credit Union Administration, and the Department of Housing and Urban Development, to name a few) have established or acquired government corporations.²⁸³ However, under the Control Act an agency may only do so if specifically authorized by Congress.

Once established, a government corporation annually must prepare and submit to the President a business-type budget. The budget, which contains estimates and statements of financial condition, income, and expenses, is then submitted to Congress in the President’s budget proposal. Although government corporations are usually expected to earn sufficient revenues to cover costs, Congress may supplement the government corporation’s budget and provide for its debts.

The inspector general of every government corporation must annually audit the corporation’s financial statements and submit audit reports to the head of the corporation, the Chairman of the House Committee on Government Reform and the Chairman of the Senate Committee on Governmental Affairs.²⁸⁴ The Comptroller General of the United States may review the audit and report his findings to the Director of the Office of Management and Budget (OMB) and the head of the corporation. The Control Act also requires a government corporation to provide management reports each year to the President, the Director of OMB, the Comptroller General, and Congress. Management reports must include statements of financial position, operations, cash flows, the results of the inspector general’s audit, and other items as required in the corporation’s charter.

²⁸³ Most government corporations, though, are established independent of federal departments.

²⁸⁴ The inspector general may also assign this responsibility to an independent external auditor or the head of the corporation.

Government corporations, unlike most government agencies, are permitted to issue obligations. However, a corporation must first seek the approval of Secretary of the Treasury, who may decide many particulars of the obligation (e.g., interest rate, maturity). The Control Act also empowers a government corporation to consolidate its cash into an account kept by the Secretary of the Treasury at a Federal Reserve bank or other bank or fiscal agent as designated by the Secretary.

Discussion

The government corporation is an attractive option to policymakers for three reasons. First, government corporations possess significant revenue streams not available to other government agencies: commercial activities and government obligation issuance. Second, government corporations are largely exempted from government management laws (including personnel and compensation ceilings). Finally, government corporations can be used as transition organizations toward eventual privatization of some government agency or program (e.g., U.S. Enrichment Corporation). On the whole, then, the government corporation option offers policymakers some of the attractions of a private entity without sacrificing governmental control.²⁸⁵

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²⁸⁵ Government corporations, no matter what function they perform or how “private” they may appear to the public or to themselves, are agents of the state subject to constitutional limitations. As the Supreme Court concluded in the 1995 *Lebron* case involving the status of AMTRAK, a government corporation has certain inherent legal characteristics that cannot be shed simply by legislative language or by corporate fiat. In the *Lebron* case, the Supreme Court decided that, while Congress can determine AMTRAK’s governmental status for purposes within Congress’s control (e.g., whether it is subject to general management laws, such as the Administrative Procedure Act), Congress cannot make the final determination of AMTRAK’s status as a governmental entity for purposes of determining constitutional rights of citizens affected by its actions. To do so, in the Court’s view, would mean that the government could evade its most solemn constitutional obligations by simply resorting to the corporate form of organization. (*Michael A. Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995).)

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Kevin R. Kosar

B. Reorganization Act of 1977, as Amended

Statutory Intent and History

Although reorganization authority expired in 1984 and has not been renewed since, it is still part of the *United States Code*.²⁸⁶ The authority to reorganize federal agencies has been delegated by Congress to the President from time to time since 1932. In 1949, the President submitted to Congress the reorganization bill that would form the basis of reorganization authority through 1977. The Reorganization Act of 1949 provided that the President could submit a reorganization plan involving any agency. This plan would go into effect as law after 60 days unless a resolution of disapproval was passed by a majority in either House (a one-house veto). Over time, Congress periodically renewed the President's reorganization authority, although the length of extensions varied and on occasion the authority was allowed to lapse.

As renewals were sought and debated, amendments were adopted altering the original law. For the most part, these amendments limited the President's authority. In most instances, specific incidents led to the limitations on presidential authority. For example, after failing to obtain a Department of Housing and Urban Development through legislation, President Kennedy employed the reorganization plan process. The plan was approved and the department established. Congress, however, found fault with the reorganization authority, and when it came up for renewal in 1963, Congress let the authority lapse. In 1965, when President Johnson once more requested the authority, Congress granted it but inserted a provision prohibiting the use of the reorganization authority to create new executive departments.

One of President Carter's first legislative proposals was a request that Congress renew the President's authority to submit reorganization plans. The Reorganization Act of 1977, as finally enacted, represented a procedural compromise. The approval process remained the same as in the 1949 Reorganization Act, except that a resolution of disapproval, subject to certain expedited procedures, was automatically introduced in both chambers. This ensured a congressional up-or-down vote. In addition, the President was permitted to amend a plan within 30 days after its submission, thus allowing for modifications in response to congressional concerns.

A major blow was struck against the reorganization plan procedure in 1983, when the Supreme Court ruled in *INS v. Chadha* that the legislative veto process was unconstitutional.²⁸⁷ The Court held that exercises of legislative power must fulfill the constitutional requirement of consideration by both houses of Congress and "presentment" to the President. Inasmuch as legislative vetoes frequently provided for consideration by only one house and, by definition, did not involve the President, the mechanism was found to be constitutionally deficient. One consequence of the *Chadha* ruling was that Congress passed legislation in 1984 that had the effect of ratifying reorganization plans previously approved (P.L. 98-532; 98 Stat. 2705).

²⁸⁶ 5 U.S.C. §§ 901-912.

²⁸⁷ 462 U.S. 919 (1983).

Congress approved the Reorganization Act Amendments of 1984, which extended the reorganization plan authority from November 1984 to December 31, 1984. Although it was never used and has expired, this version of reorganization authority remains “on the books,” and maybe found in Chapter 9 of Title 5 of the *United States Code*. The 1984 amendments, an effort to address the constitutional issues raised by the *Chadha* decision, required that a joint, rather than concurrent, resolution be introduced in both the House and Senate upon receipt of a reorganization plan. Another significant innovation in the 1984 amendments was the requirement that an implementation section be included in the President’s message accompanying the reorganization plan.

In the absence of presidential reorganization authority, reorganizations of federal agencies are accomplished through the regular legislative process.²⁸⁸ Prominent examples of such reorganizations include the creation of the Department of Veterans Affairs²⁸⁹ in 1988 and the creation of the Department of Homeland Security in 2002.²⁹⁰

Major Provisions

Under provisions of the Reorganization Act of 1977, as amended through 1984, the President could submit to Congress a reorganization plan providing for the transfer, in whole or in part, of an agency or its functions to another agency, “except that no enforcement or statutory program shall be abolished by the plan.”²⁹¹ A plan could not “create a new department,” continue an agency or function beyond the period authorized by law, or authorize an agency to perform a function not expressly provided in law.²⁹²

Once the President submitted a reorganization plan, Congress had 90 days to act upon the following joint resolution: “That the Congress approves the reorganization plan numbered _____ transmitted to the Congress by the President on _____, 19____.”²⁹³ The President had to provide an “implementation plan” meeting the requirements of the law when submitting a plan. As a joint resolution, this vehicle had to be approved by the President to have the force of law.

²⁸⁸ Certain agency heads are statutorily vested with the authority to conduct limited reorganizations within their own organizations. For example, such authority is vested in the Secretary of Defense in Title 10, Section 125, of the *United States Code*.

²⁸⁹ P.L. 100-527, 102 Stat. 2635.

²⁹⁰ P.L. 107-296, 116 Stat. 2135.

²⁹¹ 5 U.S.C. § 903(a)(2).

²⁹² 5 U.S.C. § 905(a). The statute includes several other limitations on what can be achieved by a reorganization plan.

²⁹³ The quotation is taken from the statute, which has not been updated to reflect the new century.

Discussion

The original rationale for delegating to the President broad authority to propose executive reorganization plans was the widely held view that the President, as chief manager of the executive branch, ought to have powers to make organizational and management changes without having them subject to so-called “political pressures” from Congress. Reorganization was viewed in large measure as a technical exercise best left to the experts in the executive branch.

Reorganization is now not usually regarded as merely a technical exercise. Reorganizations may lead to increased organizational efficiency, economy, and effectiveness, but they also often have significant institutional and political consequences. From the early 1960s on, questions were raised in congressional deliberations as to both the constitutional bases for reorganization authority and processes and the political wisdom of assigning this broad authority to the White House. The successive reorganization acts were founded upon the concept of permitting the President to submit to Congress what were, in fact, laws that would go into effect unless either house prevented activation by passing a motion of disapproval. Despite modifications of the process, this “legislative veto” was increasingly criticized as the years passed.

The reorganization process began to be questioned in terms of both its utility and its potential for increasing conflict and distrust between the branches. Congress, in successive reorganization acts, gave the President authority to circumvent the regular legislative process. Yet, when Presidents invoked the authority, they opened themselves to the accusation of violating the established system. Plans were sometimes submitted that probably would not have been accepted using the regular legislative process, thus increasing tension between the branches. After each presidential “misuse,” Congress responded by adding restrictions and exemptions, gradually circumscribing the power until the reorganization plan process (provided in the 1977 act, as amended) was a mere shadow of the original Reorganization Act of 1949. With the 1983 *Chadha* decision striking down the legislative veto, the utility and desirability of using the reorganization act, compared to following the regular legislative process, came into question.

Nonetheless, the drawbacks of reorganization authority might be outweighed, for some, by the perceived difficulty of reforming government organization through the conventional legislative process. It could be argued that the need for modernization of the federal bureaucracy warrants the renewal of the President’s reorganization authority, with appropriate modifications and safeguards for congressional prerogatives.

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Henry B. Hogue

C. Federal Vacancies Reform Act of 1998

Statutory Intent and History

The Federal Vacancies Reform Act of 1998²⁹⁴ (Vacancies Reform Act) replaces the Vacancies Act of 1868,²⁹⁵ as amended (5 U.S.C. §§ 3345-3349d). The purpose of the 1868 act and the 1998 act is the same: to provide for the temporary filling of certain positions in the executive branch to which the President makes appointments, subject to the advice and consent of the Senate.

The 1868 act, which applied only to executive departments — no independent agencies existed at the time — provided that when an incumbent in an advice and consent position died or resigned, or was absent or sick, the first assistant thereof was to perform the duties of the office, unless the President designated someone else who was occupying a position for which he or she had been confirmed by the Senate. Whoever assumed the duties of the position could do so for no longer than 10 days when the vacancy was caused by death or resignation. An 1891 amendment extended the time period to no more than 30 days.²⁹⁶ In 1988, the act was amended once again, extending the time period to no more than 120 days. In addition, several new provisions were added to the act. The 120-day time period was suspended if a first or second nomination to fill the vacancy was before the Senate, but would begin to run again if the nomination was rejected or withdrawn. For the first time, the heads of executive agencies were brought under the act. Finally, a temporary appointment or designation could be made only under provisions of the act, except for recess appointments.²⁹⁷

The Vacancies Reform Act addresses a number of issues raised in the administration of the prior act. These include, but are not limited to, (1) extending the act's coverage to all advice and consent positions in single-headed executive independent agencies; (2) extending the President's authority to make temporary appointments to include officials who are not in positions for which they were confirmed by the Senate; (3) lengthening the time a first assistant or acting or designated officer may serve; (4) stipulating that the act is the exclusive means for temporarily filling vacant positions, except for recess appointments and instances in which express statutory authority provides otherwise; (4) providing for the Comptroller General to report to Congress regarding agency adherence to the act; (5) temporarily suspending the now 210-day time period during a presidential inaugural transition; and (6) specifying that positions in independent multi-headed regulatory boards and commissions, as well as certain other positions, are not covered by the act.

²⁹⁴ The act is found in P.L. 105-277 (Omnibus Consolidated and Emergency Supplemental Appropriations for FY1999) under Division C, Title 1, Sec. 151.

²⁹⁵ Act of July 23, 1868, Ch. 227, 15 Stat. 168.

²⁹⁶ Act of Feb. 6, 1891, Ch. 113, 26 Stat. 733.

²⁹⁷ P.L. 100-398, Sec. 7; 102 Stat. 988.

Major Provisions

Section 3345. Acting Officer. Provides that if an officer in an advice and consent position dies, resigns, or is unable to perform his or her duties, the office may be filled temporarily in one of two ways: (1) the first assistant to the office assumes the duties of the office, unless he or she has been nominated for the vacant position and has served as first assistant for fewer than 90 of the preceding 365 days; or (2) the President selects either (a) an official from another position to which he or she has been confirmed, or (b) an official from the affected agency, whose pay rate is at least equal to GS-15, and who has been at the agency for at least 90 of the preceding 365 days.

Section 3346. Time Limitation. Establishes a 210-day time period after a vacancy occurs during which an acting officer may serve. If the vacancy occurs during an adjournment sine die, the time period begins when the Senate first reconvenes. If on the last day of the 210-day period the Senate is not in session, the second day the Senate is next in session shall be deemed to be the last day of such period (Section 3348). The 210-day restriction is suspended if a nomination is pending, but begins anew if the nomination is rejected, returned, or withdrawn. A second nomination again suspends the time restriction, which does not begin again unless the second nomination is rejected, returned, or withdrawn. (See also Section 3349a for additional time limitation provisions.)

Section 3347. Exclusivity. Provides that Sections 3345 and 3346 are the exclusive means for temporarily filling a vacant advice and consent position in an executive department or agency, unless (1) a statutory provision specifically authorizes the President, a court, or the head of an executive department to temporarily fill a specific position, or designates an officer or employee to temporarily fill a specific position; or (2) the President makes a recess appointment. The section specifically nullifies the previously held position of the Justice Department that the statutory vesting of general agency authority in the head of an agency, and allowing this authority to be delegated, provides an alternative way to fill vacant advice and consent positions.

Section 3348. Vacant Office. Provides that a vacant advice and consent position may not be filled temporarily except in conformity with the Vacancies Reform Act, and that an action taken by any person who is not acting under the provisions of the act shall have no force or effect and may not be ratified. Provides further that the head of a department or agency may perform the functions and duties of a vacant, subordinate, advice and consent position. The head of the agency may not perform these functions and duties, however, for the following positions: General Counsel of the National Labor Relations Board, General Counsel of the Federal Labor Relations Authority, any inspector general or chief financial officer in an advice and consent position, or any executive agency position, if a statutory provision expressly prohibits the head of the agency from performing the functions and duties of such office.

Section 3349. Reporting of Vacancies. Directs each agency head to notify the Comptroller General and each house of Congress when a covered vacancy occurs, including the name of the acting officer, the name of the nominee for the position,

and the date a nomination is rejected, withdrawn, or returned. If the Comptroller General determines that an acting officer is serving longer than the 210-day period, including the applicable exceptions, he is to report this fact to specified committees of Congress, to the President, and to the Office of Personnel Management.

Section 3349a. Presidential Inaugural Transitions. Provides that for any vacancy that exists during the first 60 days after a new President assumes office, the 210-day time period does not begin until 90 days after the inauguration date, or 90 days after the vacancy occurs, whichever is later.

Section 3349b. Holdover Provision. The act does not affect any statute that authorizes a person to continue serving in a fixed-term position after a term expires, until a successor is appointed or a specified period of time has expired.

Section 3349c. Exclusion of Certain Officers. The act does not cover any advice and consent officer on a board, commission, or similar entity that is composed of multiple members and governs an independent establishment or government corporation; or any member of the Federal Energy Regulatory Commission or the Surface Transportation Board; or any judge on an Article I court.

Section 3349d. Notification of Intent to Nominate. Provides that if, during a recess or adjournment of the Senate of at least 15 days, the President sends a written notification of intent to nominate a specific individual to a specific office, this notice shall be considered a nomination for purposes of the act. If the President does not submit the nomination within two days after the end of the recess or adjournment, the nomination shall be treated as a withdrawn nomination for purposes of the act.

The Vacancies Reform Act became effective on November 20, 1998, and applies to any vacancy occurring after that date. The 210-day limitation applies to any office that was vacant on the effective day as if the vacancy had occurred on that date.

Discussion

The Vacancies Reform Act was largely inspired by evidence that, by early 1998, as many as 25% of the 320 advice and consent positions in executive departments were being filled by temporary designees, most of whom had served beyond the 120-day limitation period of the old act and had not been nominated by the President. In addition, it was found that this evasion of the Senate's constitutional confirmation prerogative was being supported by the Department of Justice (DOJ). The department had developed a legal construction of the enabling legislation of the 14 departments that effectively superceded the requirements of the old act. The Attorney General was interpreting general housekeeping provisions found in the enabling statutes of all the departments as authority for the head of the department to designate an acting official to occupy, for an indefinite term, a vacant position

requiring Senate confirmation. These provisions²⁹⁸ vest department heads with the powers and functions of their agencies, and with authority to delegate some of their authority to their subordinates.²⁹⁹ The Comptroller General had rejected Justice's interpretation and issued a series of opinions on the matter.³⁰⁰ The Vacancies Reform Act makes clear that its requirements are exclusive and specifically rejects the DOJ position. To assure that the executive branch will comply with the act, the Comptroller General is now required to report to Congress if any acting officer is serving longer than the 210-day period (including the applicable extensions). In addition, the statute now stipulates that the acts of any person who is not acting under its provisions have no force or effect and may not be ratified.

The Vacancies Reform Act also addresses some of the President's concerns, particularly regarding the amount of time taken to fill positions through the regular advice and consent appointment process. Aware of the problem, Congress extended the time limit for a temporary appointment from 120 to 210 days. In addition, the 210-day time limit is suspended for a specific period during the inaugural transition period of a new President. Finally, the President now has wider choice when designating an acting official.

The Vacancies Reform Act vests the Comptroller General with the task of monitoring agency compliance, by establishing requirements for reporting, to the Congress and the Comptroller General, action related to vacancies in advice and consent positions, as well as setting standards for who can be named to act in these positions when they are vacant and how long they can remain. In performance of this duty, since 1999, the General Accounting Office (GAO) has issued a series of reports that examined agencies' performance in implementing the act. It found substantial lags between the time a reportable event, such as the naming of an acting officer, occurred and the time it was reported, as well as instances that were not reported at all. It also identified instances in which an acting officer exceeded the legally allowed maximum period for service in this capacity.³⁰¹ In 2003, GAO issued a

²⁹⁸ See, e.g., such provisions for DOJ at 28 U.S.C. §§ 509-510.

²⁹⁹ The assertion of DOJ's position at that time is found in two letters to Senator Strom Thurmond from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, dated May 2, and July 10, 1997.

³⁰⁰ See, e.g., 65 Comp. Gen. 626-635, issued on June 9, 1986. An analysis of the issue, which supports the Comptroller General's position, is found in CRS Congressional Distribution Memorandum, *Validity of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, by Morton Rosenberg, in U.S. Congress, Senate Committee on Governmental Affairs, *Oversight of the Implementation of the Vacancies Act*, hearing on S. 1764, 105th Cong., 2nd sess., Mar. 18, 1998, S.Hrg. 105-495 (Washington: GPO, 1998), pp. 62-100.

³⁰¹ For example, see U.S. General Accounting Office, *Violations of the 210-Day Limit Imposed by the Vacancies Reform Act*, B-286265, Sept. 15, 2000; *Implementation of the Federal Vacancies Reform Act of 1998*, GAO/GGD-00-210R, Sept. 29, 2000; *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, Feb. 23, 2001; and *Presidential Appointments: Agencies' Compliance with Provisions of the Federal Vacancies Reform Act of 1998*, GAO-

report identifying approaches that would facilitate prompt and accurate compliance with the act's provisions that could be applied throughout the executive branch. The report identified five critical elements essential to agency compliance with the act: (1) clear identification of the agency components responsible for each requirement under the act; (2) frequent communication between the responsible agency components; (3) maintaining up-to-date lists of the first assistants to each covered advice and consent position; (4) documentation of an agency's Vacancy Reform Act procedures to guide responsible persons when a triggering vacancy occurs; and (5) assigning Vacancy Reform Act responsibilities to career employees so as to assure continuity of an agency's compliance activities. (See the GAO report listed under "Selected Source Reading" below.)

Selected Source Reading

U.S. General Accounting Office. *Federal Vacancies Reform Act: Key Elements for Agency Procedures for Complying with the Act*. GAO-03-806. July 2000.

CRS Report 98-892A. *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, by Morton Rosenberg (1998).

CRS Congressional Distribution Memorandum. *Validity of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, by Morton Rosenberg. In U.S. Congress. Senate. Committee on Governmental Affairs. *Oversight of the Implementation of the Vacancies Act*. Hearing on S. 1764. 105th Congress, 2nd session, March 18, 1998. S.Hrg. 105-495, pp. 62-100.. Washington: GPO, 1998.

Morton Rosenberg
Henry B. Hogue

³⁰¹ (...continued)
01-701, May 31, 2001.

V. Procurement and Real Property Management

A. Public Buildings Act of 1959

Statutory Intent and History

Until 1926, each federal building was approved and funded in separate legislation. With exceptions, this remained the practice until enactment of the Public Buildings Act of 1926 (44 Stat. 630). This act provided the basic authority for construction of federal buildings by congressional authorizations and appropriations. Congress later enacted the Public Buildings Act of 1949 (63 Stat. 176) to authorize the acquisition of sites and design plans for federal buildings located outside Washington, DC, and for improvement to existing federal buildings. The same year, Congress enacted the Federal Property and Administrative Services Act of 1949 (63 Stat. 377). This act established the General Services Administration (GSA) and gave the GSA Administrator responsibility for administering federal real property. In 1954, Congress amended the Public Buildings Act of 1949 to authorize the GSA Administrator to acquire titles to real property and to construct federal buildings through lease-purchase contracts (68 Stat. 518). Under this procedure, a building was financed by private capital, and the federal government made installment payments on the purchase price in lieu of rent payments. Title to the property vested in the federal government at the end of the contract period, generally between 10 and not more than 30 years. When authority for lease-purchase contracts expired in 1957, Congress approved a successor statute, the Public Buildings Act of 1959 (40 U.S.C. § 3301 et seq.). The 1959 act re-established earlier requirements to provide for direct federal construction of public buildings through the congressional appropriations and authorizations process. This act, as amended and re-codified over the years, remains the basic statute authorizing the construction and renovation of federal civilian facilities.

The Public Buildings Act Amendments (86 Stat. 216) were enacted in 1972 to address a backlog of congressionally authorized building projects which had not received appropriations since 1959. The legislation authorized the GSA Administrator to use lease-purchase contracts for a three-year period to construct 68 federal buildings in an attempt to reconcile the urgent need for new federal facilities with budgetary constraints. The Federal Buildings Fund (FBF) was also established within GSA to be used for acquisition and maintenance of real property. Revenue to the FBF was supplied from rent payments charged to federal agencies occupying GSA's office space.

The Public Buildings Act Amendments of 1988 (102 Stat. 4049) were enacted to permit the GSA Administrator to enter into five-year contracts to realize greater savings in the operations and maintenance of federal facilities. The 1988 act increased to \$1.5 million the threshold for projects not requiring approval of the congressional authorizing committees.

Major Provisions

The Public Buildings Act, as amended, codifies existing law and establishes a uniform method for meeting the building needs of the federal government. The act vests with the Administrator of General Services sole authority to acquire, construct, alter, repair, remodel, improve, or extend most federal buildings, and to acquire the sites or additions to sites for such buildings. It also requires GSA to submit to the congressional authorizing committees a detailed prospectus of all proposed building projects costing over \$1.5 million prior to the appropriation of funds, and requires GSA to submit an annual report to Congress on all projects and conduct an ongoing survey of federal building needs.

Discussion

Since 1972, the FBF has financed GSA's real property activities through reimbursements for purchases of goods and services or as rent paid for space in GSA-owned and leased buildings. While revenue to the FBF is the principal source of funding, Congress annually authorizes how GSA may allocate its FBF revenues as new obligational authority in appropriations funding. In its early years, the revenues from the FBF proved inadequate to provide operating capital for federal buildings. As a result of insufficient revenues, GSA turned increasingly to the leasing of space to meet federal agency needs, which totaled nearly \$1.2 billion in FY1988.

In response, Congress authorized a total of \$2.8 billion in new appropriations to the FBF for construction of new federal facilities between 1990 and 1997. The following year, Congress authorized \$450 million to be deposited into the FBF from GSA's rent revenues, and also authorized a new appropriation of \$492 million for the acquisition and construction of new federal facilities. Since that time, Congress has generally remained supportive in its funding of new construction projects, while requiring GSA to justify and monitor all proposed building costs.

Most recently, the December 2003 conference report (H.Rept. 108-401) to accompany the FY2004 omnibus appropriations bill (H.R. 2673) recommended that an additional \$446 million be deposited into the FBF, for a total of \$6,758 million. Of this total, \$708 million is to be used for new construction, and an additional \$991 million is to remain available until expended for repairs and alterations.

GSA's Public Buildings Service (PBS) provides property and asset management, as well as acquisition and property disposal services. GSA has constructed nearly 1,800 buildings, and leases space in approximately 6,500 privately-owned buildings. Adequate funding for repairs and alterations continues to be of major concern for the PBS, so that it can maintain and improve these properties that are in the government's inventory. A June 2003 General Accounting Office report noted that more than \$10 billion would be needed for repairs and renovations to the federal facilities constructed over 50 years ago.³⁰²

³⁰² U.S. General Accounting Office, *Federal Real Property: Executive and Legislative* (continued...)

In both the 106th and 107th Congresses, legislation was introduced to reform property management by providing greater flexibility to GSA and executive branch agencies to manage their personal property assets more effectively. Past legislative proposals included the transfer and exchange of property with other agencies and qualifying private-sector entities, the use of subleases on unexpired portions of government leases, and the leasing of certain federal assets to the private sector. In the 108th Congress, two bills have been introduced in the House to revise federal property management policies (H.R. 2548 and H.R. 2573). If enacted, the proposed legislation would authorize the GSA Administrator to enter into agreements with non-federal entities to sell or sublease real property that is no longer needed by the federal government. These proposed changes to existing law are intended to give greater flexibility to GSA and federal agencies to manage more effectively and oversee federal property assets based on changing mission requirements.

Selected Source Reading

U.S. Congress. House. Committee on Government Reform and Oversight. Subcommittee on Government Management, Information, and Technology. *Oversight of Federal Real Property Policy*. Hearings. May 4, 1998. 105th Congress, 2nd session. Washington: GPO, 1999.

U.S. Congress. House. Committee on the Judiciary. *Revision of Title 40, United States Code, "Public Buildings, Property, and Works."* S.Rept. 107-479. 107th Congress, 2nd session. Washington: June 2002.

U.S. General Accounting Office. *Federal Real Property: Executive and Legislative Actions Needed to Address Long-standing and Complex Problems*. GAO-03-839T. June 5, 2003.

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³⁰² (...continued)

Actions Needed to Address Long-standing and Complex Problems, GAO-03-839T, Washington: June 5, 2003, p. 1.

B. Federal Acquisition Streamlining Act of 1994

Statutory Intent and History

The 103rd Congress enacted the Federal Acquisition Streamlining Act of 1994 (FASA; 108 Stat. 3243), a comprehensive procurement reform effort designed to streamline the civilian and military acquisition process, which totaled \$234.9 billion in FY2002. The new law was based in large part on recommendations contained in the 1993 National Performance Review (NPR) report.³⁰³ These reforms included the revision and consolidation of existing procurement statutes, increased use of commercially available items, and adoption of a simplified acquisition purchase threshold of \$100,000. Immediately after signing FASA into law, President William Clinton issued E.O. 12931, requiring executive branch agencies to make their administrative procurement procedures more effective and innovative “over and above those required by statute.”³⁰⁴

By way of background, the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 et seq.) established a statutory basis for the postwar procurement procedures of civilian agencies. The legislation created the General Services Administration (GSA) to procure supplies and services, including federal buildings as well as their management, and to set records management standards. Since 1949, the enabling law’s original provisions have been frequently and substantially amended. Enactment of FASA was a comprehensive attempt to revise and consolidate duplicative federal regulations that often hindered an agency’s ability to procure the highest quality goods at the lowest cost. Potential vendors also complained of the frustrating complexity of federal specifications that controlled the design and production of goods.

The Federal Acquisition Regulation (FAR) is the codification of uniform policies and procedures for executive branch acquisitions, and is the primary regulation used in the acquisition of supplies and services. The FAR is maintained and revised by the Federal Acquisition Regulatory Council, which is composed of the GSA Administrator, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration. The FAR is published as Chapter One of Title 48 of the *Code of Federal Regulations*. It can also be accessed online at [<http://www.arnet.gov/far>]. The Office of Federal Procurement Policy (OFPP), established within the Office of Management and Budget (OMB) in 1974, provides oversight of federal procurement policies for executive branch agencies (41 U.S.C. § 404). The OFPP Administrator is responsible for oversight of the council, and provides the final approval on revisions to the FAR, in the event the three member agencies fail to agree in a timely manner.

Until 1996, GSA also had responsibility for technology procurement. The Information Technology Management Reform Act (110 Stat. 679), which was

³⁰³ U.S. Office of the Vice President, National Performance Review, *From Red Tape to Results: Creating a Government That Works Better & Costs Less* (Washington: GPO, 1993), pp. 26-31.

³⁰⁴ 3 C.F.R., 1995 Comp., pp. 925-926.

incorporated as an amendment into the National Defense Authorization Act for FY1996, transferred authority for information technology acquisitions from GSA to OMB (40 U.S.C. § 1401). Later retitled the Clinger-Cohen Act (110 Stat. 3009-393), this comprehensive legislation provided federal agency procurement officials greater flexibility to acquire information technology systems through the use of multi-agency contracts.

Major Provisions

Enactment of FASA revised existing procurement law in an effort to simplify the government's 55-year-old acquisition system that had become cumbersome and duplicative. New FASA requirements authorize the use of multiple award contracts for goods and services, thus minimizing the burden on contracting officials to negotiate and administer contracts. Encouraging a more active relationship between the federal government and suppliers, FASA authorizes procurement officials to buy goods quickly and economically through the simplified acquisition purchase threshold of \$100,000, and through greater reliance on commercially available items. Micro-purchases, under \$2,500, are authorized by FASA to be made with the use of purchase cards. Procurement officials are also encouraged to conduct bid requests, quote specifications, and award contracts electronically, whenever possible.

Generally, federal agencies acquire their goods and services through contracts that mandate specific requirements. An agency can now consider a contractor's past performance, management skills, and workmanship in its decision to award supply and services contracts based on best-value procurement, instead of lowest price. In addition, the use of fixed-price performance-based contracting is also encouraged to eliminate audits and cost overruns often associated with cost-reimbursement contracts.

Discussion

FASA contained 204 sections that amended procurement law, and established September 1995 as the deadline for final implementing regulations. Two years later, the General Accounting Office (GAO) reported that the actual implementation of FASA requirements was a "complex process," involving major revisions of the FAR, as well as individual agency directives and FAR supplements.³⁰⁵ The Federal Acquisition Regulatory Council, in conjunction with 11 interagency drafting groups, initially proposed 29 FAR revisions to implement the act. While only 13 regulations were published in final form by the FASA deadline, an additional 11 regulations were published the following month. GAO found that the FAR drafting groups emphasized crafting language that would be useful to contracting officers, and addressing public comments on the more complex or controversial regulations.³⁰⁶

In the decade following enactment of FASA, federal procurement officials have been able to emphasize performance-based requirements in proposed contracts, and

³⁰⁵ U.S. General Accounting Office, *Acquisition Reform: Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*, GAO/NSIAD-96-139, June 1996, p. 1.

³⁰⁶ *Ibid.*, pp. 2-3.

to allow greater flexibility to potential vendors on the methods used to accomplish their work more effectively. Agency procurement officials have also been authorized to negotiate procurements with the use of time-and-materials contracts. In this type of contract, the vendor assumes the full burden of performing and completing the entire scope of work, within the contract's maximum not-to-exceed price for wages and materials. Title XIV of the FY2004 National Defense Authorization Act (P.L. 108-136), the Services Acquisition Reform Act of 2003 (described in more detail elsewhere in this compendium), amends FASA to provide that contracts may be used by federal agencies for the acquisition of commercial services. Agency procurement officials are required to make a determination that a time-and-materials contract is more appropriate than a traditional fixed-price contract, and include in the proposed contract a maximum, not-to-exceed price that the contractor exceeds at his own risk. Procurement officials also have the flexibility to authorize any subsequent change in the cost of the contract, if it is determined to be in the best interest of the procuring agency.

The significance of procurement in the federal government is reflected in the \$234.9 billion that civilian and defense agencies spent on goods and services in FY2002. Growth in procurement spending is likely to continue as the President and Congress address homeland security and defense issues, as well as the need to acquire updated information and technology systems within the federal government.

Selected Source Reading

U.S. Congress. House. Committee on Government Reform and Oversight. Subcommittee on Government Management, Information, and Technology. *Simplifying and Streamlining the Federal Procurement Process*. Hearings. 104th Congress, 1st session. Washington: GPO, 1996.

U.S. General Accounting Office. *Acquisition Reform: Implementation of Title V of the Federal Acquisition Streamlining Act of 1994*. GAO/NSIAD-97-22BR, October 1996.

———. *Acquisition Reform: Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*. GAO/NSIAD-96-139. June 1996.

Stephanie Smith

C. Federal Activities Inventory Reform (FAIR) Act of 1998

Statutory Intent and History

Office of Management and Budget (OMB) Circular No. A-76, which was first issued in 1966, provides guidance for federal agencies to use in determining who — a government agency or a private business — will perform commercial activities.³⁰⁷ A commercial activity is defined as “a recurring service that could be performed by the private sector.”³⁰⁸ The circular does not require agencies in the executive branch to conduct cost comparison studies. The voluntary nature of the A-76 program is manifested by varying levels of participation by executive agencies.

Concerned that civilian executive agencies infrequently consulted Circular No. A-76,³⁰⁹ and supportive of the federal government’s stated policy of relying on the private sector for commercial activities,³¹⁰ the 105th Congress responded with new legislation. As introduced in the Senate, S. 314 would have required executive agencies to procure “from sources in the private sector all goods and services that are necessary for or beneficial to the accomplishment of authorized functions of the agency,” except for inherently governmental goods and services.³¹¹ The version of the bill passed by Congress and signed by the President differed substantially from the original bill. The Federal Activities Inventory Reform Act of 1998 (FAIR; P.L. 105-270)³¹² requires agencies to compile and submit lists of their commercial activities to OMB, but does not require them to conduct cost comparison studies.

Major Provisions

This statute requires the compilation of lists of commercial activities performed by executive agencies, establishes an appeals process, and defines what is an inherently governmental function. FAIR requires executive agencies to compile an inventory of commercial activities and submit the list to OMB annually. After OMB review and consultation, the agency head sends a copy of the list to Congress and makes the list available to the public. Interested parties, such as a contractor or

³⁰⁷ The circular is available at [http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf], visited Dec. 4, 2003.

³⁰⁸ U.S. Office of Management and Budget, Circular A-76 (Revised), May 29, 2003, p. D-2.

³⁰⁹ U.S. Congress, Senate Committee on Governmental Affairs, *Federal Activities Inventory Reform Act of 1998*, report to accompany S. 314, 105th Cong., 2nd sess., S.Rept. 105-269 (Washington: GPO, 1998), pp. 5-6, 11.

³¹⁰ In acknowledgment of the Administration’s emphasis on public-private competition, the 2003 revision to the circular restated the policy: “The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition” (U.S. Office of Management and Budget, Circular No. A-76 (Revised), p. 1).

³¹¹ This version of S. 314, and all other versions, are available at the Legislative Information System website, [<http://www.congress.gov>], visited Dec. 18, 2003.

³¹² 112 Stat. 2382, 31 U.S.C. § 501 note.

federal employee labor union, may appeal the omission or inclusion of certain activities. If appeals or challenges occur, they are handled by the agency. In lieu of defining *commercial activity*, the legislation defines *inherently governmental function(s)*. An inherently governmental function is one “that is so intimately related to the public interest as to require performance by Federal Government employees.” Because this definition is included in the FAIR Act, an *inherently governmental function* now is statutorily defined.³¹³

Discussion

Agencies first compiled FAIR inventories and submitted them to OMB in 1999. Agencies identified approximately 850,000 full-time equivalents (FTEs)³¹⁴ as commercial on the 2000 inventories. Figures have changed only slightly since then.

Competitive sourcing is a component of the President’s Management Agenda (PMA), and OMB has led the effort to promote competitive sourcing among federal agencies. The agency released a revision to Circular No. A-76 in May 2003 and has issued guidance on inventories and related competitive sourcing activities. The definition of *inherently governmental* included in the circular differs from the definition found in FAIR. It is unclear whether the differences possibly could lead to different results when agencies classify activities as inherently governmental. Since 2001, OMB has required agencies to submit inventories of their inherently governmental activities. The 2003 revision of Circular No. A-76 permits interested parties to challenge the classification of an activity as inherently governmental and the application of reason codes to commercial activities.³¹⁵ Neither type of inventory challenge is included in FAIR.

Beginning in 2001, OMB issued competitive sourcing targets for agencies. For example, agencies were required to compete 5% of their commercial activities by the end of FY2002.³¹⁶ However, in July 2003, OMB abandoned government-wide targets in favor of goals tailored to each agency.³¹⁷

³¹³ Beginning with the 2003 revision of the circular, Circular No. A-76 includes criteria for an inherently governmental function (U.S. Office of Management and Budget, Circular No. A-76 (Revised), pp. A-2-A-3).

³¹⁴ A full-time equivalent represents the “staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776) rather than annual available hours that includes non-productive hours (2,080 hours)” (U.S. Office of Management and Budget, Circular No. A-76 (Revised), p. D-5).

³¹⁵ Reason codes apply only to commercial activities. Each function listed in a FAIR inventory is assigned a reason code, which indicates whether the function is eligible for public-private competition. OMB’s 2003 inventory guidance is available at [<http://www.whitehouse.gov/omb/memoranda/m03-09.html>], visited Dec. 16, 2003.

³¹⁶ U.S. Office of Management and Budget, “Performance Goals and Management Initiatives for the FY2002 Budget,” Memorandum M-01-15, Mar. 9, 2001, p. 1, available at [<http://www.whitehouse.gov/omb/memoranda/2001.html>], visited Dec. 15, 2003.

³¹⁷ U.S. Office of Management and Budget, *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*, July 2003, available at (continued...)

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- CRS Report RL31024. *The Federal Activities Inventory Reform Act and Circular A-76*, by L. Elaine Halchin.
- CRS Report RL32079. *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.
- U.S. Congress. House. Committee on Government Reform. Subcommittee on Government Management, Information, and Technology. *The Implementation of the Federal Activities Inventory Reform Act*. Hearing. 106th Congress, 2nd session, October 28, 1999. Washington: GPO, 2000.
- U.S. Congress. Senate. Committee on Governmental Affairs. *Federal Activities Inventory Reform Act of 1998*. Report to accompany S. 314. 105th Congress, 2nd session. S.Rept. 105-269. Washington: GPO, 1998.
- U.S. General Accounting Office. *Competitive Contracting: Agencies Upheld Few Challenges and Appeals under the FAIR Act*. GAO/GGD/NSIAD-00-244. September 2000.
- U.S. General Accounting Office. *Competitive Contracting: The Understandability of FAIR Act Inventories Was Limited*. GAO/GGD-00-68. April 2000.
- U.S. Office of Management and Budget. *The Federal Activities Inventory Reform Act (FAIR), P.L. 105-270*. Available at [<http://www.whitehouse.gov/omb/procurement/fair-index.html>], visited December 16, 2003. (This website includes resources and guidance involving FAIR, and information on where to find agency inventories.)

L. Elaine Halchin

³¹⁷ (...continued)

[http://www.whitehouse.gov/omb/procurement/comp_sourcing_072403.pdf], visited Dec. 15, 2003.

D. Services Acquisition Reform Act (SARA) of 2003

Statutory Intent and History

The Services Acquisition Reform Act of 2003 (SARA),³¹⁸ enacted as Title XIV of the National Defense Authorization Act for Fiscal Year 2004, joins two other major pieces of legislation enacted within the past 20 years aimed at reforming the federal government's procurement policies and processes — the Competition in Contracting Act of 1984 and the Federal Acquisition Streamlining Act of 1994 — which are discussed in this compendium.

Major Provisions

SARA focuses on the federal government's acquisition workforce; the use of business acquisition practices by the federal government; the procurement of commercial items; measures related to the American occupation of Iraq; and preparing for, or responding to, terrorist attacks.

A provision in SARA directs the Administrator of General Services to establish, and manage through the Federal Acquisition Institute, an acquisition workforce training fund. Five percent of the fees collected by federal agencies under certain contracts (e.g., government-wide contracts for the acquisition of information technology, popularly known as "GWACs") is to be credited to the training fund.

Among the business management practices instituted by SARA are the requirement for agency heads to appoint or designate chief acquisition officers (CAOs) and the creation of a chief acquisition officers council. This step follows the establishment of agency-level chief financial officers by the Chief Financial Officers Act of 1990,³¹⁹ and agency-level chief information officers by the Information Technology Reform Act of 1996 (National Defense Authorization Act for Fiscal Year 1996).³²⁰ Other major provisions require the administrator of the Office of Federal Procurement Policy (OFPP), an official in the office of Management and Budget, to establish an advisory panel to review all acquisition laws and regulations, which is to report, no later than one year after its creation, on findings, conclusions, and recommendations; extend the authority for franchise funds from October 1, 2003, to December 31, 2004; and authorize telecommuting for employees of federal contractors.

With regard to the acquisition of commercial items, a provision in SARA permits federal agencies to treat the procurement of services under a performance-based contract as a procurement of commercial items. Certain conditions apply; for example, the value of the contract cannot exceed \$25 million. This provision also

³¹⁸ 117 Stat. 1663; P.L. 108-136; H.R. 1588. The initial version of the Services Acquisition Reform Act in the 108th Congress was a separate piece of legislation, H.R. 1837.

³¹⁹ 31 U.S.C. §§ 901-903; P.L. 101-576, §§ 205-207; 104 Stat. 2838.

³²⁰ 40 U.S.C. § 1425; P.L. 104-106, Div. E, § 5125; 110 Stat. 186, at 679. This law was later renamed the Clinger-Cohen Act of 1996 by P.L. 104-208 (110 Stat. 3009-393).

allows agencies to use, under certain conditions, a time-and-materials contract or a labor-hour contract for the purchase of commercial services.

The final portion of SARA responds to circumstances in the aftermath of the September 11, 2001, terrorist attacks. The heads of civilian agencies may exercise the same authority, under the same conditions and limitations, that the Secretary of Defense has to enter into certain transactions (popularly referred to as “other transactions” because they do not involve, for example, contracts or grants) for research and development projects.³²¹ In civilian agencies, eligible projects are those related to helping defend against, or recover from, biological, nuclear, chemical, or radiological attack. Congressional interest in the use of other than full and open competition procedures by federal agencies awarding contracts for the reconstruction of Iraq led to a disclosure provision on these contracts. Information about noncompetitive contracts must be published in the *Federal Register*. For procurements in support of a contingency operation, or used to facilitate preparation for, or recovery from, nuclear, biological, chemical, radiological attack, the simplified acquisition threshold was increased; the threshold for simplified acquisition procedures was increased; and agencies may treat such items or services as commercial items.

Discussion

This statute represents an effort to continue streamlining federal procurement processes. As such, it is consistent with efforts over the past 20 years to enhance the efficiency of procurement activities while giving agency personnel greater flexibility in making procurements. However, some parties are concerned that greater flexibility could lead to problems. It is too early to tell how agency personnel will use procurement flexibilities, whether these statutory changes will enhance procurement of goods and services, and whether unintended consequences will occur.

Selected Source Reading

U.S. Congress. House. Committee on Government Reform. *Better Training, Efficiency and Accountability: Services Acquisition Reform for the 21st Century*. Hearing on H.R. 1837. 108th Congress, 1st session, April 30, 2003. Washington: GPO, 2003.

U.S. Office of Management and Budget. Office of Federal Procurement Policy. *Emergency Procurement Flexibilities, A Framework for Responsive Contracting and Guidelines for Using Simplified Acquisition Procedures*, May 2003. Available at [http://www.whitehouse.gov/omb/procurement/emergency_procurement_flexibilities.pdf], visited December 16, 2003.

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³²¹ Authority for the Secretary of Defense to enter into other transactions is found in Sec. 845 of the National Defense Authorization Act for Fiscal Year 1994 (P.L. 103-160; 10 U.S.C. § 2371 note).

E. Competition in Contracting Act

Statutory Intent and History

The last full-scale statutory changes made to the competitive contracting procedures concerning federal procurement occurred in 1984. The Competition in Contracting Act of 1984 (CICA or the Competition Act; 98 Stat. 1175; 41 U.S.C. § 251 et seq.), enacted as Title VII of the Deficit Reduction Act of 1984 (98 Stat. 494), made broad changes in the two major procurement statutes that had served as basic authority for federal government purchases of supplies and services since the late 1940s. Specifically, CICA changed the Federal Property and Administrative Services Act (40 U.S.C. § 475 et seq.), the major civilian agency procurement statute, and the Armed Services Procurement Act (10 U.S.C. § 2301 et seq.), the major military procurement statute. Additional statutory provisions to increase competition were included in the Small Business and Federal Procurement Competition Enhancement Act of 1984 (41 U.S.C. § 251 note), which is applicable to civilian agencies, and the Defense Procurement Reform Act of 1984 (98 Stat. 2588), which is applicable to the Defense Department.

Major Provisions

Before CICA, the procedures involving federal contracting were based on “formal advertising” or “competitive negotiation.” After passage of CICA, competitive procedures became defined as “procedures under which an executive agency enters into a contract pursuant to full and open competition.”³²² The Office of Federal Procurement Policy Act states that “full and open competition means that all responsible sources are permitted to submit sealed bids or competitive proposals.”³²³ The two most important competitive procedures set forth in CICA are sealed bids, corresponding to the former competitive procedure of formal advertising, and competitive proposals,³²⁴ corresponding to the former competitive procedure of negotiation. CICA also states that “competitive procedures means procedures under which an executive agency enters into a contract pursuant to full and open competition” and defines what the term includes.³²⁵

When selecting a competitive procedure, the major question concerns whether to use sealed bids or competitive proposals. Before CICA, all contracts over \$10,000 required formal advertising unless one of the exemptions allowed negotiation and advertising was not feasible and practicable. Under CICA, however, an executive agency which is conducting a procurement for property or services is required to “use

³²² 41 U.S.C. § 259(b) and 10 U.S.C. § 2302(2).

³²³ 41 U.S.C. § 403(6).

³²⁴ 41 U.S.C. § 253(a)(2)(B) and 10 U.S.C. § 2304(a)(2)(B).

³²⁵ 41 U.S.C. § 259(b) and 10 U.S.C. § 2302(2).

the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.”³²⁶

“Procedures other than competitive,” known as “sole-source” or “limited competition,” depending upon the circumstances, may be used only if meeting one of the enumerated seven exceptions. These exceptions are as follow: (1) when “the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency”; (2) when “the executive agency’s need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals”; (3) when “it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center”; (4) when “the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government have the effect of requiring the use of procedures other than competitive procedures”;³²⁷ (5) when “a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency’s need is for a brand-name commercial item for authorized resale”; (6) when “the disclosure of the executive agency’s needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals”; and (7) when “the head of the executive agency — (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.”

Discussion

Since passage of the Competition in Contracting Act, Congress has continued to examine the procurement process. Perhaps the most significant changes since 1984 occurred in the Federal Acquisition Reform Act of 1996.³²⁸ Although the provisions are not a full-scale revamping of the procurement requirements, the changes are significant. The general effect of the act is to eliminate or to simplify certain of the contracting procedures. It is likely that Congress will continue to examine whether additional changes to the procurement laws are warranted.

³²⁶ 41 U.S.C. § 253(a)(1)(B) and 10 U.S.C. § 2304(a)(1)(B). All remaining quotations are from 41 U.S.C. § 235 et seq. and 10 U.S.C. § 2304 et seq.).

³²⁷ 41 U.S.C. § 253(c)(4) and 10 U.S.C. § 2304(c)(4).

³²⁸ Division D of the 1996 Defense Authorization Act, P.L. 104-106 (110 Stat. 642).

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———. House. *Conference Report No. 98-861*. 98th Congress, 2nd session. Washington: GPO, 1996.

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Michael Seitzinger

F. Federal Contract Labor Standards Statutes

Statutory Intent and History

Through the early decades of the 20th century, federal procurement law required the government to accept the lowest responsible bid for federal contract work. Since contracts normally specified the type, style, and quality of the construction or goods to be purchased, economies were often achieved through reduced labor costs as firms engaged in competitive bidding. The result, many policymakers believed, was a system that undercut the local market to the disadvantage of contractors and workers alike. It was argued that the system also disadvantaged the government. Low-wage workers often lacked first-rate skills and allegedly produced substandard work which resulted in increased cost to the taxpayer over the long term. And, it made government, at least indirectly, a party to adverse (and often sweatshop) working conditions.

After several tentative proposals during the late 1920s, Congress adopted the Davis-Bacon Act (40 U.S.C. §§ 3141-3148) in 1931. Enacted at the urging of the Hoover Administration, in part as an effort to bring stability to the construction industry and to cope with the collapsing national economy, the act required that persons employed on federal contract work must be paid not less than the locally prevailing wage for comparable work in the locality of the project. In 1935, the scope of the act was broadened to include both public buildings and public works, together with painting and decorating. In 1964, Congress expanded the concept of prevailing wage to include the value of fringe benefits (other than those mandated by law) paid to workers employed in comparable work in the locality. Through the years, Davis-Bacon provisions have been added to more than 50 federal program statutes.

In 1936, following roughly the pattern set by the Davis-Bacon Act, Congress adopted the Walsh-Healey Act (41 U.S.C. §§ 35-45), which set basic standards with respect to goods produced under contract for the federal government. Nearly three decades later, in 1965, Congress adopted the McNamara-O'Hara (Service Contract) Act (41 U.S.C. §§ 351-358), similarly setting basic labor standards for services provided, under contract, to the federal government. These three primary federal contract labor standards statutes are supplemented, inter alia, by the Fair Labor Standards Act of 1938 (FLSA, 29 U.S.C. §§ 201-219), the Contract Work Hours and Safety Standards Act of 1969 (40 U.S.C. §§ 327-333), and the Occupational Safety and Health Act of 1970 (29 U.S.C. §§ 651-678), among others.

Major Provisions

The three statutes deal only with federal contract procurement: respectively, construction (Davis-Bacon), goods (Walsh-Healey), and services (McNamara-O'Hara). Although similar in purpose, they differ in certain details. For Davis-Bacon, the coverage threshold is \$2,000; for Walsh-Healey, \$10,000; and for McNamara-O'Hara, \$2,500. For Davis-Bacon and McNamara-O'Hara, the basic wage rate is that prevailing for the same type of work in the locality. For Walsh-Healey, the wage floor is, in practice, the minimum wage under the FLSA. Work under each of the contract labor standards statutes is subject to the overtime pay

requirements of the FLSA (or reflects a comparable standard): that is, 1½ times a worker's regular rate of pay for hours worked in excess of 40 per week. Child labor is restricted under Walsh-Healey — but also restricted in many forms under the more comprehensive FLSA. Through not addressed in Davis-Bacon, industrial homework is restricted under Walsh-Healey, McNamara-O'Hara and the FLSA — as is convict labor under Walsh-Healey. For Davis-Bacon and McNamara-O'Hara, wage rate calculations are locality based. For Walsh-Healey, in practice, they are the same national rates as those of the FLSA.

Discussion

Of the contract labor standards statutes, the Davis-Bacon Act has been the most visible — and the most controversial. Some view the act as a vital protection for contractors, workers and the public alike — as important now as when it was originally enacted. They assert that the act ensures fairness and equity for workers, that it encourages higher standards in construction, saving the government money in the long run, and that it encourages the training of construction industry professionals through recognized apprenticeship programs. Others argue that the act inflates the cost of public construction, that it is difficult and cumbersome to enforce and perhaps impossible equitably to enforce, and that its complexity works to the disadvantage of small contractors. The Davis-Bacon literature appears to be inconclusive with respect to the act's impact.

Concerning the McNamara-O'Hara Act, proponents hold that it protects workers from what would otherwise be a cycle of wage/benefit reductions as one service provider after another sought government contracts based upon the lowest possible labor costs. It also provides stability for industry and for government (as a consumer), it is argued, preventing a revolving movement of contractors as an award is made first to a low bidder and then to a still lower bidder — each competing upon the basis of ever lower wages and, often, with nonunion labor. Conversely, critics argue that the market, unrestrained, would produce a less expensive service bill for government. The statute is, they argue, difficult to administer, cumbersome, and needlessly inflates wages above market levels. The Walsh-Healey Act, perhaps because its standards are largely the same as those of the national FLSA, has been, at least through recent decades, less subject to controversy.

Historically, each of these statutes was adopted as a means of dealing with specific abuses that had arisen in the workplace and in federal procurement. There is nothing to suggest, some argue, that these abuses would not reappear were the statutes substantially modified or repealed. Conversely, others question whether, at a minimum, some consolidation of the federal contract labor standards statutes and the more general FLSA might not be appropriate.

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CRS Report 94-408. *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.

CRS-225

CRS Report 94-908. *Davis-Bacon: The Act and the Literature*, by William G. Whittaker.

William Whittaker

G. Prompt Payment Act

Statutory Intent and History

The Prompt Payment Act (PPA) was originally enacted in 1982 (96 Stat. 85; 31 U.S.C. § 3901) in response to what was perceived as a pervasive problem of federal agencies not paying their bills on time.³²⁹ While this act did lead to improvement in the timeliness of government bill paying, the 100th Congress saw the need for amendment, revision, and general tightening up of the PPA to bring about more uniform compliance with its purposes. Congress responded by enacting the PPA amendments of 1988 (102 Stat. 2455). The basic structure of the PPA is relatively simple and straightforward. If a bill is not paid on time, interest must be paid on the delinquency. The funds for the interest must come from funds already appropriated for the program which has incurred the interest.

Major Provisions

The PPA applies to all types of federal contracts, including leases (31 U.S.C. § 3901(a)(6)) for the procurement of property or services by agencies covered by the act (OMB Circular No. A-125, § 2(a); see also: 48 C.F.R. § 32.901). *Agency* is defined to include each authority of the government of the United States, whether or not it is within or subject to review by another agency, but it does not include Congress, the United States courts, governments of territories or possessions, the government of the District of Columbia, courts martial, military commissions, and military authority exercised in the field in time of war or in occupied territory (31 U.S.C. § 3901(a)(1) which incorporates by reference 5 U.S.C. § 551(1)). *Agency* also includes any entity that is operated exclusively as an instrumentality of such an agency for the purpose of administering one or more programs of that agency, and that is so identified for this purpose by the head of such agency (OMB Cir. A-125, § 1(b)). The PPA specifically applies to the Tennessee Valley Authority and the United States Postal Service.³³⁰

The head of an agency acquiring property or service from a business concern, who does not pay the concern for such complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. The interest rate to be used is the interest rate established by the Secretary of the Treasury under the Contracts Disputes Act (41 U.S.C. § 611), which is in effect when the obligation to pay PPA interest arises (31 U.S.C. § 3902(d)). The temporary unavailability of funds to make timely payment does not relieve the agency of the obligation to pay such penalty (31 U.S.C. § 3902(d)). The PPA interest penalty is to be paid automatically, whether or not it has

³²⁹ U.S. Congress, House, H.Rept. 97-461, 97th Cong., 2nd sess. (Washington: GPO, 1982). See also U.S. General Accounting Office, “*The Federal Government’s Bill Paying Performance Is Good but Should Be Better*,” FGMSD-78-16, 1978, in which GAO found that 30% of the federal government’s bills, covering 18% of the dollar total, were paid late.

³³⁰ 31 U.S.C. § 3901(b) and (c). The United States Postal Service was not included under the 1982 PPA. Coverage was added by the 1988 amendment, P.L. 100-496, § 2(c)(1), and is applicable to all obligations incurred on or after Jan. 1, 1989.

been requested by the contractor. Failure to pay such interest may result in an additional penalty. This additional penalty is equal to 100% of the original penalty and is limited to \$5,000, but cannot be less than \$25. These limitations apply to each invoice (OMB Circular No. A-125, § 8(b) and (c)). In the case of construction contracts, the regulations shall provide for the payment of interest on late progress payments and retainages (31 U.S.C. § 3903(a)(6)(A)).³³¹ The regulations are also required to include provision for prompt review of invoices submitted to agencies. Agencies are to have seven days to return invoices found to be not proper.³³²

Every construction contract awarded by an agency must include a clause which requires the contractor to include two clauses, a payment clause and an interest penalty clause, in each of its subcontracts. The payment clause must specify that the prime contractor is obligated to pay the subcontractor for satisfactory performance under its subcontract out of payments received from the agency, within seven days of such receipt. The interest penalty clause is to require that the contractor will pay an interest penalty, computed at the same rate as applied to the government under the PPA, to the subcontractor if the seven day deadline is not met (31 U.S.C. § 3905(b)). These protections are extended to all tiers of subcontractors by requiring the prime contractor to require all subcontractors to include these same two clauses in their sub-subcontracts (31 U.S.C. § 3905(c)). A contractor's obligation to pay an interest penalty to a subcontractor under any of these required clauses may not be passed along to the federal government by any means, including contract modifications or cost reimbursement claims (31 U.S.C. § 3905(k)).

Discussion

The PPA greatly reduced the problem of federal agencies not paying their bills in a timely fashion. While the problem has not been entirely eradicated, the PPA has not generally been the subject of proposed legislation since its amendment in 1988.

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Renner, Michael J. "Prompt Payment Act: An Interesting Remedy for Government Late Payment." *Public Contract Law Journal*, vol. 21 (1992), pp. 177-278.

John R. Luckey

³³¹ A period longer than 14 days may be included in the solicitation only if required to afford the agency a practicable opportunity to inspect the work adequately and to determine the adequacy of the contractor's performance under the contract (see A-125, § 10(a)(1)).

³³² The limit is shorter for meat and meat product contracts (three days), and for perishable agricultural commodities (dairy products, edible fats or oils, and food products prepared from edible fats or oils, five days) (A-125, § 7(a)(7)).

VI. Intergovernmental Relations Management

A. Intergovernmental Cooperation Act

Statutory Intent and History

Congress approved the Intergovernmental Cooperation Act of 1968 (ICA)³³³ to improve administrative relationships among federal, state, and local governments, particularly with regard to the grant-in-aid system. The legislation, as enacted, was a composite of government reform proposals that had been considered over a number of years. Recommendations from a variety of organizations, including the Kestnbaum Commission of 1955, the Advisory Commission on Intergovernmental Relations (ACIR),³³⁴ as well as public interest groups representative of state and local governments, were incorporated in the legislation.

Proponents argued for the legislation out of concern with the duplication of effort and lack of coordination in the federal domestic assistance system, in part because of the rapid expansion of categorical grant-in-aid programs in the 1960s.³³⁵ While few, if any, spoke against the intent of the legislation, some debate occurred over the proposed inclusion of a uniform relocation assistance provision in the legislation (the language was ultimately deleted from the bill) and the proposed “sunset” language (also ultimately not included).³³⁶

Major Provisions

As originally enacted, the Intergovernmental Cooperation Act consisted of six titles. Title I set out definitions. Title II established administrative requirements for grants-in-aid, and Title III authorized federal agency heads to provide technical assistance to state or local governments. Title IV required that the President issue program regulations to help state and local governments attain urban and rural community development objectives regarding land use, transportation systems, environmental protection, and other related areas. Also, Title IV required that federal aid be consistent “to the maximum extent possible” with non-federal comprehensive planning, and that units of general local government be favored to receive federal

³³³ P.L. 90-577, 82 Stat. 1098, et seq.

³³⁴ The Advisory Commission on Intergovernmental Relations (ACIR) was established by Congress in 1959 (5 U.S.C. § 2372) for continuing study of the American federal system. The commission ceased operations when Congress no longer appropriated funds after FY1996.

³³⁵ Categorical grants provide aid for specified activities and generally require adherence to rigorous guidelines and regulations.

³³⁶ Sunset provisions specify that program authority must terminate by a date certain. Advocates of sunset provisions argued that the inclusion of such language in legislation would ensure that committees of jurisdiction would conduct oversight hearings on programs and evaluate their usefulness on a regular basis. Instead of sunset language, Congress required quadrennial review by committees of jurisdiction of program administration and implementation.

aid over special purpose governments. Title V amended the Federal Property and Administrative Services Act³³⁷ to ensure that federal acquisition, use, or disposal of land in urban areas did not conflict with local zoning, land use, and planning practices. Finally, Title VI required that congressional committees with jurisdiction evaluate programs not scheduled to terminate every four years. Also, Title VI required that the Comptroller General and the ACIR conduct studies of grant-in-aid programs.

The ICA has been amended several times, most notably in 1982, when it was recodified.³³⁸ In its current form, the act sets out definitions³³⁹ and enables state officials to obtain information on the purpose and amount of grants received in the states.³⁴⁰ Concerning fund transfers and associated requirements, the act requires that federal officials make funds available to the states in an expedited fashion; establishes requirements concerning interest payments received on deposited federal funds; and requires state officials to make reports on the funds.³⁴¹ Provisions have been retained from the original statute that authorize federal agency heads to waive statutory requirements concerning designation of a single state contact³⁴² and to make specialized or technical services available to state and local governments.³⁴³ Also, the provisions of Title IV that require coordination between federal expenditures and state and local community development objectives remain in force,³⁴⁴ as do those concerning quadrennial congressional committee review.³⁴⁵

Discussion

Intergovernmental relations have undergone considerable change in recent years. Some of these changes resulted from actions required by the ICA. For example, the authority of federal agency heads to waive federal requirements concerning a single state contact, at the request of state officials, first appeared in the ICA. In recent years, such waivers have been used in a number of policy areas to improve intergovernmental relations as well as the administration of federal grant-in-aid funding. Another significant effect of the ICA was the assignment of increased responsibilities to the Office of Management and Budget (OMB). Implementation

³³⁷ 63 Stat. 377; 40 U.S.C. § 475 et seq.

³³⁸ In 1982, the ICA was technically repealed, reenacted, and recodified at 31 U.S.C. § 6501 et seq. (see P.L. 97-258, 96 Stat. 1005-1010). Previously, it had been codified at 42 U.S.C. § 4201-4243.

³³⁹ 31 U.S.C. § 6501.

³⁴⁰ 31 U.S.C. § 6502.

³⁴¹ 31 U.S.C. § 6503.

³⁴² 31 U.S.C. § 6504.

³⁴³ 31 U.S.C. § 6505.

³⁴⁴ 31 U.S.C. § 6506. E.O. 12372, signed by President Reagan July 14, 1982, and amended by E.O. 12416 on April 8, 1983, allowed states to design their own procedures for reviewing federal financial assistance and directing federal development.

³⁴⁵ 31 U.S.C. § 6507.

of the ICA was included in OMB's Federal Assistance Review efforts during the Nixon Administration.

During the Reagan Administration, officials sought to modify past patterns of federal involvement in domestic assistance programs. Although provisions of the ICA were modified, the act was not repealed. At present, though most provisions of the 1968 act remain in effect, they are largely dormant.

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U.S. Congress. Senate. Committee on Governmental Affairs. *Office of Management and Budget: Evolving Roles and Future Issues*. Committee print. 99th Congress, 2nd session. Washington: GPO, 1986, pp. 335-358.

Keith Bea

B. Intergovernmental Personnel Act of 1970

Statutory Intent and History

The Intergovernmental Personnel Act of 1970 (IPA)³⁴⁶ authorized programs to improve state and local government personnel management operations and procedures. Congress approved the IPA at the urging of federal managers, Members of Congress, and others who voiced concern over a perceived need to strengthen the core management capabilities of state and local general purpose governments. In the late 1960s, when Congress first debated the legislation, federal agencies were expanding to meet new federal policy objectives, and agency heads were competing with state and local governments to attract employees at upper management levels. Congress viewed enactment of the IPA as a means of improving the pool of public management candidates in the nation.

Two types of management needs figured in the enactment of the IPA.³⁴⁷

Policy Management — identification of needs, analysis of options, and selection of programs throughout non-federal units of government.

Resource Management — establishment of basic administrative support systems such as budgeting, financial management, procurement and supply, and personnel administration.

Major Provisions

The congressional declaration of findings and policy in the act notes that the effective management of federal funds by state and local governments is in the national interest. The IPA identified state and local manpower issues that required attention and additional resources. The issues include the interchange and retention of government employees, training, quality of public service, merit system requirements, and personnel management. Sponsors of the act sought to address these issues by authorizing the following types of assistance:

- grants-in-aid to help states and localities meet the costs of strengthening such personnel management activities as recruitment, selection, pay administration, training and employee development, and labor-management relations;
- invitations to state and local government employees to participate in federal training courses;
- technical assistance in personnel management on a reimbursable, non-reimbursable, or partly reimbursable basis;

³⁴⁶ P.L. 91-648, 84 Stat. 1909, et seq.

³⁴⁷ U.S. Executive Office of the President, *Strengthening Public Management in the Intergovernmental System* (Washington: GPO, 1975), p. vii.

- cooperative recruiting efforts;
- temporary exchange of personnel between different levels of governments and institutions of higher education (the “mobility program”); and
- transfer of responsibility for prescribing and maintaining merit system standards required under various federal assistance programs to a single agency.

The mobility program and the merit systems administration program were amended by Section 602 of the Civil Service Reform Act of 1978 (92 Stat. 1188-1189). In 1996, the 104th Congress approved technical amendments to the provision authorizing reimbursement for employees and families in transit (110 Stat. 2758). Since 1996, Congress has taken no further action on the IPA.

Discussion

The statutory authority for IPA remains on the books. Most of the IPA programs, however, have not been implemented for years. Funding for the grant program ended in FY1981. Currently, the only IPA program in existence is the Intergovernmental Mobility Program, discussed below.³⁴⁸

Congressional approval of the IPA was based on three assumptions: effective state and local governments are essential in the federal system of governance; a national interest in state and local management practices exists, since federal funds are involved; and public service at all levels of governance can be improved through better personnel administration.³⁴⁹ These assumptions remained unchallenged until 1981, when the Reagan Administration proposed termination of the grant program and all the act’s other provisions, except for its merit system principles, declarations of policy concerning public service, and provisions on interstate compacts.³⁵⁰ To support this proposal, the Administration contended that the IPA had achieved its objectives as a demonstration program and could be eliminated. The proposed abolition of much of the IPA statutory authority paralleled other Reagan Administration efforts to reduce federal involvement in “what should be primarily a state and local government responsibility.”³⁵¹

The administration proposal came at a time when many domestic assistance programs were being cut or eliminated. General management assistance usually does

³⁴⁸ The mobility program is codified at 5 U.S.C. §§ 3371-3376.

³⁴⁹ U.S. Advisory Council on Intergovernmental Personnel Policy, *More Effective Public Service* (Washington: GPO, 1973), p. 1.

³⁵⁰ U.S. Congress, Senate Committee on Governmental Affairs, *Amending the Intergovernmental Personnel Act of 1970*, hearings, 97th Cong., 1st sess. (Washington: GPO, 1981), p. 136.

³⁵¹ Donald J. Devine, Letter Transmitting Legislation to Abolish the Intergovernmental Personnel Act, *Congressional Record*, daily edition, vol. 127, Apr. 29, 1981, p. S 4141.

not have a large or effective constituency, and federal programs with such a focus were largely repealed or allowed to lapse during this period. In FY1981, the IPA grant assistance program was terminated.³⁵² In November 1981, the Office of Intergovernmental Personnel Programs in OPM, which had administered the programs, was abolished. The merit system provisions, which had been administered by this office, no longer received budgetary support from OPM, thus bringing the IPA grant assistance program to an end.

As noted above, the Intergovernmental Mobility Program is the only statutory provision that continues to be implemented, largely to facilitate temporary details of scientific and technical staff. The program allows federal, state, and local government employees to be voluntarily assigned to a public agency or to an organization oriented toward public service for no more than two years. Federal employees may be assigned to state, local, or tribal agencies, public or private institutions of higher education, or nonprofit or professional government associations. The reverse holds as well: employees of these entities may volunteer to be temporarily assigned to federal agencies. Through such assignments, scarce or technical expertise may be shared; program operational experience may be gained, or the management of federal grant programs improved. Assignments generally cannot exceed two years, although extensions might be approved. Assignment costs, including the salary of the employee, may be shared by the agencies or borne entirely by one entity, subject to agreement between the organizations. Since 1981, the IPA authority and the mobility program have been given little attention or publicity.

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———. *Intergovernmental Personnel Act of 1970: Intergovernmental Purpose no Longer Emphasized*. GAO/GGD-89 — 95. June 19, 1989.

Keith Bea

³⁵² U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1983* (Washington: GPO, 1982), p. I-V127.

C. Unfunded Mandates Reform Act of 1995

Statutory Intent and History

After considerable debate and some legislative action in the 103rd Congress, the Unfunded Mandates Reform Act (P.L. 104-4; 109 Stat. 48-71; 2 U.S.C. §§ 1501-1571) was enacted early in the 104th Congress. Generally, unfunded intergovernmental mandates include responsibilities or duties that federal programs, standards, or requirements impose on governments at other levels *without* providing for the payment of the costs of carrying out these responsibilities or duties. The intent of the mandate legislation was to limit the ability of the federal government to impose costs on state and local governments through unfunded mandates.

Legislation to restrain unfunded mandates was proposed regularly from 1984 through 1990 (98th-101st Congresses), but none of the proposals received action. During the 102nd and 103rd Congresses (1991-1994), increased pressure developed as state and local interest groups united in an effort to bring about mandate reform. Although some of this effort was concentrated on specific laws considered to impose mandates (e.g., safe drinking water, motorcycle helmet requirements, national education standards), much attention focused on overall unfunded mandate reform legislation. The Clinton Administration supported the concept of mandate reform, though not necessarily the specifics of all reform legislation.

Thirty-four mandate reform bills were introduced in the 103rd Congress, and a bipartisan compromise bill (S. 993/H.R. 5128) came close to floor action. Unfunded mandate reform was a component of the House Republican “Contract with America” in the 1994 election, and election of a Republican majority in both houses ensured early action in the 104th Congress. Mandate reform legislation was introduced as S. 1 and H.R. 5 on January 4, 1995, and the Unfunded Mandates Reform Act was signed into law on March 22, 1995.

Major Provisions

The Unfunded Mandates Reform Act has three components: revised congressional procedures regarding future mandates; new requirements for federal agency regulatory actions; and authorization for a study of existing mandates to evaluate their current usefulness. The primary objective was to create procedures that would retard and spotlight, if not stop, congressional authorization of new unfunded mandates on state and local governments.

Point of Order in Congress. The act amended Title IV of the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344; 88 Stat. 297-339), as amended, to require the Congressional Budget Office (CBO) to estimate the costs to state, local, and tribal governments and the private sector of the unfunded intergovernmental mandates established by each reported bill exceeding \$58 million (in calendar year 2002, the latest year available; the threshold is adjusted for inflation). The act requires that the cost information be printed and available before a vote is taken. If the information is not available, or if the bill does not provide that all mandates it establishes will be funded, a point of order may be raised against considering the bill. For this purpose, a mandate is considered unfunded unless the

bill establishes a mechanism to ensure that, if in any year funding is not provided, the mandate will be reviewed or abolished. An affirmative vote by a majority of those present is necessary to override the point of order.

These requirements do not apply to provisions that are a condition of federal assistance or a duty arising from voluntary participation in a federal program (except that certain large entitlement programs are subject to the special procedures). Other provisions exempt from the requirements are:

- provisions affecting constitutional rights of individuals;
- statutory rights that prohibit discrimination;
- accounting and auditing requirements attached to federal assistance;
and
- emergency assistance, national security, and emergency legislation.

Federal Agency Regulations. The second component affects federal agencies. The act requires agencies to develop a process through which state, local, and tribal governments and the private sector can participate in the development of regulations. In addition, agencies must identify the federal law that authorizes the regulation; estimate the costs and benefits, including whether federal assistance is available to pay the costs; and describe consultation with state, local, or tribal officials. Finally, the agencies must establish plans to involve local governments in the development of regulations affecting them, as well as pilot programs on local government flexibility.

Study of Existing Mandates. While the first two components of the act address proposed new mandates, the third relates to those that existed before its enactment. The act required the Advisory Commission on Intergovernmental Relations (ACIR) to study a number of things, including existing unfunded mandates. ACIR was directed to make recommendations reflecting flexibility in compliance; reconciling conflicting mandates; terminating duplicative, obsolete, or impractical mandates; suspending certain mandates not vital to public health and safety; consolidating and simplifying reporting and planning requirements; and establishing common federal definitions and standards.

Discussion

Origins. The term *unfunded federal mandates* refers to a host of flaws in the operation of the federal system perceived by some observers from the late 1970s into the 1990s. It summarized the concerns of those who asserted that there was excessive federal intrusion into state and local affairs, too much regulation, too many direct orders, too little respect for the role of state and local governments, and too little control by states and localities of their own affairs. Federal demands on state and local resources were sometimes established as conditions of federal aid, but increasingly took the form of direct requirements, although no federal funds were made available to help carry out these directives. All of this came at a time when federal funds to state and local governments were being cut back.

The Unfunded Mandates Reform Act represented a response to a coordinated campaign by state and local officials and their supporters who had protested for years against these perceived federal demands at a time when federal assistance was diminishing. The exact magnitude of the costs to state and local governments of complying with federal mandates is not clear. Various estimates were made during debate on the legislation, ranging from a high of \$500 billion to a low of \$8.9 billion.

Use of Congressional Procedures. To some extent, the focus on unfunded mandates diminished after the legislation was enacted. Many of the individual grievances and criticisms that had fueled the mandate issue were separately addressed by the 104th Congress, which enacted the Unfunded Mandates Reform Act. Many Members of the new majorities had been elected with an agenda paralleling that of the mandate opponents; consequently, a number of issues were addressed directly and, in some cases, favorably. For example, the National Highway System Designation Act of 1995 (P.L. 104-59; 109 Stat. 568-634) repealed several items that regularly appeared on mandate reform agendas, including the national speed limit, the requirement that motorcyclists wear helmets, and requirements that crumb rubber be used in highway construction.

Since the point-of-order procedures took effect, the record on their usefulness as an anti-mandate tool could be described as mixed. On the one hand, state and local organizations used the process successfully to promote or secure changes in telecommunications legislation mandates, but on the other, the new procedures were not successful in preventing enactment of immigration legislation containing a number of provisions described as unfunded mandates. From 1996 through 2003, 13 points of order under the Unfunded Mandates Reform Act were raised in the House, and none in the Senate. The first time the procedure was invoked, the House voted against considering a proposal to amend a bill to include an increase in the minimum wage. Otherwise, the House has always voted to consider the measures against which the points of order were raised, dealing with the minimum wage as well as bankruptcy, nuclear waste, internet taxation, prescription drugs, and several welfare issues.

Advisory Commission Report. In January 1996, ACIR released a preliminary version of the report on federal mandates directed by the act. After considerable opposition was expressed to these preliminary findings, a revised report was presented to the commission for final action. This final version of the report included recommendations for modifying each of 13 mandates studied in detail and six recommendations common to all mandates. On July 23, 1996, a majority of the ACIR rejected these revised recommendations on the grounds that they proposed too great a reduction in the federal role. Congress terminated funding for the ACIR in FY1996.

Private Sector Mandates. As attention to federal intergovernmental mandates grew in the 1980s and 1990s, supporters of regulatory reform began to assert a parallel between these mandates and federal laws regulating the private sector, on grounds that such laws also impose enforceable duties that entail costs of compliance. As a result, the Unfunded Mandates Reform Act includes a requirement that CBO provide information on the costs of these private sector mandates in proposed legislation, where the costs exceed \$116 million (adjusted for inflation in

calendar year 2002). The act does not, however, extend the points of order against consideration to private sector mandates. Subsequently, in both the 105th and 106th Congresses, legislation to apply to private sector mandates procedural protections similar to those now in effect for unfunded intergovernmental mandates passed the House, but it received only committee consideration in the Senate. In some versions, this Mandates Information Act would have established points of order against consideration of all private sector mandates, whether funded or not, including taxes.

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Keith Bea
Richard S. Beth

D. Single Audit Act

Statutory Intent and History

The Single Audit Act of 1984 (98 Stat. 2327; 31 U.S.C. §§ 7501-7507) established uniform audit requirements for state and local governments receiving federal financial assistance. It generally requires entity-wide audits instead of the previous program-by-program audits that had been criticized as an inefficient use of audit resources and an ineffective means of assuring accountability for federal funds.

The Single Audit Act Amendments of 1996 (110 Stat. 1391) extended the act's coverage to nonprofit agencies.³⁵³ The amendments also raised the thresholds that require compliance under the act, focused audits on riskier programs, improved audit reporting, and allowed more administrative flexibility. The only other amendments have been technical in nature (108 Stat. 1363 and 111 Stat. 2634).

As amended, the Single Audit Act has five purposes:

- to promote sound financial management (including effective internal controls) with respect to federal awards administered by non-federal entities;
- to establish uniform requirements for audits of federal awards administered by these entities;
- to promote the efficient and effective use of audit resources;
- to reduce burdens on state and local governments, Indian tribes, and nonprofit organizations; and
- to ensure that federal departments and agencies, to the maximum extent practicable, rely upon and use the audit work.

Regulatory guidance on single audits is contained in Office of Management and Budget (OMB) Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*.

Major Provisions

The Single Audit Act generally requires each non-federal entity that expends \$300,000 or more in federal awards during a fiscal year to have a single audit made for that year. A "single audit" covers both the entity's financial statements and a schedule of its federal awards. An entity subject to this provision may elect to have a program-specific audit if it has only one federal program and is not otherwise required to have a financial statement audit. An entity with federal award

³⁵³ Nonprofit organizations receiving federal financial assistance were previously subject to similar single-audit requirements in earlier versions of OMB Circular No. A-133, at that time named *Audits of Institutions of Higher Education and Other Non-Profit Organizations*.

expenditures less than the threshold is exempt from the act's audit requirements as well as from financial audit requirements of other federal laws, but must comply with federal requirements to maintain and allow access to records. These provisions do not preclude federal agencies from conducting or arranging for other audits as needed. Every two years, the Director of OMB may adjust the threshold amount, though not below \$300,000. (For fiscal years ending after December 31, 2003, the Director has determined that the threshold should be raised to \$500,000.)

Prior to the 1996 amendments, the act required single audits for state and local governmental entities that *received* (rather than expended) \$100,000 or more of federal assistance a year; entities that received \$25,000 or more but less than \$100,000 could choose to have either a single audit or the financial and compliance audit required for particular programs. Only if entities received less than \$25,000 in federal assistance were they exempt from the act. The 1996 amendments extended coverage to *federal awards*, which include cost-reimbursement contracts as well as financial assistance.

Entities subject to the act generally must conduct annual audits, although in some cases biennial audits are allowed. Audits must be conducted by independent auditors in accord with generally accepted government auditing standards, except that performance audits need not be included unless authorized by the Director of OMB. (Prior to the 1996 amendments, performance audits were expressly excluded.) Auditors must determine whether the financial statements are fairly presented in all material aspects in conformity with generally accepted accounting principles and whether the schedule of expenditures for federal awards is fairly presented in all material respects in relation to these statements.³⁵⁴

For each major program, the act requires auditors to obtain an understanding of internal controls relating to compliance requirements, assess control risk, and perform tests of controls (unless they are deemed ineffective). The auditors must also determine whether the entity has complied with provisions of laws, regulations, and other requirements that have a direct and material effect on the program. Selection of major programs is based upon *risk-based selection criteria* developed by the Director of OMB. (Prior to the 1996 amendments, the act defined major programs simply by dollar thresholds.) The number of programs selected for audit testing using risk-based criteria is generally limited to the number of programs that exceed certain dollar thresholds for the non-federal entity; however, auditors must test programs that represent at least 50% of the entity's federal expenditures, or whatever lower percentage the Director determines.

The Single Audit Act specifies various responsibilities for the Director of OMB, including (1) designating a clearinghouse to receive copies of audit reports, identifying recipients that failed to have audits required by the act, and undertaking analyses that assist the Director; (2) developing criteria to determine appropriate charges to federal awards for audit costs; (3) developing implementation guidance;

³⁵⁴ In auditing, materiality is determined by whether the magnitude of an omission or misstatement is such that a reasonable person relying on the assertion would be influenced by its inclusion or correction.

and (4) developing criteria to determine which federal agency is to provide technical and other assistance for a given non-federal entity. The Director may also authorize pilot projects to test alternative methods of achieving the purposes of the act.

Under OMB Circular No. A-133, recipients expending more than \$25 million a year (\$50 million for fiscal years ending after December 31, 2003) shall have a “cognizant agency for audit responsibilities” that shall provide technical advice and liaison to auditees and auditors, consider requests for extensions, obtain or conduct quality control reviews, inform other federal agencies and law enforcement officials of irregularities and illegal acts, advise auditors and auditees of audit deficiencies requiring corrective action, coordinate other audits or reviews made by or for federal agencies, coordinate management decisions for audit findings, coordinate audit work and reporting responsibilities among auditors to achieve cost-effective audits, and consider auditee requests to qualify as low-risk. The cognizant agency for audit shall be the federal awarding agency that provides the predominant amount of direct funding for a recipient, determined every fifth year. Recipients that do not expend more than the threshold amounts just identified shall instead have an “oversight agency for audit responsibilities” that shall provide technical assistance and may, at its option, assume some of the other responsibilities of the cognizant agencies.

In addition, the act assigns monitoring responsibilities to the Comptroller General and establishes reporting and other requirements for federal agencies that provide financial assistance, for non-federal entities that receive the assistance (or pass it through to other entities), and for auditors. For example, if there are audit findings or reports of internal control weaknesses, the non-federal entity must submit plans for corrective action or describe why they are not needed.

Discussion

The Single Audit Act has improved the amount and quality of information that is available about federal financial assistance to state and local governments. By requiring entity-wide audits conducted in accordance with generally accepted government auditing standards and employing generally accepted accounting principles, the act has led to more comprehensive and reliable audit reports. More important, it has encouraged financial management reforms: new accounting systems have been installed; new ways of tracking federal funds have been devised; and stronger administrative controls have been adopted. Federal agency oversight has improved.

The 1996 amendments were aimed at making the Single Audit Act more effective and less burdensome. Their most important change may be increased attention to federal award programs that pose the greatest financial risk — not only those with the largest expenditures but also those with ill-defined objectives, complicated administrative procedures, and minimal political review and oversight.

As is true of any audit, the effectiveness of single audits depends on timely completion and on the ability and willingness of decision makers to act on information made available. One study has shown that single audit reports have not always been received in accordance with OMB’s reporting requirements and that the agency in question did not effectively use the reports to oversee and monitor program

recipients.³⁵⁵ Another study showed that some agencies did not issue required written management decisions or have documentary evidence of their evaluations and conclusions on recipient actions to correct audit findings.³⁵⁶ For some issues, the effectiveness of single audits may also be limited because they do not as a rule include performance measures.

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³⁵⁵ U. S. General Accounting Office, *NIH Research — Improvements Needed in Monitoring Extramural Grants*, GAO/HEHS/AIMD-00-139, May 2000.

³⁵⁶ U.S. General Accounting Office, *Actions Needed to Ensure That Findings Are Corrected*, GAO-02-705, June 2002.

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Bob Lyke

VII. Human Resources Management and Ethics

A. Title 5: The Federal Civil Service

Title 5 of the *United States Code* is the codification of laws on government organization and employees.³⁵⁷ It is divided into three parts. Part I, entitled “The Agencies Generally,” includes seven chapters that cover the organization of departments, agencies, independent establishments, and government corporations; the powers of departments and agencies; administrative procedure; regulatory functions; judicial review; congressional review of agency rulemaking; and executive reorganization. “Civil Service Functions and Responsibilities” are the subject of Title 5’s Part II, which includes four chapters on the Office of Personnel Management; the Merit Systems Protection Board, and the Office of Special Counsel; special authorities (rules, regulations, and investigations); and political activities of certain state and local employees.

Part III, entitled “Employees,” presents the various policies related to management of the federal workforce. It is divided into nine subparts: Subpart A, “General Provisions,” includes chapters on definitions for terms used in Title 5 and merit system principles; Subpart B, “Employment and Retention,” includes chapters on examination, selection, and placement and retention and reemployment; Subpart C, “Employee Performance,” includes chapters on training and performance appraisal; Subpart D, “Pay and Allowances,” includes chapters on classification and pay rates and systems; Subpart E, “Attendance and Leave,” includes chapters on hours of work and leave; Subpart F, “Labor-Management and Employee Relations,” includes chapters on labor-management relations and adverse actions; Subpart G, “Insurance and Annuities,” includes chapters on retirement and health insurance; Subpart H, “Access to Criminal History Record Information,” covers access to criminal history records for national security and other purposes; and Subpart I, “Miscellaneous,” includes chapters on personnel flexibilities for the Internal Revenue Service, a human resources management system for the Department of Homeland Security, and the National Security Personnel System for the Department of Defense.

The laws codified in Title 5 encompass policies related to how the federal government manages the executive branch workforce. Over the last several years, that process has been referred to as the *management of human capital*. Other terms that have frequently been used to describe the process are *personnel administration* and *personnel management* and *human resources management*. Each of these terms is discussed briefly below.

The terms *personnel administration* and *personnel management* relate to “that aspect of management concerned with the recruitment, selection, development, utilization, and compensation of the members of an organization.... The former is mainly concerned with the technical aspects of maintaining a full complement of employees within an organization, while the latter concerns itself as well with the

³⁵⁷ This compendium does not address personnel laws in other titles of the *United States Code*, including the United States military (Title 10), the Foreign Service (Title 22), the Veterans Health Administration (Title 38), and the Postal Service (Title 39).

larger problems of the viability of an organization's human resources."³⁵⁸ Personnel management evolved from personnel administration. *Human resources management* (HRM) is a term that "although often used synonymously with personnel management ... transcends traditional personnel concerns, taking the most expansive view of the personnel department's mandate. Instead of viewing the personnel function as simply that collection of disparate duties necessary to recruit, pay, and discharge employees, a[n] HRM approach assumes that personnel's appropriate mission is the maximum utilization of its organization's human resources."³⁵⁹ In the late 1970s and early 1980s, textbooks on the federal workforce began to emphasize HRM. The term has been especially used in discussing federal workforce management since the publication in September 1993 of the reports prepared under Vice President Albert Gore's National Performance Review (NPR).

The term *human capital management* refers to "a concept that views employees as assets in the same sense as financial capital. It presupposes that an investment in human potential will yield significant returns for the organization."³⁶⁰ Human capital also "describe[s] what an organization gains from the loyalty, creativity, effort, accomplishments, and productivity of its employees."³⁶¹ The economist Lester C. Thurow further defined human capital as:

an individual's productive skills, talents, and knowledge. It is measured in terms of the value (price multiplied by quantity) of goods and services produced. Since consumption is the ultimate goal of our economic system, the value of a man's capital is the same as the value of the consumption goods and services which he directly or indirectly produces. When the value of goods and services rises, the value of human capital rises. When the value of goods and services falls, the value of human capital falls.³⁶²

On September 6, 1966, Title 5 was recodified with the enactment of P.L. 89-554 (80 Stat. 378). Information on the derivation of laws in the title is provided in the *United States Code Annotated* under the "Historical and Revision Notes" accompanying each section. Among the laws codified in the title are the Pendleton Act of 1883; the Retirement Acts of 1920, 1930, and 1956; the Classification Acts of 1923 and 1949; the Hatch Acts of 1939 and 1940; the Ramspeck Act of 1940; the Veterans' Preference Acts of 1944 and 1953; the Federal Employees' Pay Acts of 1945 and 1946; the Annual and Sick Leave Act of 1951; the Federal Employees' Group Life Insurance Act of 1954; the Fringe Benefits Act of 1954; the Federal Employees Salary Increase Act of 1958; the Government Employees Training Act of 1958; the Federal Employees Health Benefits Act of 1959; and the Federal Salary Reform Act of 1962.

³⁵⁸ *Facts on File Dictionary of Personnel Management and Labor Relations* (New York: Facts on File, Inc., 2nd ed., 1985).

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *The Human Resources Glossary* (New York: American Management Association, 1991).

³⁶² Lester C. Thurow, *Investment in Human Capital* (Belmont, CA: Wadsworth Publishing Co., Inc., 1970).

Other laws codified in Title 5 include the Intergovernmental Personnel Act of 1970; the Job Evaluation Policy Act of 1970; the Federal Pay Comparability Act of 1970; the Equal Employment Opportunity Act of 1972; the Federal Wage System Act of 1972; the Civil Service Reform Act of 1978; the Alternative Work Schedule Act of 1978; the Spouse Equity Act of 1984; the Federal Employees' Retirement System Act of 1987; the Federal Employees Leave Sharing Acts of 1988 and 1993; the Whistleblower Protection Act of 1989; the Federal Employees Pay Comparability Act (FEPCA) of 1990; the Hatch Act Reform Amendments of 1993; and the Federal Workforce Restructuring Act (FWRA) of 1994.

This compendium's treatment of civil service issues is organized by chapters as they appear in Title 5. The chapter entries include discussion of selected laws on managing the federal executive branch workforce and their major amendments.³⁶³

Twenty years of effort to establish a civil service for the executive branch of the federal government that was based on law and featured competitive examinations, relative security of tenure, and political neutrality culminated with enactment of the Pendleton Act of 1883.³⁶⁴ The act established the Civil Service Commission, which continued with largely the same mandate until 1978, when the Office of Personnel Management (OPM) was created in its stead. Although over the years many statutes (including those listed above) have been enacted to, among other things, expand the civil service, regulate political activities, classify and grade federal jobs, and set pay rates or establish mechanisms for pay setting, none so changed the original character of the civil service as did the Civil Service Reform Act (CSRA) of 1978 (92 Stat. 1111).³⁶⁵

In addition to creating OPM, the CSRA of 1978 established the Office of Special Counsel (OSC), the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority (FLRA) as independent organizations charged with protecting the merit system and adjudicating disputes between agencies and employees. The law also created a Senior Executive Service (SES) to enable department and agency heads to be assisted by experienced managers, some of whom were career civil servants and others of whom were political appointees, who could be moved to fill positions as assignments required. For the first time, authority for labor-management relations within the federal government was established in statute. Finally, personnel research programs and demonstration projects were authorized as a means for experimenting with various HRM policies, including pay and classification of jobs.

³⁶³ Several chapters of in Parts II and III of Title 5 are not included in this edition of the compendium. The omitted chapters include Chapter 29 ("Commissions, Oaths, Records, and Reports"); Chapter 81 ("Compensation for Work Injuries"); Chapter 85 ("Unemployment Compensation"); and Chapter 91 ("Access to Criminal History Records for National Security and Other Purposes").

³⁶⁴ Paul P. Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, and Company, 1958). Although dated, this work is still widely considered the best history of the federal civil service.

³⁶⁵ Patricia W. Ingraham and Carolyn Ban, eds., *Legislating Bureaucratic Change, The Civil Service Reform Act of 1978* (Albany, NY: State University of New York Press, 1984).

Implementation of the provisions of the CSRA of 1978 (particularly those on pay for performance and personnel research programs and demonstration projects) and FEPCA of 1990 were among the issues focused on during the Administrations of Presidents Ronald Reagan and George H.W. Bush. Among the concerns of President William J. Clinton's Administration was implementation of the recommendations presented by the NPR of 1993³⁶⁶ (particularly those on creating a family-friendly workplace) and the FWRA of 1994, which sought to reduce the size and scope of government. During the 1990s, OPM downsized considerably and contracted out traditionally centralized functions such as training and investigations. Executive branch agencies used voluntary separation incentives (commonly referred to as *buyouts*) instead of reductions-in-force to reduce their workforces. Departments and agencies developed in-house HRM capacities or contracted with OPM or other vendors for administrative services such as review and rating of job applications, classification of federal jobs, training, payroll administration, implementation of affirmative action policies, and counseling services. During this period as well, OPM publicized the various HRM flexibilities provided government-wide under Title 5 and encouraged departments and agencies to use them. Congress authorized separate authorities for personnel management at the Federal Aviation Administration and the Internal Revenue Service that provide for greater HRM flexibilities than Title 5 generally permits.³⁶⁷

Policies on federal workforce management in the Administration of President George W. Bush have been influenced significantly by the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, and the discovery of anthrax in Washington, DC, and other cities. The President's term began with OPM's continued emphasis on the full use of already existing government-wide personnel flexibilities by departments and agencies and the incorporation of the management of human capital into agency strategic plans and processes (currently being implemented through the establishment of agency chief human capital officers (CHCOs) and a CHCO Council). In the wake of 9-11, however, new requirements for the federal government's HRM system have been stated by the White House and OPM. According to the President, the nation's efforts to fight terrorism require a system that is modern and flexible and puts the right people in the right place at the right time. In practice, this has been translated into law as authority for separate HRM systems for the Transportation Security Administration and the Departments of Homeland Security (DHS) and Defense (DOD) that provide the respective department heads with considerable discretion to establish their particular systems

³⁶⁶ U.S. Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better & Costs Less. Report of the National Performance Review* (Washington: GPO, 1993).

³⁶⁷ For the Federal Aviation Administration (FAA), see P.L. 104-50, 109 Stat. 436 and subsequent amendments in P.L. 104-122, 110 Stat. 876; P.L. 104-264, 110 Stat. 3213; P.L. 105-339, 112 Stat. 3182; and P.L. 106-181, 114 Stat. 61. For the Internal Revenue Service (IRS), see P.L. 105-206, 112 Stat. 711. The FAA authority is codified in Title 49 of the *United States Code*. The IRS authority is codified in Title 5 of the *United States Code* as Chapter 95.

outside of many of the current Title 5 policies.³⁶⁸ Depending on how they are implemented, the DHS and DOD changes arguably could rival the CSRA of 1978 for impact on the civil service.

Both of the newly created systems at DHS and DOD have been described by the White House and some Members of Congress as demonstration projects whose various features could ultimately be applied to executive branch employees government-wide. Currently, the systems are authorized in separate chapters of Title 5 (Chapter 97 covers DHS and Chapter 99 covers DOD), and their implementation is expected to occur over several years. Whether the features of one or both of the new systems are determined to be applicable to other federal agencies, or whether individual agencies continue to seek congressional approval for their own personnel flexibilities (a National Aeronautics and Space Administration proposal is currently pending in the 108th Congress), it seems likely that Congress will need to reconsider Title 5 (and the accompanying Title 5 *Code of Federal Regulations* that compiles the implementing regulations) as the Chapters 97 and 99 provisions are fully implemented.

Approaches that might be examined include recodification of the title into chapters that reflect HRM policies that apply government-wide; recodification of the title into chapters arranged by the general principles governing a particular policy, followed by all the exceptions to the policy; or continuation of the current amendment process that establishes separate chapters in Title 5 or other titles of the *United States Code* for individual departments granted separate authority. Issues that could be considered include which approach would provide for the administration of policies on government organization and employees in an efficient, understandable, coordinated, and fair manner; which approach would facilitate ongoing oversight of agency systems to ensure conformance with merit system principles and avoidance of prohibited personnel practices; and whether OPM or another organization or organizations would centrally administer HRM policies and exercise the authority for overseeing these policies.

Barbara L. Schwemle

³⁶⁸ For the Transportation Security Administration (TSA), see P.L. 107-71, 115 Stat. 597; for the Department of Homeland Security (DHS), see P.L. 107-296, 116 Stat. 2229; and for the Department of Defense (DOD), see P.L. 108-136, 117 Stat. 1621. The TSA authority is codified in Title 49 of the *United States Code*. The DHS authority is codified as Chapter 97, and the DOD authority is codified as Chapter 99 in Title 5 of the *United States Code*.

(1) Office of Personnel Management (Chapter 11; in Part II).***Statutory Intent and History***

The Office of Personnel Management (OPM), established pursuant to the Civil Service Reform Act of 1978 (92 Stat. 1119) succeeded the Civil Service Commission (CSC) established in 1883. The original objective in creating the CSC was to remove the selection and management of federal personnel from partisan political influence. With the passage of time, the leadership provided by the CSC, a multi-headed agency, was judged critically by some in the executive branch and in Congress. It was hoped that a new single-headed agency would provide more effective leadership. By giving OPM the leadership role in federal personnel management, it was believed that the agency would be able to concentrate on planning and administering an effective government-wide program of personnel management. “Without the demands generated by a heavy day-to-day workload of individual personnel actions, OPM should provide the President, the civil service, and the Nation with imaginative public personnel administration.”³⁶⁹

In a 1993 assessment of the agency, the Clinton Administration’s National Performance Review (NPR) identified OPM as a leader and source of expert advice concerning a broad range of human resources management matters. For the immediate future, the NPR envisioned OPM advising the President on issues affecting the management of federal employees; demonstrating commitment to diversity; planning for development of the workforce of the future; identifying strategies for providing the training essential to achieve a cultural shift toward more entrepreneurial management; conducting research, providing consulting services, and advising agencies on best practices; coordinating and sponsoring interagency cooperation on common issues; influencing government-wide change; and leading by example. The NPR indicated that achievement of this role would require OPM to overhaul its structure and change its internal culture. OPM privatized its investigations function, while training programs were transferred to the U.S. Department of Agriculture Graduate School. The OPM Director assured Congress that the agency would retain government-wide training policy and leadership responsibilities.

Significant reorganization of the agency, based on OPM’s strategic plan, occurred in December 2002 when OPM’s 12 departments were combined into 4 central divisions: Strategic Human Resources Policy, Human Resources Products and Services, Management and Chief Financial Officer, and Human Capital Leadership and Merit Systems Accountability. In the Homeland Security Act of 2002 (116 Stat. 1229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621), Congress authorized the OPM Director, along with the Secretaries of the Departments of Homeland Security (DHS) and Defense (DOD), respectively, to jointly prescribe regulations to establish new human resources

³⁶⁹ U.S. Congress, House Committee on Post Office and Civil Service, *Legislative History of the Civil Service Reform Act of 1978*, committee print, 96th Cong., 1st sess., Committee Print 96-2 (Washington: GPO, 1979), vol. II, p. 1470.

management (HRM) systems at DHS and DOD. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Established as an independent agency in the executive branch, OPM's management structure comprises a director, deputy director, and the four associate directors mentioned above. The director executes, administers, and enforces civil service laws, rules, and regulations and oversees other OPM activities, including retirement and classification, except functions for which the Merit Systems Protection Board or the Special Counsel (the agency head for the Office of Special Counsel) are primarily responsible. The director aids the President as requested in preparing civil service rules, and otherwise advises the President on actions which may be taken to promote an efficient civil service and a systematic application of the merit system principles, including recommending policies relating to the selection, promotion, transfer, performance, pay, conditions of service, tenure, and separation of employees. The director also conducts or provides studies and research on improvements in personnel management. The director's duties may be delegated, except those regarding competitive examinations for positions with requirements common to all federal agencies. OPM maintains an oversight program to ensure that delegated authorities are in accordance with merit system principles and standards.

The Homeland Security Act of 2002 (116 Stat. 2289) at Section 1304 amended the director's functions to mandate that OPM design a set of systems, including appropriate metrics, for assessing the management of human capital by federal agencies. The systems must be defined in OPM regulations and include standards for (A) aligning agency human capital strategies with their missions, goals, and organizational objectives and integrating those strategies into agency budget and strategic plans; (B) closing skill gaps in mission critical occupations; (C) ensuring continuity of effective leadership through implementation of recruitment, development, and succession plans; (D) sustaining a culture that cultivates and develops a high-performing workforce; (E) developing and implementing a knowledge management strategy supported by appropriate investment in training and technology; and (F) holding managers and human resources officers accountable for efficient and effective human resources management in support of agency missions in accordance with merit system principles. The provision became effective on May 24, 2003.

In January 1999, the director was designated as the Chair of the President's Task Force on Federal Training Technology, established to encourage the use of technology in training. The director also chairs the Chief Human Capital Officers Council. (See the discussion of the 5 U.S.C. Chapter 14 provision in this compendium.)

Discussion

In the 104th Congress, legislation (H.R. 3483) was considered, but not enacted, which would have substantially altered the OPM Director's responsibilities. The thrust of the legislation, and the recent internal management activities of OPM, supported by the NPR, have been to delegate to the departments and agencies as

many personnel functions as possible. OPM has been envisioned as a catalytic and overseer agency, not as an agency performing personnel functions of an executive-branch-wide nature. Concerns have been raised by a number of organizations, such as the Senior Executives Association, that the downsizing of OPM and dispersal of its authorities and operations have placed OPM's capacity to carry out its statutory responsibilities at risk.

OPM's human resources management initiatives for 1998 and 1999 emphasized its expertise and leadership and sought to amend the agency's authorization to reorganize and clarify the responsibilities of the OPM Director. Vice President Gore announced in January 1999 that OPM would be proposing new hiring options to permit alternative selection procedures, to authorize agencies to make direct job offers in critical areas like information technology, to establish additional means for recruiting a diverse workforce, and to use non-permanent employees, with appropriate benefits, but a legislative proposal was not submitted to the 106th Congress.

Since enactment of P.L. 103-62, the Government Performance and Results Act (GPRA), oversight of OPM's role has especially focused on its administration of the civil service merit system and its human resources management leadership. The President's budget during the last three fiscal years of the Clinton Administration emphasized OPM's role as the administrator of the merit systems and designated it as a high impact agency. OPM announced an ambitious plan in its GPRA-mandated strategic plan for FY2000-FY2005. The strategic plan was revised in December 2002 and now covers the period 2002-2007. The plan has three strategic goals: (1) to have federal agencies adopt human resources management systems that improve their ability to build successful, high performance organizations; (2) to have federal agencies use effective merit-based human capital strategies to create a rewarding work environment that accomplishes the mission; and (3) to meet the needs of federal agencies, employees, and annuitants through the delivery of efficient and effective products and services. Various objectives accompany each goal. An annual performance plan accompanies the strategic plan. GAO concerns surrounding the agency's performance plans have been the inclusion of cost-based performance measures to provide an indication of how efficiently OPM is performing various activities and the credibility of agency performance information. OPM's FY2004 performance plan includes various instruments intended to permit program evaluation.

As part of the President's Management Agenda, OPM is leading the federal government's Strategic Management of Human Capital Initiative. (See [<http://www.opm.gov>], and choose "Strategic Management of Human Capital" on the home page menu.) OPM staff have been engaged in a joint effort with DHS and DOD to write the regulations creating new HRM systems at these departments since late 2002.

Significant workforce reductions have occurred at the agency. Especially troubling to some practitioners was the downsizing of the agency's library, which resulted in the loss of much of its well-regarded collection of materials on the Civil Service and all aspects of HRM. Questions about the agency's ability to carry out its statutory responsibilities despite the loss of staff persist. The Merit Systems

Protection Board's (MSPB's) statutorily mandated evaluation of OPM's administration of the merit system found much improvement, but recommended increased leadership and coordination with the agencies. MSPB's December 2001 report included recommendations that OPM actively influence "broad-based regulatory or statutory changes where feasible" and "be an active participant in decisionmaking regarding HR [human resources] policies and programs." In a January 2003 report on OPM, GAO identified OPM's management challenges as: (1) leading strategic human capital management government-wide; (2) overseeing agency human capital management systems; (3) transforming OPM and managing its internal operations; and (4) administering the retirement and health insurance programs. A May 2003 GAO report suggested that OPM compile, analyze, and share information about personnel flexibilities that are being and should be used and "more vigorously identify new flexibilities that would help agencies better manage their human capital and then work to build consensus for the legislative action needed."

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Barbara L. Schwemle

(2) Merit Systems Protection Board; Office of Special Counsel; and Employee Right of Action (Chapter 12; in Part II).

Statutory Intent and History

The underlying statute for the Merit Systems Protection Board (MSPB) is the Civil Service Reform Act (CSRA) of 1978 (92 Stat. 1121). This same statute and the Whistleblower Protection Act of 1989 (103 Stat. 17) also established the Office of Special Counsel (OSC) and Employee Right of Action. These laws sought to create separate entities to perform personnel appellate and adjudicatory functions. The OSC, initially part of MSPB, became an independent agency with enactment of the whistleblower law, an action largely prompted by disputes over budget resources. In stating the need for reform, the CSRA legislative history noted that, "There is little doubt that a vigorous protector of the merit system is needed. The lack of adequate protection was painfully obvious during the civil service abuses only a few years ago. Establishment of a strong and independent Board and Special Counsel will discourage subversions of merit principles." MSPB and OSC were reauthorized through 2007 in P.L. 107-304 (116 Stat. 2364), enacted on November 27, 2002.

Major Provisions

The Merit Systems Protection Board was established with three members. The functions of the board are to (1) hear, adjudicate, or provide for the hearing or adjudication of personnel matters and take final action on such matters; (2) order any federal agency or employee to comply with any decision of the board and enforce compliance; (3) conduct special studies on the civil service and executive branch merit systems, and report to the President on protection of the merit system; and (4) review OPM rules and regulations.

The Office of Special Counsel was established to (1) protect employees, former employees, and applicants for employment from prohibited personnel practices; (2) receive and investigate allegations of prohibited personnel practices and bring petitions for stays and corrective actions, and file complaints or recommend disciplinary actions; (3) receive, review, and forward to the Attorney General (where necessary) disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; (4) review OPM rules and regulations; and (5) investigate and bring actions concerning allegations of violations of laws.

An employee may seek corrective action from MSPB for a prohibited personnel action taken against him or her; MSPB may issue a stay of the personnel action involved.

If the Special Counsel does not transmit the information to the agency head, the Special Counsel shall inform the individual of the reasons why the disclosure may not be further acted on and other offices available for receiving disclosures, should the individual wish to pursue the matter further (added by P.L. 107-304, 116 Stat. 2364).

Discussion

As originally established by Congress, MSPB was granted a permanent authorization. Seeking “to maintain close scrutiny” of the agency, Congress changed this to a term authorization in 1989. Among the issues which have arisen in discussions of MSPB’s mission are these: the agency’s role in enforcing the Whistleblower Protection Act provisions; whether it has a bias toward management; the board’s use, or lack thereof, of employee stays; its actions to hold agencies accountable; and the agency’s interpretation of concepts such as burden of proof, reasonable belief, and eligibility.

An issue that has concerned both the authorizing and the appropriating committees is the process by which an employee appeals a personnel action. In a September 1995 issue paper, the Vice President’s National Performance Review and MSPB recommended streamlining of the process. A draft version of H.R. 3841, an original bill offered during the 104th Congress, included language that would have provided for employee appeal rights to either MSPB or the Equal Employment Opportunity Commission, but not both. Lacking bipartisan agreement, this provision was removed during subcommittee markup of H.R. 3841. A similar provision, but one providing that MSPB would have the jurisdiction, was included in draft legislation, prepared but not introduced, in the 105th Congress, by the House Civil Service Subcommittee chair, Representative Mica. A National Academy of Public Administration study of the issue found that “MSPB is generally viewed in a positive light due to its timely and consistent decisions.” A January 1999 symposium marking the 20th anniversary of MSPB heard renewed calls for improvement to the appeals process.

Other issues involving MSPB concern caseload, use of alternative dispute resolution procedures, and administrative judge pay. With regard to the latter, an agreement between the MSPB chair and the MSPB professional association would have amended Title 5 to establish an administrative judge pay system with four levels of pay referenced to Senior Executive Service pay and the application of locality pay. In the 106th Congress, Representative George Gekas introduced H.R. 2946, which included the provisions found in the agreement, but no further action was taken. Similar legislation (H.R. 1965) was introduced in the 107th Congress.

Congress changed the Office of Special Counsel from a permanent to a term authorization for the same reason as MSPB’s authorization was changed. Much of the discussion about the OSC has focused on its alleged ineffectiveness and employee bypassing of the agency to seek relief in other forums. H.R. 5512, introduced in the 106th Congress, would have provided that “except as provided in Section 518 of Title 28, relating to litigation before the Supreme Court, attorneys designated by the Special Counsel may appear for the Special Counsel and represent the Special Counsel in any civil action brought in connection with Section 2302(b)(8) [relating to prohibited personnel practices] or Subchapter III of Chapter 73 [relating to prohibitions on political activity], or as otherwise authorized by law.” The bill also would have authorized the Special Counsel to obtain review of any final order or decision of the Merit Systems Protection Board by filing a petition for judicial review in the United State Court of Appeals for the Federal Circuit under certain circumstances. No further action occurred on H.R. 5512.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws amend appellate procedures for these employees. (See the discussions of the 5 U.S.C. Chapter 77, Chapter 97, and Chapter 99 provisions in this compendium.)

In a December 5, 2003 memorandum to employees, MSPB announced that as part of a consolidation of agency operations, its Boston and Seattle field offices would be closed by March 31, 2004. The agency anticipates closing the Denver field office in 2005 and may close the New York City field office no earlier than 2005. Changes to the appellate procedures made by the Homeland Security and DOD Authorization Acts are reportedly part of the impetus for consolidation.

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Barbara L. Schwemle

(3) Special Authority (Chapter 13; in Part II).

Statutory Intent and History

The system of special authority i.e., drafting and issuing personnel rules and regulations, and controlling, supervising, and retaining records of and examinations for the competitive service, as well as investigating personnel security matters and issuing reports generally, was established by the Civil Service Act of 1883 (Pendleton Act; 22 Stat. 404) and the Veterans Preference Act of 1944 (P.L. 78-359; 58 Stat. 387). The intent was to remove partisan political influences from the selection and retention of civil servants, protect veterans' preference with respect to employment and retention, and authorize security investigations.

Major Provisions

The Office of Personnel Management (OPM), formerly the Civil Service Commission, is directed to aid the President, at his request, in preparing the rules he prescribes under Title 5 of the *United States Code* for administering the competitive service. OPM is required to prescribe regulations, control, supervise, and preserve records of and examinations for the competitive service. The agency is charged also with issuing and enforcing regulations to implement provisions of Title 5 of the *United States Code* and relevant executive orders that set forth the policy giving preference to eligibles (i.e., certain veterans) in the competitive service and the excepted service in the executive agencies and the government of the District of Columbia.

OPM is authorized to investigate and report on matters concerning enforcement and the effect of rules the President and the OPM prescribe under Title 5 of the *United States Code* for administering the competitive service.

OPM is directed to conduct investigations and issue reports required by cited sections of Titles 22 and 42 of the *United States Code* relating to security status of United States representatives appointed to some international organizations and individuals involved with the National Science Foundation. This investigative authority may be exercised by the Federal Bureau of Investigation (FBI), rather than OPM, under certain circumstances. A revolving fund is available to OPM without fiscal year limitation for financing investigations, training, and other functions the office is authorized or required to perform on a reimbursable basis. An agency may use available appropriations to reimburse OPM or the FBI for the cost of investigations, training, and functions performed for the agency or to make advances for their cost.

For the purposes of certain sections of Title 5 of the *United States Code* that relate to administrative law judges, OPM may and, for purposes of 5 U.S.C. § 7521 relating to administrative law judges, the Merit Systems Protection Board may investigate, require reports of agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees as established for the courts of the United States.

OPM is required to keep minutes of its proceedings and to publish annual reports on Chapter 83 (retirement), including the status of the Civil Service Retirement and Disability Fund, and to report annually to Congress on the operation of Chapters 87 (life insurance) and 89 (health insurance) of Title 5 of the *United States Code*.

Discussion

This chapter, which generally originated in the Civil Service Act of 1883, centralizes federal personnel functions in OPM. Some have argued that some functions granted herein should be exercised by agencies to permit them to design regulations and procedures suitable to their individual needs, while others believe that continuing the current centralized system is more effective.

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Thomas J. Nicola

(4) Agency Chief Human Capital Officers (Chapter 14, in Part II).

Statutory Intent and History

Title XIII, Subtitle A of The Homeland Security Act of 2002 (116 Stat. 2287; P.L. 107-296) authorizes the establishment of chief human capital officer (CHCO) positions in federal executive branch agencies. The purpose of the provision is to raise the institutional profile of strategic human capital management within federal agencies.

Major Provisions

Section 1301 of the Homeland Security Act is entitled the Chief Human Capital Officers Act of 2002. Section 1302, amends Part II of Title 5 *United States Code* by adding a new Chapter 14 — Agency Chief Human Capital Officers. The new Section 1401 of Title 5 *United States Code* provides that the agency head must appoint or designate a CHCO who must advise and assist the agency head and other agency officials in carrying out the agency's responsibilities for selecting, developing, training, and managing a high-quality, productive workforce in accordance with merit system principles; implement the rules and regulations of the President and OPM and the laws governing the civil service within the agency; and carry out such functions as his or her primary duty.

The agencies covered by the CHCO provision are enumerated at 31 U.S.C. § 901(b)(1) and (2), which lists agencies subject to the Chief Financial Officers (CFO) Act, and include the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, the Treasury, Veterans Affairs, the Environmental Protection Agency, and the National Aeronautics and Space Administration. Other agencies covered are the Agency for International Development, the Federal Emergency Management Agency, the General Services Administration, the National Science Foundation, the Nuclear Regulatory Commission, the Office of Personnel Management, the Small Business Administration, and the Social Security Administration.

The Department of Homeland Security (DHS) is not covered by Chapter 14, although Section 103 of the Homeland Security Act (116 Stat. 2145) established a CHCO for DHS with responsibilities enumerated in Section 704 (116 Stat. 2219). The 108th Congress is considering legislation (H.R. 2886, S. 1567) that would, if enacted, include DHS among the CFO Act agencies and therefore make DHS subject to Chapter 14.

Under the new Section 1402, CHCOs have six functions, including (1) setting the workforce development strategy of the agency; (2) assessing workforce characteristics and future needs based on the agency's mission and strategic plan; (3) aligning the agency's human resources policies and programs with organization mission, strategic goals, and performance outcomes; (4) developing and advocating a culture of continuous learning to attract and retain employees with superior abilities; (5) identifying best practices and benchmarking studies; and (6) applying methods for measuring intellectual capital and identifying links of this capital to

organizational performance and growth. CHCOs must have access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials that are the property of the agency or are available to the agency; and relate to programs and operations with respect to which the CHCO has responsibilities. The CHCO may request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by Chapter 14 from any federal, state, or local governmental entity.

Section 1303 of the law establishes a CHCO Council consisting of the OPM Director who acts as chairperson; the OMB deputy director for management who acts as vice chairperson; and CHCOs of executive departments and any other members designated by the OPM Director. The council must meet periodically to advise and coordinate the activities of the member agencies on such matters as modernization of human resources systems, improved quality of human resources information, and legislation affecting human resources operations and organizations. The CHCO Council must ensure that representatives of federal employee labor organizations are present at a minimum of one meeting of the council each year. The representatives are not members of the council. Each year the CHCO Council must submit a report to Congress on its activities.

Section 1304 of the law amends 5 U.S.C. § 1103 by adding a subsection (c) which provides that OPM must design a set of systems, including appropriate metrics, for assessing the management of human capital by federal agencies. (See the discussion under 5 U.S.C. Chapter 11 in this compendium.) The CHCO provisions became effective on May 24, 2003, under Section 1305 of the law.

Discussion

The provisions on CHCOs are intended to facilitate communication among executive branch departments and agencies and enhance the coordination of human resources management in the federal government. At two days of hearings in March 2002 on the federal workforce, conducted by the Senate Subcommittee on International Security, Proliferation, and Federal Services, Members took testimony on the positive role that councils play in developing and implementing initiatives to address federal management issues and serving as communities of interest that share best practices. They also received testimony as to the intent of the provisions that CHCOs be senior managers who are charged with deploying human resources management authorities efficiently and strategically.

On May 24, 2003, OPM Director Kay Coles James announced the names of those who will serve on the CHCO Council. The Council conducted its first meeting on June 11, 2003. Council meetings have included, among other issues, discussions on encouraging federal agencies to use the personnel flexibilities that have already been authorized, career development in the federal government, and emergency procedures for federal agencies.

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(5) Political Activity of Certain State and Local Employees (Chapter 15; in Part II).***Statutory Intent and History***

Chapter 15, commonly referred to as the Hatch Act covering state or local government officers and employees, addresses the extent to which such workers can be politically active. The underlying statutes for the Chapter 15 provisions are the Federal Election Campaign Act Amendments of 1974 (88 Stat. 1290) and the Civil Service Reform Act of 1978 (92 Stat. 1225). The 1974 law removed all but three of the prohibitions on political activities of certain state and local employees. Enforcement provisions that provide penalties for violations were added in 1978.

Major Provisions

Chapter 15 covers state or local government officers or employees who are “employed by a State or local agency [and] whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency.” An individual who exercises no functions in connection with such activity is not covered. District of Columbia (DC) government officers or employees, other than the mayor, members of the City Council, or the Recorder of Deeds, are covered by Chapter 73 provisions of the Hatch Act Reform Amendments of 1993 (107 Stat. 1001).

A covered state or local officer or employee may not:

- use official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
- directly or indirectly coerce, attempt to coerce, command, or advise a state or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
- be a candidate for elective office.

A state or local officer or employee retains the right to vote and express opinions on political subjects and candidates. The prohibition on candidacy for elective office applies to only a limited number of state and local elections. A state or local officer or employee is not prohibited from being a candidate in any election if none of the candidates being nominated or elected represents a party whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected. Office of Personnel Management (OPM) regulations define this as a nonpartisan election.

Any federal agency making a loan or grant of U.S. funds to a state or local officer or employee for an activity must report to the Special Counsel (who heads the Office of Special Counsel, a federal agency) if it reasonably believes that the individual has violated the prohibitions against influencing elections or taking part in political campaigns. If warranted, the Special Counsel then investigates and

presents its findings and any resulting charges to the Merit Systems Protection Board (MSPB). MSPB fixes the time and place for a hearing and notifies the officer or employee being charged and the employing agency of the alleged violation. The hearing may not be held earlier than 10 days after the notice is mailed.

The state or local officer or employee and the agency may appear with counsel at the hearing. After the hearing, MSPB determines whether a violation has occurred; if so, the board determines whether the violation warrants removal from the office or job and notifies the individual and the agency by mail. MSPB imposes a penalty when it finds that (1) a state or local officer or employee has not been removed from office or employment within 30 days of receiving its notice that the individual has violated the law and must be removed; or (2) a removed state or local officer or employee has been appointed within 18 months to an office or employment in the same state in a state or local agency which does not receive loans or grants from a federal agency. In such cases, MSPB orders the federal agency to withhold from its loans or grants to the state or local agency an amount equal to two years' pay at the rate the individual was receiving when the violation occurred. If the appointment has been made within 18 months to a state or local agency that receives federal loans or grants, MSPB directs that the withholding be made from the agency. The order becomes effective 30 days after it has been mailed to the agency. MSPB may not require an amount to be withheld from a loan or grant pledged by a state or local agency as security for its bonds or notes if such withholding jeopardizes payment of the principal or interest.

MSPB may subpoena witnesses to attend and testify and produce documentary evidence relating to any matter concerning political activity of covered state and local employees. When a subpoena is disobeyed, a U.S. court may require the attendance and testimony of witnesses and the production of documentary evidence. In case of contumacy or refusal to obey a subpoena, the United States District Court within whose jurisdiction the inquiry is proceeding may order the person to appear before MSPB, or to produce documentary evidence if so ordered, or to give evidence concerning the matter in question. Any failure to obey the court order may be punished as contempt. MSPB may order testimony to be taken by deposition at any stage of its proceeding or investigation. A person subpoenaed by MSPB may not be excused from attending, testifying, or producing documentary evidence because to do so could incriminate or subject him to a penalty or forfeiture. A person who falsely testifies may be prosecuted for perjury.

A party aggrieved by an MSPB action may, within 30 days, petition for a review in the United States District Court for the district in which he or she resides. The start of proceedings does not stay the order or determination unless the court so orders, and the officer or employee is suspended from his office or employment while proceedings are pending. The court reviews the entire record, including questions of fact and law. It may direct that additional evidence be taken. MSPB may modify its findings or determination or order because of additional evidence. The modification is filed with the court if conclusive. The court affirms the determination or order, or the modified action if it is in accord with law. If it is not, the court remands the proceeding to MSPB with directions to comply with the law. The court's actions are final, subject to review by the appropriate United States Court

of Appeals, as are those of the court of appeals subject to review by the United States Supreme Court on certiorari or certification.

Discussion

Legislation (H.R. 308) which sought to repeal the prohibition on state or local government officers or employees seeking elected office was introduced in the 105th Congress, but no further action occurred. Similar legislation had been introduced in both the 103rd and 104th Congresses. Also in the 104th Congress, legislation (H.R. 3918) which would have treated DC government employees the same as state and local government employees for purposes of 5 U.S.C. Chapter 15 was introduced, but no further action occurred. Similar legislation also was introduced in the 107th Congress (H.R. 4617).

Discussions to amend the Hatch Act covering state or local government officers and employees might focus on issues including these: whether the availability of federal funds mandates political activity restrictions; whether coercion and patronage would result from a liberalized political activity law; and whether state laws, known as the “little” Hatch Acts, are sufficiently strong to prevent the misuse of government authority.

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Barbara L. Schwemle

(6) Definitions (Chapter 21; in Part III, Subpart A — General Provisions).

Statutory Intent and History

The Pendleton Act of 1883 (22 Stat. 403-407) provides the basis for the definitions of the civil and competitive service terminology still in use today. The act provided that the civil service would be comprised of individuals who had successfully passed competitive examinations. It also provided for specific exceptions and established the President as the officer with the authority to regulate admissions to the civil service. The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 21 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Sections 2101 through 2109 provide definitions for *civil service, armed forces, uniformed services, Senior Executive Service, competitive and excepted services, officer, employee, Member of Congress, congressional employee, veteran, preference eligible, and air traffic controller.*

Discussion

Throughout Title 5 there are sections that provide definitions of some of these same categories, particularly of *employee* and *agency*. The definitions specifically associated with provisions would govern. However, throughout Title 5, there are cross references to definitions elsewhere in the title. The definition of *employee* (Section 2105) is probably the most common reference. At other points in Title 5 different definitions are used, and in some instances, it is necessary to follow several references until the specific definition, and its exceptions, become clear. For example, Section 5302 defines *employee* for the pay comparability system. *Statutory pay system* is defined, in part, as a pay system under “Subchapter III, relating to the General Schedule.” Section 5331 (definitions under Subchapter III) leads the reader to a cross-reference to the definitions under Section 5102, which is the definitional section for the position classification system. Section 5102 defines *employee* as “an individual employed in or under an agency,” defines *agency*, and provides a substantial listing of exceptions.

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Mitchel A. Sollenberger

(7) Merit System Principles (Chapter 23; in Part III, Subpart A — General Provisions).

Statutory Intent and History

The Civil Service Reform Act (CSRA) of 1978 (92 Stat. 1113) is the underlying statute for Chapter 23. The law codifies merit principles and prohibits personnel practices that had previously been expressed in rules, regulations, and executive orders. The legislative history of the CSRA indicates that the statute codified merit system principles for the first time, and required agencies and employees to adhere to them.

Major Provisions

Each agency head is responsible for preventing prohibited personnel practices, for complying with, and enforcing, applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring that agency employees are informed of the rights and remedies available to them. The law defines *personnel actions* as: appointments; promotions; adverse actions or other disciplinary or corrective actions; details, transfers, or reassignments; reinstatements; restorations; reemployment; performance evaluations; decisions concerning pay, benefits, or awards, concerning education or training, if such may reasonably be expected to lead to a personnel action; decisions to order psychiatric testing or examination; and any other significant changes in duties, responsibilities, or working conditions. Nine merit system principles and 12 prohibited personnel practices are codified in law and summarized below.

Merit System Principles.

- recruit from qualified individuals to achieve a workforce from all segments of society; selection and advancement solely on the basis of relative ability, knowledge, and skills; assure equal opportunity through fair and open competition;
- fair and equitable treatment of employees and applicants for employment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights;
- equal pay for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition for excellence in performance;
- employee adherence to high standards of integrity, conduct, and concern for the public interest;
- efficient and effective use of the federal workforce;

- retain employees on the basis of the adequacy of their performance; correct inadequate performance; and separate those who cannot or will not improve performance to meet required standards;
- provide employees effective education and training to improve organizational and individual performance;
- protect employees against arbitrary action, personal favoritism, or coercion for partisan political purposes, and prohibit the use of official authority or influence to interfere with or affect the result of an election or a nomination for election;
- protect employees against reprisal for the lawful disclosure of information reasonably believed to evidence a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Prohibited Personnel Practices.

- discriminating for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
- soliciting or considering any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of such individual, or an evaluation of the character, loyalty, or suitability of such individual;
- coercing the political activity of any person (including the providing of any political contribution or service) or taking any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;
- deceiving or willfully obstructing any person with respect to such person's right to compete for employment;
- influencing any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
- granting any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

- appointing, employing, promoting, advancing — or advocating such — in or to a civilian position any individual who is a relative of such employee if such position is in the agency in which such employee is serving as a public official or over which such employee exercises jurisdiction or control as an official;
- taking or failing to take, or threatening such, a personnel action with respect to any employee or applicant for employment because of any disclosure of information, including to the Special Counsel³⁷⁰ or an agency Inspector General, by the individual which he or she reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; provided the disclosure is not specifically prohibited by law and if such information is not specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;
- taking or failing to take, or threatening such, any personnel action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; testifying for, or otherwise lawfully assisting, any individual in the exercise of any right referred to above; cooperating with or disclosing information to, the Inspector General of an agency, or the Special Counsel, in accordance with the law; or for refusing to obey an order that would require the individual to violate a law;
- discriminating for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the individual or the performance of others; except this shall not prohibit an agency from taking into account, in determining suitability or fitness, any conviction of the employee or applicant for any crime under federal, state, or District of Columbia law;
- knowingly taking, recommending, or approving, or failing to do such, any personnel action if the taking of, or failing to take, such action would violate a veterans' preference requirement;
- taking or failing to take any other personnel action if such would violate any law, rule, or regulation implementing, or directly concerning, the merit system principles.

³⁷⁰ The Special Counsel heads the Office of Special Counsel (OSC), a federal agency. See the discussion of 5 U.S.C. Chapter 12 for more information on the OSC.

Discussion

No substantive amendments have been made to the merit system principles since their codification in 1978. Concerning the prohibited personnel practices, however, significant amendments have been made. In 1993, the Hatch Act Reform Amendments (107 Stat. 1001) expressly prohibited a Member of Congress from making a recommendation on behalf of an applicant for federal employment, except as to character and the residence of the individual. In 1996, this prohibition was ended by restoring the language first enacted in 1978 (110 Stat. 2395). There is currently no specific prohibition on Members' recommending or referring applicants for federal positions or federal personnel actions. In 1998, the prohibition relating to violation of the veterans' preference requirement was added in the Veterans Employment Opportunities Act of 1998 (112 Stat. 3187).

H.R. 5512, introduced in the 106th Congress, would have added a 13th prohibited personnel practice related to the implementation or enforcement of any nondisclosure policy, form, or agreement. The bill also would have amended the eighth prohibited personnel practice to clarify the disclosures covered. No further action occurred on the bill. Similar legislation (H.R. 2588 and S. 995) was introduced in the 107th Congress and is pending in the 108th Congress (H.R. 3281, Whistleblower Protection Enforcement Act; and S. 1229 and S. 1358, Federal Employee Protection of Disclosures Act).

At the request of the Administration, legislation (S. 1495) was introduced in the 105th Congress to require the federal appeals court to hear every appeal from a Merit Systems Protection Board (MSPB) decision brought by OPM (currently the court has discretion to decide whether or not to hear OPM petitions). Additionally, the legislation would have granted OPM 60 days to file a petition for review rather than the current 30 days. In a hearing on the bill, OPM justified its request for the amendments by saying that it was in a better position than the court to judge the impact of erroneous MSPB and arbitration decisions and that the 60-day time frame was the same as that for government appeals from the Federal Labor Relations Authority. The Justice Department and the National Academy of Public Administration supported OPM's views. Representatives of the National Treasury Employees Union, the American Federation of Government Employees, and the National Federation of Federal Employees opposed the amendments. Among their comments were these: that the federal circuit should retain its discretion (a system of checks and balances) as appeals were only to be granted in exceptional circumstances; that the other parties to a case have only 30 days to appeal; that arbitration decisions are nonprecedential cases; and that courts make and are qualified to make decisions about whether an appeal should be heard in every case. No further action occurred on the bill.

In the 108th Congress, legislation (H.R. 2867 and S. 1440, Federal Bureau of Investigation (FBI) Reform Act of 2003) is pending to amend 5 U.S.C. § 2303 to increase the protection for FBI whistleblowers. Similar legislation (S. 1974) was introduced in the 107th Congress.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621)

authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 23 merit system principles and prohibited personnel practices cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

By law, the Office of Personnel Management is to execute, administer, and enforce the civil service laws and rules and regulations and conduct oversight of any personnel management authorities which it delegates to agency heads. Under its strategic plan, mandated by P.L. 103-62, the Government Performance and Results Act, one of OPM's FY2004 goals is to "monitor and assess agencies' effectiveness in implementing merit-based strategies that support their mission." OPM's FY2004 budget request allocated \$16,070,000 (out of a total of \$120,246,000) and 136 (out of a total of 796) full-time equivalent employees to carrying out this goal.

MSPB, by law, is required to submit an annual report to the President and Congress which includes an analysis of "whether the actions of OPM are in accord with merit system principles and free from prohibited practices." Its July 1998 report found that OPM's reorganized oversight program had improved; it enjoyed a high degree of top-management support within OPM and was seen as having value to the agencies. Among MSPB's recommendations for further improvement were that evaluation needs to be more consistent in the field divisions, information obtained through oversight needs to be better used and disseminated, and oversight of line managers needs to occur. Recommendations focused on OPM's leadership and coordination in developing human resource management evaluation standards. MSPB's December 2001 report found that OPM's oversight program "seems to have been given the appropriate amount of attention and support," is funded entirely by appropriated funds, and "is sound." The report included recommendations that OPM actively influence "broad-based regulatory or statutory changes where feasible" and "be an active participant in decisionmaking regarding HR [human resources] policies and programs."

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Barbara L. Schwemle

(8) Authority for Employment (Chapter 31; in Part III, Subpart B — Employment and Retention).***Statutory Intent and History***

In addition to the 1966 Title 5 codification statute (P.L. 89-554; 80 Stat. 378), the basic statutes for Chapter 31, “Authority for Employment,” include the Postal Revenue and Federal Salary Act of 1967 (P.L. 90-206; 81 Stat. 613), the Civil Service Reform Act of 1978 (P.L. 95-454; 92 Stat. 1111), the Federal Employees Pay Comparability Act (FEPCA) of 1990 (P.L. 101-509; 104 Stat. 1427), and a 1988 amendment to Title 5 authorizing the establishment of the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) Senior Executive Service (P.L. 100-325; 102 Stat. 579). The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 31 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions elsewhere in this compendium.)

Most recently, Congress amended Chapter 31 to streamline the hiring process for the Securities and Exchange Commission (SEC) with the Accountant, Compliance, and Enforcement Staffing Act of 2003 (P.L. 108-44; 117 Stat. 842) in the wake of unfolding financial market scandals. Following a series of corporate accounting scandals that began with Enron in late 2001, Congress moved to increase the size and budget of the SEC, the federal agency that regulates corporate securities markets. From \$438 million in FY2002, the SEC’s annual appropriation was increased to \$716.3 million for FY2003, and then to \$811.5 million for FY2004. The increases were to fund about 900 new professional staff positions, including a substantial number of accountants, examiners, and economists, in addition to the hiring made necessary by staff turnover. The SEC estimated that the FY2003 budget would result in the hiring of 200 lawyers, 250 accountants, 300 examiners, 10 economists, and some other specialists. As FY2003 came to a close, however, the SEC reported that it had been unable to fill many of these jobs and, as a result, \$103 million of its appropriation was unspent. Time-consuming hiring procedures and rules that apply to the federal competitive service were considered a major reason for the delay.

Major Provisions

The chapter generally mandates agency hiring of personnel, and also enumerates specific hiring authorizations, restrictions, and prohibitions affecting federal employment. For instance, there are provisions to assist blind and deaf federal employees in the performance of their duties, as well as restrictions on hiring and using attorneys; hiring publicity experts; accepting student volunteers; and using experts and consultants. The employment of private detectives and the appointment of relatives by public officials are prohibited.

The Accountant, Compliance, and Enforcement Staffing Act of 2003 added a new Section 3114 to Subchapter I of Chapter 31. The SEC is authorized to appoint accountants, economists, and securities compliance examiners to competitive service positions by following the procedures that apply to the excepted service. Positions thus filled are not to be considered excepted service positions. The statute directs the SEC to submit two reports to congressional committees describing its exercise of this authority. The initial report is due 90 days after the end of FY2003; the second, 90 days after the end of FY2005.

The purpose and composition of the Senior Executive Service (SES) is specified. Creation of the SES was a key component of the Civil Service Reform Act of 1978. The SES is a corps of top managers and administrators in the federal service encompassing approximately 7,000 positions formerly in General Schedule grades 16-18 and certain positions formerly in Executive Schedule levels IV and V. The SES includes career and political civil servants, with a limit of 10% on noncareer members. It emphasizes mobility, managerial discretion in assignments, accountability and performance of a very high order, and a reward system based on managerial excellence, risk-taking, and initiative.

The chapter also authorizes a separate Senior Executive Service for the FBI and the DEA within the Department of Justice, independent of the government-wide SES, but closely paralleling its pay, performance, and removal provisions. Requirements for an annual report to Congress on the FBI-DEA Senior Executive Service are also set forth.

Discussion

The chapter reflects both evolving trends in the federal workforce and enduring precepts. Provisions concerning work station access for the disabled as well as assistance for handicapped federal employees are recent chapter additions intended to prevent discrimination based on employee disability, and closely parallel similar protections found in the Americans with Disabilities Act (104 Stat. 327, as amended, 105 Stat. 1077, at 1095) applying to the private sector. In both instances, unencumbered entrances, walkways, ramps, and the like are required, along with specially adapted office machinery to assist employees in fulfilling their work potential.

The specified employment prohibitions, on the other hand, are long-standing. The anti-nepotism provision, together with prohibitions on employment of publicity experts and private detectives, reflect rather permanent attitudes about certain public proprieties in federal employment not necessarily paramount in the private sector.

With regard to the SEC provisions, the persistence of corporate and financial scandals in the headlines created a sense of urgency in Congress for reinforcing federal securities regulation. The bill that became P.L. 108-44 (H.R. 658) passed the House by a vote of 423-0 on June 17, 2003, and was approved without amendment by unanimous consent in the Senate two days later. The legislative history contains no arguments against the concept of streamlined appointment authority for the SEC. However, in the report accompanying H.R. 658 (H.Rept. 108-63), 24 minority members of the House Financial Services Committee expressed the view that the

authority should be temporary and supported a sunset date at the end of FY2008. The final version of the legislation makes the expedited hiring authority permanent. The Office of Personnel Management (OPM) did not comment on similar language in hearings on H.R. 1836 in May 2003 before the House Committee on Government Reform. On June 20, 2003, one day after the Senate passed H.R. 658, OPM Director Kay Coles James issued a memorandum stating, among other things, that direct-hire authority³⁷¹ would be available to the SEC for two years to appoint accountants, economists, and securities compliance examiners “to respond to Congressional interest and to help the agency meet its mandate to fill in excess of 800 positions.”³⁷²

The Senior Executive Service provisions of the Civil Service Reform Act of 1978 were, originally, the most important contribution of this landmark legislation. Since its creation, the SES has continued to be challenged by several major issues. The National Commission on the Public Service took note, in its 2003 report, of problems affecting the SES, such as the inclusion of scientists, other professionals, and technical specialists in the SES, and a compensation and reward system that has failed to function properly. The commission recommended dividing the SES into a Professional and Technical Corps (PTC) and an Executive Management Corps (EMC), and advised that more attention should be paid to developing strong management talent within the federal government. Another issue is the lack of diversity found within the senior executive ranks. A comprehensive report by the General Accounting Office (GAO) documenting the extent of diversity within the SES noted that workforce planning, notably succession planning, could be used by agencies to enhance diversity. In 2003, OPM launched an SES candidate development program, which was presented as an initiative to aid in the development of a high-quality SES that reflects the diversity of America.

The 20th anniversary of the SES in 1998 prompted an examination of the service by OPM and other interested parties. OPM issued, in April 1998, “An Outline of OPM’s Proposed Framework for Improving the Senior Executive Service.” The Senior Executives Association (SEA) responded to this document in June 1998, and an OPM- and SEA-sponsored survey of SES members was completed in 1999. These efforts sought to reinforce the concept of a senior executive corps and improve the recruitment and retention of senior executives. Major problems and issues currently facing the Senior Executive Service are pay compression, retirement and succession planning, the proliferation of separate cadres of senior executives at selected agencies, mobility, restructuring, and performance management.

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³⁷¹ See the discussion of 5 U.S.C. Chapter 33 in this compendium for more about direct-hire authority, which was enacted by the Homeland Security Act of 2002.

³⁷² U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, and Chief Human Capital Officers, “New Human Resources Flexibilities — Direct Hire Authority,” June 20, 2003.

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(9) Examination, Selection, and Placement (Chapter 33; in Part III, Subpart B — Employment and Retention).***Statutory Intent and History***

The basic statutory authorities contributing to the provisions of Chapter 33, “Examination, Selection, and Placement,” are the 1966 Title 5 codification statute (80 Stat. 378) and the Civil Service Reform Act of 1978 (92 Stat. 1111). Additional provisions derive from a 1967 law providing for the acquisition of career status by certain temporary federal employees (81 Stat. 273); the Intergovernmental Personnel Act of 1970 (84 Stat. 1920); a 1972 amendment to Title 5 providing a career program for and greater flexibility in the management of air traffic controllers (86 Stat. 141 at 142); the Department of Defense Authorization Act, 1986 (99 Stat. 777); the Whistleblower Protection Act of 1989 (103 Stat. 32); the Ethics Reform Act of 1989 (103 Stat. 1756); and the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229). In recent years, there have been statutes which removed groups of employees from hiring processes managed by the Office of Personnel Management. Policymakers in the Internal Revenue Service, Federal Aviation Administration, and Federal Bureau of Investigation have been granted specific authority to design and implement new systems for selected groups of staff. The Homeland Security Act of 2002 and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 33 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

The chapter provides certain general conditions for federal employment and also outlines the basic elements of a merit-based civil service system. It includes provisions dealing with competitive and noncompetitive examinations; probationary employment periods; and prohibitions on political influence and offering any recommendation regarding merit system employment, advocacy of the overthrow of the government, and participating in a strike or asserting the right to strike.

Major Provisions

Chapter 33 provides general authority to the President for examination, certification, and appointment in the federal civil service. The President is mandated to prescribe rules for entry into competitive service, for competitive and noncompetitive examinations, and for the probationary period before the appointment becomes final. Political recommendations from Members of Congress and others are prohibited, although competitive appointment based on service in the legislative and judicial branches is allowed under certain conditions.

In addition to general conditions of federal employment, specific conditions of employment governing certain classes of federal employees are given, including those for air traffic controllers, law-enforcement officers, public safety personnel, reemployed annuitants, retired military personnel, and members of the Senior Executive Service (SES). Aspects of employment affecting these classes, such as age

limits, veterans' preference, credit for prior military service, promotion policy, and disability credits and preference, are enumerated.

The responsibilities of the Office of Personnel Management (OPM), as the central personnel agency, are detailed, including conducting examinations for the competitive service, maintaining and certifying from a competitive service register of eligibles, prescribing rules governing appointment to positions classified above GS-15, and keeping and making public a government-wide list of vacant positions in the competitive service.

Key provisions of the chapter relate to the inter- and intra-agency detailing of federal employees, as well as detailing to state and local government entities, including limitations on length of details; responsibilities and obligations of detailees accruing special benefits from certain assignments; protection of pay, benefits, and seniority while on detail; and provisions governing injury and death while on detail. On September 9, 2003, OPM published proposed regulations relating to the detail of executive branch employees to the legislative branch (68 FR 53054). The regulations propose to limit such details to 180 days with one additional period of up to 180 days and to limit the activities in which executive branch employees could engage. During consideration of the Transportation and Treasury Appropriation Bill FY2004 (H.R. 2989), the Senate agreed by voice vote to an amendment (No. 1949) offered by Senator Charles Grassley that would prohibit any funds appropriated or made available under the act from being used to implement the regulations. In a March 12, 2003, memorandum to human resources directors, OPM's Associate Director for Human Capital Leadership and Merit Systems Accountability requested that executive branch agencies provide OPM with information about the use of interagency details as part of their workforce strategies.³⁷³

Provisions governing the SES are elaborated, including the creation and mission of executive resource, qualification review, and performance review boards within the SES. Specific attention is devoted to aspects of SES employment such as assignment and reassignments and appropriate notice pertaining thereto, career development, and sabbaticals. S. 2651, introduced in the 107th Congress, would have amended 5 U.S.C. § 3132 to establish a new appointment in the SES, simply known as "limited," which would have replaced limited term and limited emergency appointments and to allow limited appointees who meet certain conditions to fill career-reserved positions. Sections 3394 and 3395 would have been amended to vary the duration of appointments, extensions, and reassignments and transfers for limited appointees according to the type of SES position a limited appointee filled. Any limited appointee would not have been allowed to serve more than seven consecutive years in any combination of limited appointments. No further action occurred on the bill. In the 108th Congress, the NASA Flexibility Act of 2003, as passed by the Senate (S. 610) and as reported to the House of Representatives (H.R. 1085), includes similar provisions.

³⁷³ U.S. Office of Personnel Management, Memorandum for Human Resources Directors, "Number of Agency Details," Mar. 12, 2003.

Section 1321 of the Homeland Security Act of 2002 repealed the Title 5, *United States Code*, recertification requirement for senior executives (for agencies that are subject to this chapter of the title; i.e., much of the executive branch) and struck from 5 U.S.C. § 3393 the reference to a senior executive being removed for failure to be recertified.

The Homeland Security Act also amended the Title 5, *United States Code*, process for hiring in the competitive service (again, for much of the executive branch). Section 1312 of the law amended 5 U.S.C. § 3304(a) by adding a new paragraph (3) providing authority for agencies to appoint, without regard to 5 U.S.C. §§ 3309-3318, candidates directly to positions for which public notice has been given and OPM has determined that there exists a severe shortage of candidates or there is a critical hiring need. (This authority is often called “direct-hire” authority.) OPM regulations must prescribe criteria for identifying such positions and may delegate authority to make determinations under such criteria.³⁷⁴ Section 1312 of the law also added a new Section 3319 — Alternative Ranking and Selection Procedures to Title 5, *United States Code*. OPM, or an agency which has been delegated examining authority, may establish category rating systems for evaluating applicants for positions in the competitive service. Applicants may be evaluated under two or more quality categories based on merit, consistent with OPM regulations, rather than be assigned individual numerical ratings. Within each quality category, applicants who are eligible for veterans’ preference must be listed ahead of applicants who are not eligible for preference. Except for applicants for scientific and professional positions at GS-9 (equivalent or higher), each applicant who is a veteran with a compensable service-connected disability of 10% or more must be listed in the highest quality category.

An appointing official may select any applicant in the highest quality category, or, if fewer than three candidates have been assigned to the highest quality category, in a merged category consisting of the highest and the second highest quality categories. The appointing official may not pass over a preference eligible in the same category from which selection is made, unless the requirements of 5 U.S.C. § 3317(b) or § 3318(b), as applicable, are satisfied. Each agency that establishes a category rating system must submit, in each of the three years following this establishment, a report to Congress on the system that must include information on the number of employees hired under the system; the system’s impact on the hiring of veterans and minorities, including those who are American Indian or Alaska Native, Asian, Black or African American, and native Hawaiian or other Pacific Islander; and the way in which managers were trained in the administration of the system. OPM published regulations to implement the provisions on June 13, 2003 (68 FR 35265).

³⁷⁴ U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, and Chief Human Capital Officers, “New Human Resources Flexibilities — Direct Hire Authority,” June 20, 2003.

Discussion

Examination, selection, and placement provisions in federal civil service law illuminate many key elements and potentially critical stress points in the operation of the personnel system. These include probation, anti-politicization, age limits for certain classes of employment, temporary duty assignments, detailing of employees, veterans preference, loyalty provisions, and prohibitions on the right to strike.

The one-year probationary period for new federal employees has engendered controversy over the years, as have legislative proposals to modify it. Proposals to grant appellate rights to those denied tenure after one year, raise probationary employee benefits, and increase the probationary time from one to three years have all been proposed, but not accepted into law.

Although the statutory limitation on temporary service is three years, abuses of this provision have long been reported, with many instances of individuals complaining of far longer periods of service in temporary status.

The practice of detailing federal employees, notably those from executive branch agencies to the White House, has been a recurring problem for many years. Critics allege that detailed employees have been used to enhance the President's political agenda, and that the number of detailees at work in the White House at any given time is difficult to ascertain because of incomplete or inaccurate reporting.³⁷⁵

Maximum age requirements for federal law enforcement officers and air traffic controllers have raised questions regarding the utility, equity, and possible adverse effects of these limits. The arbitrary loss of highly skilled professionals, for instance, may be more costly to the agency than any benefits resulting from a reduced workforce.

Appointment, reassignment, transfer, and development in the SES have been repeatedly criticized over the years. Entry into the SES has long been viewed as unduly restricted and haphazard by many career SES candidates. Reassignment, transfer, and mobility programs, regarded as key elements in the reform legislation creating the SES, have been considered a signal failure, since the overwhelming proportion of career SES begin and end their careers in the same agency. Performance appraisal programs have also been found wanting, since only a small number of SES members have ever been faulted for inadequate performance. SES members themselves have long criticized the service for perceived deficiencies in compensation and management, political interference, and low morale.

³⁷⁵ See, for example, U.S. General Accounting Office, *Personnel Practices: Federal Employees Detailed from DOD to the White House*, GAO/GGD-88-33, 1988; U.S. General Accounting Office, *Personnel Practices: Schedule C and Other Details to the Executive Office of the President*, GAO/GGD-93-14, Nov. 1992.

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Sharon S. Gressle
Barbara L. Schwemle

(10) Part-Time Career Employment Opportunities (Chapter 34; in Part III, Subpart B — Employment and Retention).

Statutory Intent and History

The Federal Employees Part-Time Career Employment Act of 1978 (92 Stat. 1055; 5 U.S.C. §§ 3401-3408) is intended to encourage the use of part-time career employment by requiring all agencies to establish programs for increased part-time career employment opportunities. Proponents of the legislation argued that it would benefit the federal government, and therefore the country at large, as well as a substantial segment of the potential workforce. The federal government would benefit from a system of permanent part-time employment that could tap the talents of many citizens who were not seeking employment because they were either unwilling or unable to work full-time schedules. It was also contended that part-time schedules would benefit several pools of potential employees. These would include women whose family commitments made them unable to work full time; handicapped individuals with the potential for making considerable contributions but who were physically unable to work a 40-hour week; and senior citizens who could bring broad experience to the workplace during a transitional period leading to retirement.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 34 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Part-time career employment is defined as part-time employment of 16 to 32 hours a week under a schedule consisting of an equal or varied number of hours per day, whether in a position which would be part-time without regard to the statute or one established to allow job-sharing or comparable arrangements. The provisions of the statute do not apply to persons paid at rates equal to the minimum rate of pay for senior-level personnel (5 U.S.C. § 3405(b)). The provisions do not include employment on a temporary or intermittent basis. Federal agencies and the Office of Personnel Management (OPM) are required to establish, maintain, and periodically review the part-time employment program. Representation by employee organizations is allowed.

Discussion

For a period of at least one year prior to enactment of the 1978 statute, federal agencies had been actively exploring the possibilities of increased part-time employment programs. President Carter, in 1977, had instructed the agencies to establish innovative programs for the purpose of expanding part-time opportunities. During the year before enactment, the number of part-time permanent workers in the federal system increased by about 20%, from 43,000 to 51,000. At the time of

enactment, permanent part-time employment constituted over 2.7% of the permanent federal workforce. According to OPM, as of March 2003, permanent part-time employees made up 5.74% of the federal civilian workforce.

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Kevin R. Kosar

(11) Retention Preference, Voluntary Separation Incentive Payments, Restoration, and Reemployment (Chapter 35; in Part III, Subpart B — Employment and Retention).

Statutory Intent and History

The Veterans' Preference Act of 1944 (58 Stat. 388) and the Civil Service Reform Act of 1978 (92 Stat. 1149) are the underlying statutes for employee retention during reduction in force (RIF). Senior Executive Service (SES) provisions are authorized by the Civil Service Reform Act of 1978 (92 Stat. 1165), except for those on RIFs in the SES, which are authorized by provisions of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 756); furloughs in the SES, which are authorized by the Civil Service Retirement Spouse Equity Act of 1984 (98 Stat. 3220); and repeal of the SES recertification process, which is provided by the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229). Voluntary separation incentive payments also are authorized for executive branch agencies by the Homeland Security Act of 2002, and for the Smithsonian Institution by the Smithsonian Facilities Authorization Act (117 Stat. 889). The authority for reemployment after service with an international organization derives from the Foreign Assistance Act of 1969 (83 Stat. 825). Reemployment following limited appointment in the Foreign Service is authorized by the Foreign Service Act of 1980 (94 Stat. 2164). The intent of the laws, with regard to reduction in force, was to codify retention practices. The laws confirmed the regulations and practices in effect at the time.

Major Provisions

Retention during reduction in force is based on tenure, military preference, length of service, and efficiency or performance ratings. Sixty days notice of impending RIF action must be given to the affected employee and his or her labor representative.

Chapter 35 includes several provisions relating to the SES. A career appointee to the SES can be removed during the one-year probationary period or at any time for less than fully successful executive performance. A former career appointee may be reinstated in the SES if the probationary period has been successfully completed, and if the appointee left the SES for reasons other than misconduct, neglect of duty, malfeasance, or less than fully successful executive performance. A career appointee who was appointed from a civil service position to the SES and who is removed from the SES during the probationary period for reasons other than misconduct, neglect of duty, or malfeasance may be placed in a civil service position in any agency. Agencies provide competitive procedures for removing employees from the SES during a RIF of career appointees. Determinations are based primarily on performance. Employees in the SES may be furloughed for reasons of insufficient work, or funds or for other nondisciplinary reasons. Final Office of Personnel Management (OPM) regulations, which became effective on November 13, 2000, detail the SES performance appraisal process (5 CFR Part 430, Subpart C).

The Homeland Security Act of 2002 delegated to OPM authority to review and approve requests from federal executive branch agencies (as defined at 5 U.S.C. § 105) to offer voluntary separation incentive payments of up to \$25,000 to employees

in particular occupational groups, organizational units, or geographic locations who retire or resign. OPM is to do this in consultation with the Office of Management and Budget (OMB). The authority to offer separation payments (“buyouts”) applies across all executive agencies. Buyouts can be used by agencies seeking to reduce their total employment or to reshape their workforce to meet critical agency needs. Agencies seeking approval from OPM must submit a plan that describes the intended use of the buyouts. Payments are to be made from the agencies’ regular appropriations for salaries and are subject to all applicable federal, state, and local income taxes. They are not included in the employee’s basic pay for purposes of calculating the amount of his or her retirement annuity.

The Smithsonian Facilities Authorization Act allows the Secretary of the Smithsonian Institution to establish a program “substantially similar” to the program established by the Homeland Security Act. However, the law leaves unclear what approval role, if any, OPM or OMB have under this authority.

Provisions on transfer of functions, waiver of physical qualifications for veterans’ preference employees, reinstatement or restoration of individuals suspended or removed for national security, and reemployment after service with an international organization or following limited appointment in the foreign service are also included in Chapter 35.

Discussion

In the 104th Congress, H.R. 3841 would have amended the RIF regulations to increase the weight given to performance appraisal in a RIF. The bill would have codified language on granting additional years of service credit. The additional service credit an employee received for performance would have consisted of the sum of the employee’s three most recent annual performance ratings — those received during the four-year period prior to the issuance of RIF notices, or the four-year period prior to the agency-established cutoff date. This would have been an important change. Under the current RIF regulations, the additional years of service credit are totaled, averaged, and then added to seniority to determine retention standing. Under H.R. 3841, employees were to receive five, seven, or 10 additional years of service depending on the number of rating levels in their performance appraisal system. H.R. 3841 passed the House of Representatives after the RIF language was struck, but no further action occurred in the 104th Congress. However, during subcommittee hearings on the measure, federal manager and employee organizations testified that the RIF changes would adversely affect employees who were outstanding performers and politicize the retention system by allowing managers to give high performance ratings to favored employees.

Draft legislation, prepared but not introduced in the 105th Congress, by the House Civil Service Subcommittee chair, Representative Mica, would have authorized employees in agencies facing workforce reductions to volunteer for RIFs. Additionally, the legislation proposed a separate retention register for federal employees with less than “fully successful” performance ratings. According to the draft, this was to ensure that the poor performers would receive less retention consideration in a RIF than good performers with less seniority.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 35 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.) Section 1321 of the Homeland Security Act repealed the recertification requirement for senior executives. A September 1998 OPM report assessing recertification found that more than 99% of executives were recertified; the average cost of recertifying one executive ranged from \$34 to \$3,400; and 50 reporting agencies spent about 12,600 work hours on recertification, costing them almost \$750,000. The Homeland Security Act delegated to OPM authority to review and approve requests from federal agencies to offer voluntary separation incentive payments of up to \$25,000 to employees in particular occupational groups, organizational units, or geographic locations who retire or resign.

In an August 1998 report on downsizing in the federal government during the years 1994 to 1996, OPM found that agencies reduced their workforces without massive reductions in force by using such tools as buyouts (79% of the time) and early retirement (72% of the time). RIFs in all executive branch agencies totaled 2,092 (FY2000), 1,586 (FY2001), 1,360 (FY2002), and 286 (1st quarter of FY2003).

OPM published final revised regulations on the use of performance appraisal ratings to determine retention during a RIF in November 1997 (5 CFR § 351.504). The regulations provide for additional years of service credit ranging from 12 to 20 years and specify that only actual performance ratings can be used to determine retention credit. (Under the previous regulations, an employee received 12, 16, or 20 additional years of service credit for “fully successful,” “exceeds fully successful,” or “outstanding” performance, and a rating of “fully successful” could have been assumed for missing ratings.) Interim regulations, effective on October 20, 2000 clarified the “longstanding policy that an agency determines the grade or grade-interval range of a released employee’s potential retreat rights [to another position] solely on the basis of the official position of record held by the employee on the effective date of the reduction in force” (5 CFR § 351.701(f)).

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Barbara L. Schwemle
Patrick J. Purcell (buyout authority)

(12) Information Technology Exchange Program (Chapter 37; in Part III, Subpart B — Employment and Retention).

Statutory Intent and History

Chapter 37, which was established by the E-Government Act of 2002 (P.L. 107-347), provides for the exchange of information technology (IT) professionals between the public and private sectors.³⁷⁶

The Intergovernmental Personnel Act, P.L. 91-648 (5 U.S.C. §§ 3371-3375), gives agencies authority to exchange personnel with state and local governments, as well as certain nongovernmental organizations, such as institutions of higher education.³⁷⁷ The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 37 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

This chapter authorizes the exchange of information technology personnel between federal government agencies and private sector organizations. Chapter provisions outline eligibility criteria for federal employees and private sector employees, establish the duration of assignments, require an agency to provide a written agreement between the agency and an employee who participates in an exchange, address the employment and benefits status of federal employees and private sector employees who participate in an exchange assignment, and establish the terms and conditions under which an employee of a private sector organization would be employed by a federal agency. This chapter also authorizes the chief technology officer of the District of Columbia to arrange for public-private exchanges of information technology personnel between his or her office and private sector organizations. Any references in Chapter 37 to federal law or regulations are deemed to be a reference to applicable provisions of the District's laws and regulations.

The Office of Personnel Management (OPM) is responsible for prescribing regulations for administering this chapter, and is required to prepare and submit semiannual reports to the Senate Committee on Governmental Affairs and the House Committee on Government Reform. OPM also is required to provide a report on all existing public-private exchange programs. Additionally, the General Accounting Office (GAO) is required to prepare and submit a report on information technology training programs.

³⁷⁶ 116 Stat. 2899, at 2925; H.R. 2458.

³⁷⁷ U.S. Office of Personnel Management, "Intergovernmental Personnel Act Mobility Program," available at [<http://www.opm.gov/programs/ipa/>], visited Dec. 3, 2003.

Discussion

This chapter reflects an interest in recruiting and retaining federal government information technology personnel. In a 2001 report, GAO estimated that the demand for IT workers was high in all sectors, and concluded that the federal government and other employers were having trouble getting enough “highly skilled IT workers” to meet the demand.³⁷⁸ Additionally, a comparison of federal compensation with compensation offered by state and local governments, non-profit organizations, private business, and academic institutions showed that the federal government was low on salary levels, rewards and recognition, advancement and training, and the use of recruiting tools.³⁷⁹ It is anticipated that the exchange program will help meet the training needs of government employees, while offering private sector employees the opportunity for public service.

It is too early to tell the extent to which federal agencies and their employees, as well as private sector organizations and their personnel, will make use of Chapter 37. OPM issued proposed regulations early in 2004 for implementation of this chapter.³⁸⁰

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³⁷⁸ U.S. General Accounting Office, *Human Capital: Attracting and Retaining a High-Quality Information Technology Workforce*, GAO-02-113T, Oct. 4, 2001, p. 3.

³⁷⁹ National Academy of Public Administration, *Comparative Study of Information Technology Pay Systems, Executive Summary* (Washington: National Academy of Public Administration, 2001), p. 10.

³⁸⁰ U.S. Office of Personnel Management, “Information Technology Exchange Program,” 69 *Federal Register* 2308, Jan. 15, 2004.

(13) Training (Chapter 41; in Part III, Subpart C — Employee Performance).***Statutory Intent and History***

The 1966 Title 5 codification statute (80 Stat. 378) and the Civil Service Reform Act of 1978 (92 Stat. 1111) are the basic authorities for Chapter 41. Additional authority is provided by a 1982 amendment to Title 5 providing training opportunities for employees under the Office of the Architect of the Capitol and the Botanic Garden (96 Stat. 1647). The Federal Workforce Restructuring Act of 1994 (108 Stat. 1111) added language which served to emphasize the need for training so that it benefits not only the individual, but also the organization and assists in achieving agency mission and goals. The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136; 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 41 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Federal employee training programs are designed to insure that federal employees maintain and improve their basic job skills and knowledge in order to render maximum service to their agency's mission and to the public at large. To attain this goal, both government-wide and agency-specific instruction programs are offered to keep federal personnel informed and up to date on professional, scientific, and technical developments related to their fields of expertise. Off-site training programs at colleges and universities are also available, provided that the instruction received relates to and enhances employees' performance in their respective occupations. The ultimate objective of government training is to build and retain a workforce of skilled and efficient employees.

Major Provisions

Chapter 41 consists of provisions governing the availability and use of federal training options for federal employees in both government and nongovernment facilities. The costs of training, employee agreements, and federal assistance to defray costs are also addressed.

Federal training is defined as providing for instruction or education options for federal employees or the placement of employees in instruction or education programs to assist in achieving agency mission and performance goals. Certain agencies are excepted from the provisions of the chapter, and the President is authorized to delete or add exceptions, but may not alter the role of the Office of Personnel Management (OPM) in administering training programs.

Agency heads also are granted authority to establish training programs for their employees. They also may contract-out training programs where considered appropriate and cost-effective. According to OPM, information on the extent of government-wide training programs is not available because of the widespread dispersal of individual in-house and off-site training programs. Government facilities

under agency control are to be used for training when practicable, but other government facilities may be utilized on a cost-reimbursable basis.

Section 1331 of the Homeland Security Act (P.L. 107-296) amended Chapter 41 to permit agencies to select and assign employees to academic training and pay or reimburse the costs thereof. Consistent with the merit system principles at 5 U.S.C. §§ 2301 (b)(2) and (7), an agency that exercises this authority must “provide employees effective education and training to improve organizational performance” while taking into consideration “the need to maintain a balanced and integrated federal workforce.” Furthermore, 5 U.S.C. § 4107(b)(2) requires agencies to assure that “the training is not for the sole purpose of providing an employee an opportunity to obtain an academic degree or qualify for appointment to a particular position for which the academic degree is a basic requirement.” This training may not be made available to members of or those seeking a position in the Senior Executive Service. Agencies are encouraged, “to the greatest extent practicable, [to] facilitate the use of online degree training.”

Federal employees availing themselves of training incur certain obligations, including a requirement to serve an appropriate time with the agency after training, and reimburse the cost of training if there is failure to comply. The government is entitled to pursue costs of training as a debt owed to the United States. Specific costs of training payable by the agency are enumerated, including the cost of the training program, travel and per diem costs, transportation of family and household goods, library and laboratory services, and other services.

Discussion

Allegations of waste and mismanagement have appeared in the media against the government-wide federal employee training system. In past years, the system, costing an estimated \$25 billion annually, has been criticized for fragmentation, duplication, confusing eligibility criteria, and inadequate reporting. OPM retains an administrative role in training policy development. However, since 1995, the U.S. Department of Agriculture Graduate School has operated several of the training offices and programs that were formerly the responsibility of OPM.

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(14) Performance Appraisal (Chapter 43; in Part III, Subpart C — Employee Performance).***Statutory Intent and History***

The underlying statute for Chapter 43, “Performance Appraisal,” is the Civil Service Reform Act of 1978 (92 Stat. 1131). The law’s intent was to mandate agency establishment of performance appraisal systems so that appraisals of employee performance would be made within a single, interrelated system.

Major Provisions

Agency performance appraisal systems are required to (1) provide for periodic appraisals of job performance; (2) encourage employee participation in establishing performance standards; and (3) use performance appraisal results as the basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees. Each agency performance appraisal system must include performance standards permitting the accurate evaluation of job performance on the basis of objective criteria. An employee may be reduced in grade or removed because of unacceptable performance. The law provides 30 days’ advance written notice to the employee of the proposed action, a “reasonable” time for the employee to answer orally and in writing, and a written decision of the action recommended. The decision to retain, reduce in grade, or remove an employee must be made within 30 days of the notice period’s expiration.

Chapter 43 also authorizes agencies to establish performance appraisal systems for the Senior Executive Service (SES). The systems are designed to permit the accurate evaluation of performance, provide for systematic appraisals, encourage excellence in performance, and provide a basis for making eligibility determinations for retention and performance awards. Appraisals in the SES are based on individual and organizational performance. Performance factors include improvements in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork; cost efficiency; timeliness of performance; other indications of the effectiveness, productivity, and performance quality of the employees for whom the senior executive is responsible; and meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with merit system principles. SES performance appraisal systems provide annual summary ratings of performance with one or more fully successful levels, a minimally satisfactory level, and an unsatisfactory level.

Discussion

H.R. 3841, proposed in the 104th Congress, but not enacted, would have required that performance appraisal systems assist employees in improving unacceptable performance and provide for reassignment, reduction in grade, removal, or other appropriate action against employees whose performance was unacceptable. Upon notification of unacceptable performance, an employee would have been afforded a one-time opportunity to demonstrate acceptable performance before a reduction in grade or removal. H.R. 3841 passed the House of Representatives, but no further action occurred. Another measure, H.R. 3483, would have authorized an agency to

remove or take other appropriate action against employees whose performance was unacceptable. It also sought to repeal the procedures on reducing the grade of or removing an employee for unacceptable performance. If this latter provision had been enacted, agencies would have had to use the Chapter 75 adverse action procedures to remove poor performers. H.R. 3483 was referred to committee, but no further action occurred.

Draft legislation, prepared but not introduced in the 105th Congress, by the House Civil Service Subcommittee chair, Representative Mica, would have prohibited the appeal of a denied within grade increase to the Merit Systems Protection Board, delayed the establishment of any new “pass/fail” performance management systems until the Office of Personnel Management (OPM) provided an evaluation of the current ones, and allowed for the removal of a problem employee after one performance improvement plan.

Among the comments expressed about performance appraisal during House hearings conducted in the 104th and 105th Congresses were statements that employees should have an opportunity to improve their performance before being separated; that a fundamental problem is the inability to identify sub-par performance in terms of expected contributions; and that the administrative process surrounding performance appraisal is litigious, complex, time-consuming, and provides excessive due process. Differing opinions were expressed on whether pass/fail performance appraisal systems strengthen or degrade performance, whether the weight of performance ratings should be increased in reduction in force, and whether strong enforcement of the current performance appraisal system is required, rather than amendments to the current system.

OPM’s human resource management initiatives for 1998 and 1999 included a recommendation that pay and performance systems be aligned with agency missions. Vice President Gore, in an address before a January 1999 international conference on reinventing government, said that the Administration would begin drafting civil service legislation that would establish a set of standards providing for flexible pay-for-performance systems which each agency could use to create its own system. He said the legislation would also allow agencies to evaluate their managers, including those in the SES, on a balanced set of results, including the GPRA [Government Performance and Results Act] goals, customer satisfaction rates, and the outcome of employee satisfaction surveys, and that these evaluations would guide in setting salaries and paying bonuses for these managers.³⁸¹ The president of the National Treasury Employees union, in a news release on the Vice President’s announcement, stated that fair performance evaluations mandate federal employee involvement in setting and implementing performance measures, while a news release from the Senior Executives Association president expressed concern about evaluating and paying managers on the basis of surveys “address[ing] issues over which career managers and executives have little impact.” A legislative proposal was not submitted to the 106th Congress.

³⁸¹ National Partnership for Reinventing Government, *Vice President Gore Announces Three Reinvention Initiatives at International REGO Forum*, Jan. 14, 1999, available at [<http://govinfo.library.unt.edu/npr/library/news/011499.html>], visited Dec. 23, 2003.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security (DHS) and Defense (DOD). Both laws permit changes to the Chapter 43 provisions and specify requirements for performance management systems at DHS and DOD. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.) The National Defense Authorization Act for FY2004 also creates a Human Capital Performance Fund to reward the highest performing and most valuable employees in an agency and offer federal managers a new tool for recognizing employee performance that is critical to an agency's achieving its mission. (See the discussion of the 5 U.S.C. Chapter 54 provision in this compendium.)

A September 1995 MSPB issue paper recommended that Chapter 43 authority on performance-based actions be repealed and that RIF laws be amended to permit RIF procedures to be used to remove poor performers. The same month, OPM published regulations providing agencies with increased flexibility to develop their performance appraisal systems. Eight patterns of summary levels of performance may be used. These patterns range from a pass/fail system with two summary levels (unacceptable and fully successful) to a system with five summary levels (unacceptable, less than fully successful, fully successful, exceeds fully successful, and outstanding).

In a draft framework for the Senior Executive Service (SES) published in April 1998, OPM proposed a three-year performance agreement with annual progress reviews. OPM published a status report on the draft framework in December 1998 and proposed administrative rule changes in July 1999 (64 FR 41334). Final OPM regulations on managing senior executive performance, which became effective on November 13, 2000, "will help agencies hold senior executives accountable by: Reinforcing the link between performance management and strategic planning; requiring agencies to use balanced measures in evaluating executive performance; and giving agencies more flexibility to tailor performance management systems to their unique mission requirements and organizational climates"³⁸² [5 CFR Part 430, Subpart C]. Some agency performance appraisal systems might change as a result of provisions at Section 1125 of the National Defense Authorization Act for FY2004. This statute shifted the cap on basic pay for the SES from Level IV of the Executive Schedule to Level III. However, the cap will be Level II for any agency that is certified as having a performance appraisal system which makes meaningful distinctions based on relative performance. Agencies might have to modify their performance appraisal systems to achieve certification.

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Barbara L. Schwemle

(15) Incentive Awards (Chapter 45; in Part III, Subpart C — Employee Performance).

Statutory Intent and History

The basic statutory authorities contributing to the provisions of Chapter 45, “Incentive Awards,” are the 1966 Title 5 codification statute (P.L. 89-554; 80 Stat. 378) and the Civil Service Reform Act of 1978 (P.L. 95-454; 92 Stat. 1111). Additional provisions derive from the Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35, Title XVII, Subchapter II; 95 Stat. 755); Treasury, Postal Service, and General Government Appropriations Act of 1991 (P.L. 101-509, § 529; 104 Stat. 1427); the Treasury, Postal Service, General Government appropriation as found in the Omnibus Consolidated and Emergency Supplemental Appropriations for FY1999 (P.L. 105-277, Division A, § 101(h), § 631); and the Treasury and General Government Appropriations Act of 2002 (P.L. 107-67, Title VI, § 641(d); 115 Stat. 554). The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 45 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

The chapter sets forth provisions governing the range and scope of contributions and services for which federal employees are eligible to receive monetary and non-monetary awards, including suggestions, inventions, performance, and acts of heroism.

Cash incentive awards are available to federal employees, except for those paid under the Executive Schedule, for suggestions, inventions, superior performance, heroism, or ideas to reduce paperwork. Awards are limited to \$10,000, except in cases where accomplishment is unusually outstanding, when awards not to exceed \$25,000 are authorized with the approval of the Office of Personnel Management (OPM). Cash awards are in addition to regular pay, and acceptance by the employee absolves the government of any further claims involving use of ideas or devices, etc. The President may grant an incentive award, which may be in addition to an agency award. Subject to limitations, the President may grant rank awards to members of the Senior Executive Service (SES) and individuals serving in certain senior-level positions.³⁸³ Meritorious Executive awards are to equal 20% of annual basic pay, and Distinguished Executive awards are to equal 35% of annual basic pay. Cash awards of up to 5% of basic pay are authorized for selected federal law enforcement officers, including those of the U.S. Park Police, the Diplomatic Security Service, and probation officers who possess and make use of one or more foreign languages in the performance of official duties.

³⁸³ Senior-level positions include positions classified above GS-15 pursuant to 5 U.S.C. § 5108 and scientific or professional positions established under 5 U.S.C. § 3104.

Federal employees may receive awards for cost savings disclosures, including those to combat fraud, waste, or mismanagement. The amount of these awards may be \$10,000 or an amount that equals 1% of agency cost savings attributable to the award, whichever amount is less. Presidential awards of \$20,000 for cost savings disclosures are also allowed, but are limited to 50 in a fiscal year.

Discussion

The federal awards program has recognized many outstanding federal employees by granting monetary and non-monetary awards. Each year, OPM publishes an awards brochure providing statistics on the distribution of the awards, as well as their scope and extent.

Over the years, this program, when compared with awards programs in the private sector, has generally been found to be inadequate. Although legislation has been introduced from time to time to expand the scope of the federal awards program, it actually has changed very little.

Probably the greatest criticisms have been that the amounts of the monetary awards are too small; too few awards are given; and they are too concentrated in certain agencies — notably the defense establishment. Cost-savings awards, for instance, are said to be so small in proportion to cost savings generated for agencies that they are minuscule vis-à-vis those considered appropriate in the private sector. The SES rank awards had remained for 20 years at the same established dollar rates until the 1998 legislation, which keyed the awards to a percentage of basic pay. The minimum award increased from \$10,000 to \$20,460 in 1999.

Certain agency abuses in the granting of awards have also occurred, with some agencies granting none, others granting too many. In addition, questions have arisen periodically about whether agencies have granted awards in lieu of pay raises, particularly during times of pay freezes or budget austerity, thereby circumventing the rationale of the awards program itself.

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L. Elaine Halchin

**(16) Personnel Research Programs and Demonstration Projects
(Chapter 47; in Part III, Subpart C — Employee Performance).**

Statutory Intent and History

The underlying statute for Chapter 47, “Personnel Research Programs and Demonstration Projects,” is the Civil Service Reform Act of 1978 (92 Stat. 1185). The law’s intent was to provide agencies with authority to experiment with different personnel management methods through demonstration projects.

Major Provisions

The Office of Personnel Management (OPM) is authorized to:

- establish and maintain (and assist in the establishment and maintenance of) research programs to study improved methods and technologies in federal personnel management;
- evaluate the research programs and establish and maintain a program to collect and disseminate to the public information relating to personnel management research and to facilitate the exchange of information among interested persons and entities; and
- provide for an evaluation of demonstration project results and their impact on improving public management.

Prior to OPM’s establishment of a personnel management experiment, a project plan must be developed. Contained within this plan are the project’s purpose, the types and numbers of employees to be covered, methodology, duration, training program, anticipated costs, and the evaluation methodology and criteria. Aspects of the project which lack specific authority and current laws, rules, or regulations which must be waived in order for the project to be conducted must be specifically described in the plan as well. Once the demonstration project plan is finalized by OPM, it is published in the *Federal Register* and is the subject of a public hearing. Employees likely to be affected by the experiment, and both the Senate and the House of Representatives, are notified about the proposed project 180 days in advance of its implementation date. Each agency involved must approve the final version of the plan which must also be submitted by OPM to both houses of Congress at least 90 days in advance of the project’s effective date.

By statute, the number of active demonstration projects that can be operating simultaneously is limited to 10, and the total number of employees covered is capped at 50,000. An individual demonstration project cannot cover more than 5,000 workers. Each demonstration project runs for five years and terminates before the end of this period. A project may, however, continue beyond this date to the extent necessary to validate the project results.

If OPM or the agency determine that a project imposes substantial hardship on, or is not in the best interests of, the public, federal government, employees, or eligibles, either or both may terminate it.

OPM's annual report to Congress includes a summary of research programs and demonstration projects conducted during the year, the effect of the programs and projects on improving public management and increasing government efficiency, and recommendations of policies and procedures which will improve management and efficiency.

Discussion

In the 104th Congress, H.R. 3841 sought to amend Chapter 47 to make several changes: coverage of a government corporation under a demonstration project; OPM development or approval of a demonstration project plan; solicitation of comments on the project plan, 30-days' notice to affected employees; projects lasting five years; project extensions for up to two years, up to 15 projects; up to five projects covering 5,000 or more individuals, including collective bargaining unit employees in a project, evaluation of the projects, terminating a project, and obtaining congressional approval for making a project permanent. Another bill, H.R. 3483, was similar to H.R. 3841, but would have deleted the requirement for a public hearing, provided 150 days' notice, and included expedited congressional procedures for making a project permanent. H.R. 3841 passed the House of Representatives and H.R. 3483 was referred to committee, but no further action occurred on either bill.

Among the comments on the demonstration project proposals expressed during House hearings were the following views:

- demonstrations projects should help determine whether one system should apply to all employees or each agency should have a system tailored to its needs;
- the number of individuals covered by a demonstration project and the number of demonstration projects should be limited, because they place some federal employees in the precarious position of being test subjects for untried personnel practices;
- consultations should include both managers and supervisors; and
- public hearings on proposed demonstration projects, independent evaluations of demonstration projects and their impact on public management, and OPM annual reports on research and demonstration projects and their effect on improving public management and increasing government effectiveness should be continued.

Discussions about the issue continued in the 105th Congress. Draft legislation, prepared but not introduced by the House Civil Service Subcommittee chair, Representative Mica, would have amended the demonstration project authority to increase the number of demonstration projects authorized at any time from 10 to 15, and to eliminate the restriction of 5,000 employees per demonstration. Additionally, bargaining over wages and benefits would have been prohibited, and "impact and implementation" bargaining would have been limited. During a June 1998 hearing on the draft bill, OPM testified in favor of making demonstration projects permanent

after testing and evaluation. (OPM's 1998 and 1999 human resources management initiatives proposed that it be granted this authority.) Two federal employee unions opposed limiting the subjects that could be negotiated between labor and management. The Senior Executives Association supported such bargaining limits and favored limiting to 25,000 the number of employees in an agency who could participate in a demonstration project. The General Accounting Office noted that use of the demonstration project authority has been limited.

Vice President Gore, in an address before a January 1999 international conference on reinventing government, said that the Administration would begin drafting civil service legislation that would establish a set of standards for flexibility in pay, hiring, and retention which each agency could use to create agency-specific systems. Labor and management would mutually agree upon any plan before its implementation. A legislative proposal was not submitted to the 106th Congress.

In the 108th Congress, S. 129, the Federal Workforce Flexibility Act of 2003, as introduced, included amendments to several major features of current law on demonstration projects. The requirements that a public hearing be conducted, that a demonstration project be limited to 5,000 employees, that the number of projects in effect at any one time be limited to 10, and that Congress receive a report on a project's final plan 90 days before a project's effective date would have been removed. The time period required for advance notification of affected employees would have been shortened, and the requirement for advance notification of Congress would have been removed. The provisions were removed from S. 129 during markup by the Senate Committee on Governmental Affairs. (Similar provisions were included in S. 2651 introduced in the 107th Congress.)

In the 108th Congress as well, H.R. 1085, the NASA Flexibility Act of 2003, would amend current law to allow a demonstration project at NASA to cover 8,000 employees rather than 5,000 employees.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 47 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Three demonstration projects have been made permanent, and four have been completed. One at the Department of Commerce, testing pay-for-performance using broad pay bands, was implemented in March 1998 and modified in September 1999. Another one, covering the civilian acquisition workforce at the Department of Defense and testing streamlined hiring processes and broad pay bands, among other features, had a phased implementation which was completed in October 1999. Demonstration projects are in progress at eight DOD laboratories. Congress authorized a demonstration project for the Internal Revenue Service in the Internal Revenue Service Restructuring and Reform Act of 1998 (112 Stat. 715).

In a 2001 report on lessons learned from the demonstration projects, OPM determined, among other findings, that successfully tested alternative systems and flexibilities should be able to be converted to permanent programs without separate legislation; that agencies need to have an executive champion who will promote, defend, and support an alternative system; that if alternative systems are extended government-wide, there should be flexibility to customize programs; and that the effectiveness of alternative systems needs to be continuously evaluated.

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Barbara L. Schwemle

(17) Agency Personnel Demonstration Project (Chapter 48; in Part III, Subpart C — Employee Performance).

Statutory Intent and History

The Investor and Capital Markets Fee Relief Act (P.L. 107-123; January 16, 2002; 115 Stat. 2390) included “pay parity” provisions that allowed the Securities and Exchange Commission (SEC) to raise the salaries of certain employees to levels comparable to those of federal bank examiners, whose pay ranges from \$180,000 to \$250,000, depending on the agency. These provisions appear in Section 8 of the legislation, which created a new Chapter 48 in Subpart C of Part III of Title 5, *United States Code*.

Congress’s intent was to address the SEC’s difficulty in attracting qualified employees and unusually high staff turnover. The basic problem was that the skills required by the SEC — mastery of securities law and regulation, or detailed knowledge of financial markets — are in high demand on Wall Street, where some of the highest salaries in the world are offered.

The Office of Personnel Management (OPM) opposed the pay parity provisions because of concerns about the fragmentation of personnel systems and adverse effects on the ability of federal employees to move from one agency to another. In a May 15, 2001 letter to Chairman Dan Burton of the House Government Reform Committee, OPM noted that it had approved special pay rates for SEC lawyers, accountants, and examiners in March 2001. The letter recommended that the pay parity provisions not be enacted until the effectiveness of these special pay rates could be assessed, and also called for more study of the SEC pay situation. Chairman Burton also stated that the SEC pay raises should not be enacted without a broad review of the effects on the civil service system.

Estimates of the cost of granting pay parity raises to SEC employees were in the range of \$60-\$80 million. The Senate version of the FY2002 Commerce-State-Justice appropriations legislation provided \$60 million for this purpose, but this provision was not adopted in conference. (The SEC’s FY2002 budget was set at \$437.9 million.)

The Administration’s FY2003 budget requested \$466.9 million for the SEC, still not enough to fund pay parity fully. In the wake of the Enron scandal, Congress passed the Sarbanes-Oxley accounting reform legislation (P.L. 107-204; 116 Stat. 745), which included a provision authorizing appropriations of \$775 million for the SEC in FY2003. The FY2003 appropriation was finally set at \$716.3 million. For FY2004, the conference report provides \$811.5 million for the SEC.

Major Provisions

Chapter 48 authorizes the SEC to appoint and fix the compensation of officers, attorneys, economists, examiners, and other employees “as may be necessary” for carrying out its functions. The SEC may set and adjust basic rates of pay for all employees without regard to the provisions of Chapter 51 or Subchapter III of Chapter 53 of Title 5, *United States Code*. The SEC may provide additional

compensation or benefits to employees if the same types of compensation or benefits are provided by federal bank regulators (agencies referred to under Section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. § 1833 b)). In setting the total amount of compensation for these employees, the SEC is required to consult with the banking agencies and to maintain comparability of pay and benefits.

The SEC is also directed to implement the pay parity provisions in consultation with OPM and in a manner consistent with merit system principles.

Discussion

After Enron and the succeeding wave of corporate accounting scandals, and the revelations of abuses by stock analysts and others in the securities industry, there was little controversy about the need to increase the size and resources of the SEC. In budget terms, the cost of pay parity was rather small compared to the overall increases in SEC appropriations that were enacted post-Enron. On the other side of the issue, arguments in favor of a uniform civil service pay system remained, as did uneasiness about rank-and-file SEC staffers earning more than the President or Vice President. However, with the scandals still fixed in recent memory (and with new investigations, such as those involving mutual funds, continuing to develop), there has been no move to reverse the SEC's pay parity authority. There has been some interest in extending the pay parity provisions to the Commodity Futures Trading Commission (CFTC), which regulates the futures exchanges, but no authorizing legislation has yet advanced in Congress.

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Mark Jickling (SEC-related history)
Clinton T. Brass (personnel provisions)

(18) Classification (Chapter 51; in Part III, Subpart D — Pay and Allowances).***Statutory Intent and History***

The current system for classifying and grading most positions in the federal civil service was established under the Classification Act of 1923 (42 Stat. 1488). This statute was the initial systematic attempt to achieve a uniform alignment of jobs and salaries among various federal departments and agencies. The act established the following principles:

- positions covered by the act were to be classified and graded according to their duties and responsibilities;
- the same pay scale was to apply to all positions falling into the same class and grade, regardless of agency;
- the different pay scales and the various classes and grades were to be logically associated so that pay was properly related to work; and
- one agency would be responsible for equalizing and coordinating the classification and grading of positions for all agencies.

The Classification Act of 1949 (63 Stat. 954) maintained the principles set out in 1923, adding that there should be equal pay for equal work, and that the positions be grouped, or classified, in such a way that the position classification system could be used in all phases of personnel administration.

The Internal Revenue Service Restructuring and Reform Act of 1998 (112 Stat. 711), the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229), and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) allow the Internal Revenue Service (IRS), Department of Homeland Security (DHS), and Department of Defense (DOD) to establish classification systems independent of Chapter 51. (See the discussions of the 5 U.S.C. Chapter 95, Chapter 97, and Chapter 99 provisions, respectively, in this compendium.)

Major Provisions

Four services had been established in 1923: Professional and Scientific; Clerical, Administrative, and Fiscal; Subprofessional; and Crafts, Protective, and Custodial. Under the 1949 act, the newly established General Schedule comprised positions classified under the first three of these services. No similar schedule was established for the fourth service. The 1949 act also added the GS-16, -17, and -18 grades, which became known as the “supergrades” and were later the foundation for the Senior Executive Service under provisions of the Civil Service Reform Act of 1978 (P.L. 95-454; 92 Stat. 1111). These grades were abolished by the Federal Employees Pay Comparability Act of 1990 (FEPCA; P.L. 101-509; 104 Stat. 1427, at 1443).

Discussion

Government-wide classification of positions is an issue that has generated substantial controversy over the course of the last several years. Critics point out the problems of managing an enormous system which is both rigid and cumbersome. On the other hand, if the system is administered consistently, the uniformity of position classification, occupational definition, and grading provide a framework within which staff and positions can transfer from one agency to another. The controversy led to the enactment of statutes allowing the Department of Homeland Security, Department of Defense, and Internal Revenue Service to design classification systems outside of Chapter 51, potentially affecting approximately 30% of the federal civilian workforce.

Even before the Office of Personnel Management (OPM) was dramatically downsized in 1994, there was an effort to vest the responsibility for position classification in the agencies. Among the favorable arguments was that each agency has its own culture, and that human resources managers should be allowed to classify and grade positions according to these cultures. The National Academy of Public Administration was a proponent of this philosophy. Soon after the Academy issued a report to this effect, the Director of OPM held extensive discussions with several leading personnel administrators in federal agencies. It was determined that while the classification system has substantial problems, they are not so dire that a complete overhaul should be undertaken.

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- U.S. Congressional Budget Office. *Changing the Classification of Federal White-Collar Jobs: Potential Management and Budgetary Impacts*. CBO Papers, July 1991. Washington: CBO, 1991.
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Mitchel A. Sollenberger

(19) Pay Rates and Systems (Chapter 53; in Part III, Subpart D — Pay and Allowances).

Chapter 53, “Pay Rates and Systems,” provides the statutory basis for several major pay systems within the federal service. This profile of Chapter 53 departs from the compendium’s usual format for profiling Title 5 chapters. Rather than present each system’s statutory intent, summary of major provisions, and discussion under separate headings, this profile combines these topics under one heading for each pay system. Among the pay systems discussed are the pay comparability system, the General Schedule, the Senior Executive Service, the Executive Schedule, and the prevailing rate (blue collar) system. Systems covered in other titles of the *United States Code*, but related to the General Schedule, such as those in the foreign service and veterans hospitals, are not discussed.

In addition, the Internal Revenue Service Restructuring and Reform Act of 1998 (112 Stat. 711), the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229), and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) allow the Internal Revenue Service (IRS), Department of Homeland Security (DHS), and Department of Defense (DOD), respectively, to establish classification and pay systems independent of Chapter 53. (See the discussions of the 5 U.S.C. Chapter 95, Chapter 97, and Chapter 99 provisions, respectively, in this compendium.) The DHS and DOD systems are currently being designed, and it remains to be seen how the pay comparability system and the prevailing rate system will be changed for these agencies.

Pay Comparability System (5 U.S.C. §§ 5301-5307). Prior to 1962, the system of classification of jobs followed the principle of equal pay for equal work within a pay system, but there was no method of equating pay for equal work among the various systems. P.L. 87-793 (76 Stat. 832, at 841), provided that federal salary schedules be based on equal pay for substantially equal work, and on comparability of federal salary rates with those in private industry for the same levels of work. While the comparability principle was in place, Congress continued to legislate the rates of adjustment, perpetuating a salary lag between federal and private sector pay. The Pay Comparability Act of 1970 (84 Stat. 1946) was considered to be the most important pay legislation subsequent to the 1962 statute. The act established a mechanism under which the Bureau of Labor Statistics conducted a survey of private sector salaries, and the President, his agent, and two advisory groups determined the appropriate rate of adjustment for the General Schedule. This rate of adjustment went into effect automatically unless Congress acted to disapprove it, or the President determined that another rate or schedule of implementation was appropriate. The system established under this statute was utilized for almost 20 years. By the time it was amended, the gap between private and federal white collar salaries had widened to over 30%. During the conference on the Treasury, Postal Service, and General Government Appropriations Act for FY1991, a new pay setting mechanism was crafted. The Federal Employees Pay Comparability Act (FEPCA; 104 Stat. 1429) currently governs the pay policy for most of the federal civilian workforce.

FEPCA continued, with some changes, the mechanism under which rates are to be adjusted for the General Schedule and related systems. The key difference is that the rate of adjustment is to be equal to one-half percent less than the rate of change

in the private sector wages and salaries element of the Employment Cost Index for a given period of time. The second principal innovation under FEPCA was the establishment of a system of locality-based payments. Recognizing that the incomparabilities in salaries ranged from a large gap between private and federal salaries in some localities to no gap at all in other localities, Congress determined that there would be an identification of localities and that the rate of adjustment (in addition to the annual national General Schedule adjustment) would be based on salary surveys conducted within these localities. The plan was to bring federal salaries across the country to within 5% of the private sector salaries for comparable occupations in each locality at the end of 10 years.

Because of a wide range of circumstances, the pay setting provisions of FEPCA have never been fully implemented. The mechanisms have been utilized, but policymakers in the executive and legislative branches have determined that the rates of adjustment should be reduced. The result is that there has not been a systematic reduction in the gap between federal and private sector salaries. In a tight job market, and while the government is downsizing, this gap may not have a negative effect on the potential for the government to recruit and retain the personnel needed to reach mission goals. On the other hand, selectively within certain occupations, a hiring crisis could result. The locality pay provisions in FEPCA are written in a manner which requires that if, in any given year, no locality-based payments were allowed, the salary of the individual would fall back to the base rate of the General Schedule. If Congress or the President determined that a locality-based payment were not appropriate, it is assumed that a saved-pay provision would be enacted to protect the current payable rates.

General Schedule (5 U.S.C. §§ 5331-5338). These sections provide the housekeeping elements for the General Schedule. The language relates to defining the scope of positions and agencies to which the pay schedule applies, establishes Office of Personnel Management (OPM) authority for setting minimum pay rates for new appointees and rates of basic pay, and sets out the rules for periodic and special within-grade (or “step”) increases. Although these provisions are not controversial in and of themselves, the within-grade provisions could be affected by various proposals to change the pay-for-performance policies within the human resources management arena.

Senior Executive Service (5 U.S.C. §§ 5381-5385). The structure and appointment policies for the Senior Executive Service (SES), established by the Civil Service Reform Act of 1978, are codified in Chapter 33, Subchapter VIII, of Title 5. The National Defense Authorization Act for FY2004 significantly changed the compensation system for the SES. The SES remains essentially a rank-in-person compensation system, with the general guidelines set forth in the law. SES base compensation ranges from 120% of the minimum pay of a GS-15 to Level II of the Executive Schedule. There is also a system of monetary performance awards which may be accorded to members of the SES. OPM will promulgate regulations under which the range of rates of pay and a rigorous performance management system will be established. Under the new statute, locality pay is no longer available to the SES.

Executive Schedule (5 U.S.C. §§ 5312-5318). The Executive Schedule is a series of five pay levels for officers of the executive branch, most of whom are

political appointees subject to the confirmation process. Level I salaries are primarily for the heads of departments, and Level V salaries apply, generally, to positions such as general counsels and assistant administrators in independent agencies. Generally, when Congress establishes an agency or realigns agency responsibilities, these sections of Title 5 will be amended to reflect the change in salary level for specific positions.

The salary levels are applied to several positions that do not appear on the Executive Schedule. For example, several legislative branch agency officials, such as the Comptroller General and the Librarian of Congress, are paid at rates equal to specified levels of the Executive Schedule.

The Executive Schedule was established under the provisions of the Government Employees Salary Reform Act of 1964 (P.L. 88-426; 78 Stat. 400). Previously, Congress had been setting salaries for positions as they were created. The statute brought salaries into alignment for the various officers of the executive branch. Congress continued to legislate salary increases for these positions. From 1975 until 1990, salaries were adjusted under the Executive Cost of Living Adjustment Act of 1975 (89 Stat. 419). Salaries for Members of Congress and judges were also adjusted under the same provisions. Although the salaries were to be adjusted at the same rate and time as the General Schedule, Congress usually voted to deny the increases. Under the Ethics Reform Act of 1989 (103 Stat. 1716), as amended, there is to be an annual adjustment based on the increase in private sector wages and salaries, minus one-half percent. The adjustment cannot be more than 5%, and it cannot exceed the rate of adjustment for the base pay of General Schedule salaries. Since 1993, there have been five adjustments, with 2.2% scheduled as an adjustment in January 2004.

Under statute (81 Stat. 613, at 642, as amended by 78 Stat. 400), there is to be a quadrennial review of federal officials' salaries, with subsequent recommendations by the President to Congress. However, the Citizens' Commission on Public Service and Compensation has not been activated since the most recent review in FY1988.

Prevailing Rate System (5 U.S.C. §§ 5341-5349). Since the late 19th century, skilled (blue-collar) federal employees have been paid on the basis of the prevailing wage rates for similar occupations in specific geographic areas. While there existed a general statutory authority for the Civil Service Commission (now Office of Personnel Management) to set blue-collar salaries, there was no specific statutory language covering wage administration. The Federal Wage System was established in 1972 (86 Stat. 564).

A wage survey is conducted in each of the 135 wage areas in the United States by the agency in the area which is the lead federal blue-collar employer, usually the Department of Defense. Adjustments in wage rates are staggered throughout the year, depending on the timing of the surveys. Historically, it was administratively possible to maintain consistent and equitable salary relationships between the federal and private sector skilled labor forces.

However, since 1978, Congress has limited federal blue-collar salaries to a maximum adjustment rate equal to the General Schedule rate of adjustment. The

result is that, while federal wages in some areas have kept pace with those in the private sector, federal wages in high cost areas have not done so. One of the reasons Congress found it necessary to place caps on these wages is that many of the supervisors are General Schedule employees. Allowing blue-collar wages to advance while white-collar salaries were limited would result in line employees being paid more than supervisory staff. Most interested parties have long acknowledged that there are significant flaws in the Federal Wage System, but remedial proposals have not been forthcoming.

Miscellaneous. The other sections of this chapter of Title 5 apply to grade retention policy (generally under a reduction in force), pay policy related to student employees, and special occupational pay systems established by OPM. The 1990 FEPCA statute also established pay systems for administrative law judges, contract appeals board members, and senior-level positions (those graded above GS-15, but not in the Senior Executive Service). The act also provided a means of identifying critical positions and of setting salary levels for these positions. Under the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229), the limitation of total aggregate annual compensation was increased from Level I of the Executive Schedule to the salary of the Vice President. Agencies may apply these provisions only after OPM has certified that the agency has an appropriate appraisal system in place.

Selected Source Reading

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Mitchel A. Sollenberger

(20) Human Capital Performance Fund (Chapter 54; in Part III, Subpart D — Pay and Allowances).***Statutory Intent and History***

Title XI, Subtitle C of the National Defense Authorization Act for Fiscal Year 2004 (117 Stat. 1641; P.L. 108-136, Section 1129) amends Part III, Subpart D of Title 5, *United States Code* by adding a new Chapter 54 entitled “Human Capital Performance Fund.” (The provisions were also included in H.R. 1836, 108th Congress, as reported.) The legislation states that the purpose of the provisions is to promote better performance in the federal government. The fund is to reward the highest performing and most valuable employees in an agency and offer federal managers a new tool for recognizing employee performance that is critical to an agency’s achieving its mission. A \$500 million Human Capital Performance Fund was proposed by President George W. Bush in his FY2004 budget to create and reinforce the value of pay systems based on performance. The Consolidated Appropriations Act, 2004 (P.L. 108-199; 118 Stat. 3, at 339), provided a \$1 million appropriation for the fund, with several provisos.

Major Provisions

Organizations eligible for consideration to participate in the fund are executive departments, government corporations, and independent agencies. The General Accounting Office is not covered by the chapter. The fund may be used to reward General Schedule, Foreign Service, and Veterans Health Administration employees; prevailing rate employees; and employees included by OPM following review of plans submitted by agencies seeking to participate in the fund. However, Executive Schedule (or comparable rate) employees; SES members; administrative law judges; contract appeals board members; administrative appeals judges; and individuals in positions which are excepted from the competitive service because of their confidential, policy-determining, policy-making, or policy-advocating character are not eligible to receive payments from the fund.

OPM will administer the fund, which is authorized a \$500,000,000 appropriation for FY2004. Such sums as may be necessary to carry out the provision shall be authorized for each subsequent fiscal year. In the first year of implementation, \$50,000,000 (up to 10% of the appropriation) is authorized to be available to participating agencies to train supervisors, managers, and other individuals involved in the appraisal process on using performance management systems to make meaningful distinctions in employee performance and on using the fund.

Agencies seeking to participate in the fund must submit plans to OPM for approval. The plans must incorporate the following elements:

- adherence to merit principles under 5 U.S.C. § 2301;
- a fair, credible, and transparent performance appraisal system;
- a link between the pay-for-performance system, the employee performance appraisal system, and the agency’s strategic plan;

- a means for ensuring employee involvement in the design and implementation of the pay-for-performance system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the pay-for-performance system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

An agency will receive an allocation of monies from the fund once OPM, in consultation with the Chief Human Capital Officers (CHCO) Council, reviews and approves its plan. (The CHCO Council will include an evaluation of the formulation and implementation of agency performance management systems in its annual report to Congress.) Ninety percent of the remaining amount appropriated to the fund (\$405,000,000, monies not yet appropriated) may be allocated to the agencies. An agency's prorated distribution may not exceed its prorated share of executive branch payroll. (Agencies must provide OPM with necessary payroll information.) If OPM were not to allocate an agency's full prorated share, the remaining amount would be available for distribution to other agencies.

Ten percent of the remaining amount appropriated to the fund (\$45,000,000, monies not yet appropriated), as well as the amount of an agency's prorated share not distributed because of the agency's failure to submit a satisfactory plan, will be allocated among agencies with exceptionally high-quality plans. Such agencies will be eligible to receive a distribution in addition to their full prorated distribution.

Agencies, in accordance with their approved plans, may make human capital performance payments to employees based on exceptional performance contributing to the achievement of the agency mission. In any year, the number of employees in an agency receiving payments may not be more than the number equal to 15% of the agency's average total civilian full-time and part-time permanent employment for the previous fiscal year. A payment may not exceed 10% of the employee's basic pay rate. The employee's aggregate pay (basic, locality pay, human capital performance pay) may not exceed Executive Level IV (\$134,000 in 2003).

A human capital performance payment is in addition to annual pay adjustments and locality-based comparability payments. Such payments are considered basic pay for purposes of Civil Service Retirement System, Federal Employees' Retirement System, life insurance, and for such other purposes (other than adverse actions) which OPM determines by regulation. Information on payments made and the use of monies from the fund must be provided by the agencies to OPM as specified.

Initially, agencies shall use monies from the fund to make the human capital performance payments. In subsequent years, continued financing of previously

awarded payments shall be derived from other agency funds available for salaries and expenses. Under current law at 5 U.S.C. § 5335, agencies pay periodic within-grade increases to employees performing at an acceptable level of competence. Presumably, funds currently used to pay within-grade increases could be used to make human capital performance payments instead. Monies from the fund may not be used for new positions, for other performance-related payments, or for recruitment or retention incentives.

OPM shall issue regulations to implement the new Chapter 54 provisions. Those regulations must include criteria governing:

- an agency's plan;
- allocation of monies from the fund to the agencies;
- the nature, extent, duration, and adjustment of, and approval processes for, payments to employees;
- the relationship of agency performance management systems to the Human Capital Performance Fund;
- training of supervisors, managers, and other individuals involved in the process of making performance distinctions; and
- the circumstances under which funds could be allocated by OPM to an agency in amounts below or in excess of the agency's pro rata share.

Discussion

The effectiveness of agency performance management systems and whether the performance ratings would be determined according to preconceived ideas of how the ratings would be arrayed across the particular rating categories are among the concerns expressed by federal employees and their unions and representatives about the fund. Other concerns are that the fund could take monies away from the already reduced locality-based comparability payments and that the performance award amounts would be so small as not to serve as an incentive (this may be of particular concern given the FY2004 appropriation of \$1 million).

Selected Source Reading

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U.S. Congress. Conference Committees, 2003. *National Defense Authorization Act for Fiscal Year 2004. Conference Report to Accompany H.R. 1588.* H.Rept. 108-354. 108th Congress, 1st session. Washington: GPO, 2003, pp. 339, 1026.

Barbara L. Schwemle

(21) Pay Administration (Chapter 55; in Part III, Subpart D — Pay and Allowances).***Statutory Intent and History***

For the most part, the pay administration provisions in Title 5 reflect practices put in place in the early to mid-20th century through various statutes. The practices authorized in these sections, such as the bi-weekly pay period, enable the federal government to administer the various pay systems. The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 55 provisions cannot be waived, modified, or otherwise affected by the new HRM systems, except that, for the Department of Defense, Subchapter V of the chapter, “Premium Pay,” may be waived, modified, or otherwise affected by the new HRM system, apart from Section 5545b (“Pay for firefighters”).

Major Provisions

Many of the sections in this chapter focus on the managerial details of pay administration. These include the identification of bi-weekly and monthly pay periods, the various bases for withholding pay, payment for accumulated and accrued leave, payments to missing employees, and settlement of accounts. Also included in this chapter are premium pay provisions and the policy for dual pay and dual employment. Statutes enacted to provide civilian agencies with buyout authority are found as notes to 5 U.S.C. § 5597, “Separation Pay.”

Discussion

Chapter 55 comprises provisions that define the “bread and butter” administrative processes through which federal employees are compensated. Recently the overtime cap was raised and flexible spending accounts were established. Dual pay and dual employment provisions set out the rules under which a retired member of the armed forces working as a federal civilian employee receives reduced retirement pay.

Overtime Cap. The National Defense Authorization Act of FY2004 amended 5 U.S.C. § 5542 to provide that an employee whose basic pay rate exceeds GS-10, Step 1, will receive overtime at a rate which is the greater of one-and-one-half times the hourly rate for GS-10, Step 1, or his or her hourly rate of basic pay. Overtime compensation has been limited to GS-10, Step 1, to the disadvantage of personnel whose hourly rate of basic pay exceeded this limit.

Pre-tax Employee Benefits. The federal government, like many other public and private employers, offers its employees a choice of pre-tax benefits through a cafeteria plan (defined in 26 U.S.C. § 125). To provide pre-tax benefits, a cafeteria plan must offer employees the choice of cash or one or more qualified benefits, and cannot discriminate among employees on the basis of compensation.

The benefits are pre-tax in that they reduce income for calculation of income and employment taxes.

Although there is no specific authority for federal agencies to offer a flexible benefits plan to employees, under 5 U.S.C. § 5525, agency heads may make allotments from employee pay as they think appropriate. The Office of Personnel Management operates the federal program, known as FedFlex, and currently offers employees³⁸⁴ a choice of one (or more) of three pre-tax benefits: payment of health insurance premiums (premium conversion); a health care flexible spending arrangement; and a dependent care flexible spending arrangement.

Federal retirees are not eligible to participate in the flexible benefit program or to have their health insurance premiums paid on a pre-tax basis. Legislation has been introduced in each session of Congress, since premium conversion began, to permit federal retirees to pay health insurance premiums on a pre-tax basis.

Premium Conversion. Beginning in October 2000, federal employees automatically have health insurance premiums (paid by the employees) taken from their income on a pre-tax basis. That is, for calculation of income and employment taxes, an employee's income is reduced by the value of the insurance premiums. This has been called "premium conversion" because the health insurance premiums were converted from a post-tax to a pre-tax basis, saving the employee the income and employment taxes that previously would have been imposed on the value of the health insurance premium. Employees do have the option of electing out of the premium conversion.

Flexible Spending Arrangements. Beginning in 2003, federal employees are able to set aside funds for health and dependent care expenses on a pre-tax basis through a program of flexible spending arrangements known as FSAFEDS. A flexible spending arrangement for health (or dependent) care reimburses an employee for eligible expenses not covered by health insurance (or for dependent care expenses). Dependent care expenses reimbursed through a flexible spending arrangement are not eligible expenses for the dependent care tax credit, and for tax purposes there is a maximum of \$5,000 in dependent care expenses that can be paid through an employer-provided reimbursement arrangement. The limitations on the amount of income an employee can set aside in a health care reimbursement account are determined by the employer. For federal employees, in 2004, the maximum that can be set aside in a health reimbursement account is \$4,000. P.L. 108-126 provided that any administrative fees associated with the flexible spending arrangements are paid by the federal agency and not the employee. In addition, any unused FSA funds revert to the plan administrator and not to the employee.

³⁸⁴ Agencies that are not part of the executive branch may choose to offer the FedFlex program. Therefore, not all federal employees are eligible for participation in FedFlex, and some employees are not eligible for all the FedFlex benefits.

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- U.S. Office of Personnel Management, The Flexible Spending Account Program Overview 2004, OPM-FSA-OVTF-10-03, available at the FSAFEDS administrators website: [<https://www.fsafeds.com/forms/OPM-FSA-OVTF-10-031.pdf>], visited January 6, 2004.

Mitchel A. Sollenberger (general pay administration)
Christine Scott (pre-tax benefits)

(22) Travel, Transportation, and Subsistence (Chapter 57; in Part III, Subpart D — Pay and Allowances).***Statutory Intent and History***

Chapter 57, “Travel, Transportation, and Subsistence,” provides for the payment of various travel, transportation, and subsistence expenses, including those for new and transferring employees; overseas travel; and transportation of family, household goods, personal effects, and privately owned vehicles. Reiterating policy set by the Travel Expense Act of 1949 (P.L. 81- 92, 81st Congress; 63 Stat. 166) and codified in 1966 (P.L. 89-554; 80 Stat. 378), only actual and necessary travel expenses are allowed. The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 57 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Provisions of Chapter 57 provide details regarding allowances permitted for travel, transportation, and subsistence expenses. Typical of the provisions are those governing the transportation of an employee’s immediate family and household goods and personal effects when the employee is transferred to a post to which the family is not permitted to accompany him or her for military or other reasons. Per diem allowances, travel expenses, and storage allotments are authorized in this chapter as well.

Other policies established by Chapter 57 include provision for the traveling expenses of the President and mileage allowances for Members of Congress. Relocation allowances for employees, including the conditions to be met by agencies entering into contracts with private firms in support of these allowances, and payment of expenses to obtain professional credentials are included.

Discussion

Most of Chapter 57 has not been amended for more than a decade. The Joint Financial Management Improvement Project (JFMIP), in a 1995 report, made a number of recommendations on travel management. One such recommendation was that a government-issued charge card should be used for all travel-related expenses. Cost savings of \$62 million were anticipated. P.L. 105-264, enacted on October 19, 1998, address this recommendation by requiring the use of the federal travel charge card for payment of all official government travel expenses to the maximum extent practicable. Other provisions of the law include authorizing the government to collect financial information needed to verify that charges on the card are business related, and providing that employees whose charge payments are overdue will have the delinquent amounts deducted from their paychecks. Concerns about fraud, waste, and abuse in the use of travel cards by federal employees prompted Congress to act. Two statutes that apply only to Department of Defense (DOD) personnel include

provisions dealing with travel card management. Section 1008 of P.L. 107-314³⁸⁵ amends 10 U.S.C. § 2784 by inserting a section on the disbursement of travel allowances and offsets for delinquent travel card charges. Provisions in Section 1009 of P.L. 108-136 also address the disbursement of travel allowances, determinations of creditworthiness, and penalties for misusing travel cards.

The JFMIP also recommended improvements in automating and auditing travel data. P.L. 105-264 establishes requirements for prepayment audits of federal agency transportation expenses to verify that charges are correct. The General Services Administration (GSA) estimates that this will save \$50 million per year. Efforts to further automate and audit travel will likely continue.

With the passage of P.L. 107-107,³⁸⁶ the National Defense Authorization Act for FY2002, federal employees who receive promotional items, such as frequent flier miles, as a result of official government travel may keep and use the promotional items. Section 1116 of P.L. 107-107 applies to any items received before, on, or after the date of enactment (December 28, 2001).

Through the use of contractors, GSA is establishing an online travel system, the eTravel Service (eTS). The Web-based system will include all aspects of travel, including authorizing travel, making reservations, filing travel claims, and reconciling vouchers. A proposed rule requires federal agencies to begin implementing eTS no later than December 31, 2004. GSA's system is separate from DOD's online travel management system, the Defense Travel System (DTS), which began operating in 2003.

GSA annually adjusts per diem rates for payment of lodging and meals during official government travel within the continental United States. Effective October 1, 2000, changes in the per diem rates occur at the start of the fiscal year. Effective January 1, 1999, federal employees are reimbursed for all local taxes on hotel room charges (in the past, taxes were not always reimbursed). Incidental expenses for laundry and dry cleaning will not be reimbursed for short-term travel of less than four days.

Following the Internal Revenue Service's increase in its standard mileage reimbursement rate, from 36 cents to 37.5 cents per mile for 2004, the Administrator of General Services, who sets the reimbursement rate for all federal employees, also increased the GSA rate to 37.5 cents per mile.³⁸⁷

Selected Source Reading

U.S. Congress. House. Committee on Government Reform and Oversight.
Subcommittee on Government Management, Information and, Technology.

³⁸⁵ 116 Stat. 2458, at 2634.

³⁸⁶ 5 U.S.C. § 5702 note; 115 Stat. 1012, at 1241.

³⁸⁷ The mileage reimbursement rate established by the General Services Administration cannot exceed the rate established by the Internal Revenue Service (5 U.S.C. § 5704).

H.R. 3637, Travel Reform and Savings Act of 1996. Hearing on H.R. 3637. 104th Congress, 2nd session, July 9, 1996. Washington: GPO, 1997.

U.S. Congress. Senate. Committee on Governmental Affairs. *Travel and Transportation Reform Act of 1997*. 105th Congress, 2nd session. S.Rept. 105-295. Washington: GPO, 1998.

U.S. General Services Administration. "Federal Travel Regulation: eTravel Service (eTS)." *Federal Register*, vol. 68, no. 125 (June 30, 2003), pp. 38661-38665.

U.S. Joint Financial Management Improvement Program, *Improving Travel Management Governmentwide*. Washington: GPO, 1995.

L. Elaine Halchin

(23) Allowances (Chapter 59; in Part III, Subpart D — Pay and Allowances).***Statutory Intent and History***

This chapter, with a few subsequent modifications, derives from the statute codifying Title 5 in 1966 (80 Stat. 378). It provides for payment of various allowances to cover the costs of specific expenses outside of those normally expected or to enhance recruitment and retention.

Major Provisions

General allowance provisions include those for living quarters for personnel stationed in foreign countries; differential cost-of-living allowances (COLAs) for personnel living in high-cost areas such as Alaska; “danger pay” to be given to personnel assigned to areas where war conditions or other threatening elements are present; incentive allowances for physicians; and other cost-of-living and uniform allowances.

Discussion

Non-foreign area cost-of-living allowances and physicians’ comparability allowances are frequently examined by executive branch administrators, Members of Congress, and federal employees to ensure that the intent of the authorizing statutes is carried out.

The Office of Personnel Management’s (OPM) *Special COLA Research Announcement* (see “Selected Source Reading,” below) in July 2000 provided the following information:

The Government pays nonforeign area COLAs to approximately 44,000 Federal white-collar and U.S. Postal Service employees in Alaska, Hawaii, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. COLA rates reflect differences in living costs between the allowance areas and the Washington, DC, area. OPM conducts surveys in the COLA areas and in the Washington, DC, area to determine COLA rates. The law limits COLAs to no more than 25 percent of basic pay Since 1991, OPM’s surveys conducted using the existing methodology have indicated that, using this methodology, COLA rates would have been reduced in several allowance areas. This has raised concerns relating to the COLA methodology. Since 1991, Congress has barred COLA rate reductions. The bar is in effect through December 31, 2000. Congress also required OPM to study and submit a report on the COLA program and the compensation of Federal employees in the COLA areas. Since 1996, the Government and the plaintiffs have engaged in a cooperative effort under [a memorandum of understanding]. This cooperative effort led to a proposed settlement of *Caraballo, et al. v. United States*, No. 1997-0027 (D.V.I.), a case brought in the District Court of the Virgin Islands.

The settlement, which the court approved on August 17, 2000, formed the basis for new regulations for the COLA program. OPM published proposed regulations

to significantly modify the COLA methodology consistent with the court agreement on November 9, 2001 (66 FR 56741). The final regulations were published on May 3, 2002 (67 FR 22339). Current COLA rates are: in Alaska, 25% (Anchorage, Fairbanks, Juneau, and rest of the state); in Hawaii, 25% (Honolulu), 16.5% (Hawaii County), 23.25% (Kauai County), and 23.75% (Kalawao and Maui Counties); in Guam and the Commonwealth of the Northern Mariana Islands, 25%; in Puerto Rico, 11.5%; and in the U.S. Virgin Islands, 22.5%.

Federal physicians may receive up to \$30,000 per year as a physicians' comparability allowance (PCA). The allowance had been reauthorized every three years. In the 106th Congress, the Federal Physicians Comparability Allowance Amendments of 2000 (114 Stat. 3054) permanently authorized the comparability allowance and treated it as part of basic pay for retirement purposes. In FY2000 (actual data), 47% of all eligible physicians, or 1,521 physicians, received a PCA and the average PCA paid was \$17,889. For FY2001, approximately 1630 physicians (48% of all those eligible) received a PCA.

In the 107th Congress, the National Defense Authorization Act FY2002 (115 Stat. 1238) amended current law to provide hostile fire pay of \$150 per month in certain circumstances. During the same Congress, the Foreign Relations Authorization Act FY2003 (116 Stat. 1380) amended current law with regard to the baggage allowance and to provide an allowance to Foreign Service employees who are outside their countries of employment and require medical treatment in specific circumstances.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 59 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Selected Source Reading

Federal Physicians Association. *2001 Presidential Report on the Physicians' Comparability Allowance Program*, available at [http://www.fedphy.org/pay_reports.htm], visited December 11, 2003.

U.S. Office of Personnel Management, "Nonforeign Area Cost-of-Living Allowances," *Special COLA Research Announcement*, available at [<http://www.opm.gov/oca/cola/html/cola-n.htm>], visited December 11, 2003. See also the COLA Settlement Litigation website at [<http://www.colasettlement.com/>], visited December 11, 2003.

Barbara L. Schwemle

(24) Hours of Work (Chapter 61; in Part III, Subpart E — Attendance and Leave).***Statutory Intent and History***

The 1966 Title 5 codification statute (80 Stat. 378), the Civil Service Reform Act of 1978 (92 Stat. 1111), and the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (96 Stat. 227) are the basic authorities contributing to the hours of work provisions of Chapter 61. The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 61 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

The impetus for revamping federal employee hours of work into flexible and compressed schedules stems from the reality that variations on the standard eight-hour work day can oftentimes lead to greater efficiency, productivity, and employee morale. Studies in both the federal and private sector appear to support the conclusion that alternative work-hour options benefit both employees and management.

Major Provisions

In general, the hours of work provisions of Chapter 61 establish the basic work week for federal employees, list official federal holidays, and define the availability of flexible and compressed work schedule options. Pursuant to this chapter, agency heads are responsible for establishing the basic 40-hour workweek, hours and days of duty, telecommuting policy, approval of scheduling academic programs for improving job-centered skills, and approval of premium pay provisions.

Provisions governing compensation for 11 federal holidays are set forth. Federal compensable holidays identified in the chapter include New Year's Day, the birthday of Martin Luther King Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and Inauguration Day (the last reserved for employees in Washington, DC and the immediate vicinity, and observed only quadrennially).

Flexible and compressed work schedules are defined. Consistent with certain mandatory hours of attendance, and provided that agency operations are not disrupted as a result, agencies may authorize employees to vary the length of a workweek or workday and schedule the 80 hours biweekly work requirement in less than 10 workdays, including a four-day workweek and variation in reporting and departure times. Provisions affecting compensatory time, premium pay provisions, night differential pay, and leave and retirement provisions interactive with flexible and compressed work schedules are described. Collective bargaining is authorized for determining flexible and compressed work schedules.

Federal employees may not coerce fellow employees with respect to participation or non-participation in flexible and compressed work schedules; the Office of Personnel Management (OPM) has responsibility for administering the program.

Discussion

The transformation of the federal workplace in terms of wide-ranging work schedule variation, including flexible sign-in-sign-out and compressed schedules, is a revolutionary change from the generations-old “nine to five/Monday through Friday” workweek pattern. The responsibility of the agency head for determining the efficiency of the system and managing workload accomplishment remains in place, subject to the challenges posed by flexible work schedules. Aside from a few complaints that certain core hours are sometimes inadequately covered, the system appears to work well.

Selected Source Reading

U.S. Congress. House. Committee on Post Office and Civil Service. *Federal Employees Leave Sharing Amendments Act of 1993*. Committee Rept. 103-246. 103rd Congress, 1st session. Washington: GPO, 1993.

U.S. General Accounting Office. *Alternative Work Schedules: Many Agencies Do Not Allow Employees the Full Flexibility Permitted by Law*. Washington: GPO, 1994.

Kevin R. Kosar

(25) Leave (Chapter 63; in Part III, Subpart E — Attendance and Leave).***Statutory Intent and History***

The 1966 Title 5 codification statute (80 Stat. 378) and the Civil Service Reform Act of 1978 (92 Stat. 1111) are the basic authorities underlying Chapter 63. Additional authorities contributing to its provisions include a 1968 statute authorizing federal employee leaves of absence to attend funerals of immediate relatives who died while serving as members of the armed forces in combat zones or for those employees called to duty as members of the National Guard or armed forces reserves (82 Stat. 1151, as amended by P.L. 108-136, Sections 1113 and 1114); the Treasury, Postal Service, and General Government Appropriations Act of 1995 (108 Stat. 2423); the Federal Employees Leave Sharing Act of 1988 (102 Stat. 2834); the Family and Medical Leave Act of 1993 (107 Stat 19); and provisions for leave transfers in major disasters and emergencies (111 Stat. 196). The Homeland Security Act of 2002 (116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 63 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Federal employee annual, sick, holiday, and other leave options are among the most important and expensive elements of the basic federal benefits package. Insofar as total federal compensation comparability is concerned, leave benefits, along with health and retirement, are considered to be key components in comparing federal and private sector employment.

Major Provisions

Federal employee leave benefits are defined as regular workdays, for which employees are compensated, exclusive of holidays. Provisions detail categories of leave, the leave accrual process, and federal leave bank programs.

Federal leave benefits accrue to full-time and part-time employees, and are authorized during any part of the work year, subject to approval of agency heads. Annual leave is accrued on the basis of length of service and ranges from four hours to eight hours per biweekly pay period. Applicable federal service in another agency is creditable for annual leave purposes. Accumulation of annual leave, with certain exceptions, is limited to 30 days in a calendar year. Payment for unused annual leave, upon separation from the federal service, is authorized for up to 30 days, except for members of the Senior Executive Service and Senior Foreign Service, who may accumulate and be compensated for annual leave up to 90 days.

Federal employee sick leave accrues at the rate of four hours per biweekly pay period. There is no limit on sick leave accrual and, under the Civil Service Retirement System (CSRS), but not the Federal Employees Retirement System (FERS), unused sick leave may be credited for retirement purposes upon separation

of the employee. Sick leave may be used in connection with child adoption, and up to 30 days of sick leave may be advanced in the case of serious illness. Sick leave is not charged to certain federal law enforcement officers for injury or illness resulting from performance of duty.

The Office of Personnel Management (OPM) is authorized to establish a program by which federal employees may transfer accumulated annual leave, subject to certain limitations, to other employees in cases of medical emergencies. Provisions for restoring unused transferred leave are provided. Federal employees are prohibited from exercising any coercion, intimidation, or promises in connection with receipt or donation of annual leave.

Agencies are authorized to establish their own voluntary leave banks for use by federal employees. Agencies in the excepted service may establish separate leave bank programs. An employee's accrued annual leave, up to 50% of his or her annual entitlement, may be contributed to the leave bank and made available to another employee needing leave for a medical emergency. No coerciveness may be involved in the granting or utilization of annual leave for this purpose. Leave Bank Boards review and administer the leave banks.

Discussion

Federal leave benefits — annual, sick, holiday, and other — at an estimated cost of 15% of the federal payroll, are a prime and costly part of the benefits package to federal employees. One indication of cost is that a prime inducement for entry and retention in the Senior Executive Service was the entitlement to unlimited accrual of annual leave benefits and the subsequent curtailment thereof to a maximum of 90 days. Other federal employees may accrue a maximum annual carryover of 30 days of annual leave. All unused annual leave from the current year is computed, considered compensable income, and granted to the federal employee upon separation from the federal service, either through normal retirement or other means.

Federal sick leave, accrued at the rate of 13 days per calendar year for all full-time employees, and proportionally less, according to work schedules, for part-time employees, may be accumulated without limit. Payouts for unused sick leave are not permitted.

The federal leave bank program has been a dramatic new departure in allocating additional annual leave to federal employees requiring it for medical emergencies. Pursuant to the program, federal employees may donate or borrow annual leave. An individual's donation of annual leave may not exceed 50% of his or her annual entitlement. Intra-agency, a federal employee may designate a co-worker as beneficiary of donated annual leave because of medical emergency.

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Kevin R. Kosar

(26) Labor-Management Relations (Chapter 71; in Part III, Subpart F — Labor-Management and Employee Relations).*Statutory Intent and History*

Title VII of the Civil Service Reform Act of 1978 (92 Stat. 1191; P.L. 95-454) gives federal employees the statutory right to form labor unions and bargain collectively over the terms and conditions of employment.³⁸⁸ The statute excludes specific agencies and gives the President the authority to exclude other agencies for reasons of national security.

The Civil Service Reform Act of 1883 (commonly called the Pendleton Act, after its sponsor, Senator George Pendleton) established the Civil Service Commission (CSC). The act was an attempt to reform the political patronage system. It provided for merit hiring and promotion of federal employees, but did not give federal workers the right to unionize.

After President John Kennedy issued Executive Order 10988 in January 1962, union membership among federal employees increased significantly. The order gave employees of the executive branch the right to form unions and bargain collectively. Federal employees were allowed to bargain over the conditions of employment but not over work assignments. The authority to set wages and fringe benefits remained with Congress. Agencies could require union representatives to bargain during nonwork hours. Federal workers were not allowed to strike. Collective bargaining agreements could include negotiated procedures for resolving grievances. The CSC and the Department of Labor were required to develop a code of fair labor practices. The executive order did not apply to the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), or other agencies or subagencies primarily performing investigative, intelligence, or security functions, if the head of the agency determined that union representation was not in the interests of national security.

Executive Order 11491, issued by President Richard Nixon in October 1969, replaced Executive Order 10988. President Nixon's order created a more independent administrative structure for federal labor-management relations. The Federal Labor Relations Council (FLRC) was created to administer and interpret the executive order, and the Federal Services Impasses Panel was created to resolve bargaining impasses. Members of the FLRC included the Chairman of the CSC, the Secretary of Labor, and an appointee from the Executive Office of the President. The Assistant Secretary of Labor for Labor-Management Relations was given responsibility for determining the appropriateness of bargaining units, supervising union elections, and settling complaints of unfair labor practices. The executive order listed specific actions for both labor and management that would be considered unfair labor practices. Union representatives were required to bargain during nonwork hours. The executive order did not require bargaining unit members to pay dues. The order required unions to make regular financial reports available to members. The order did not cover the FBI, CIA, or the General Accounting Office

³⁸⁸ 5 U.S.C. §§ 7101-7135.

(GAO). The language giving agency heads the authority to exclude unions was similar to the language in Executive Order 10988.

Executive Order 11491 was amended by other executive orders. Executive Order 11616, issued by President Nixon in August 1971, required collective bargaining agreements to include negotiated procedures for resolving grievances and designated the Director of the Office of Management and Budget as the presidential appointee to the FLRC.

Major Provisions

Executive orders may be amended or withdrawn. Title VII of the Civil Service Reform Act of 1978 (CSRA) established in statute the right of federal employees to organize and bargain collectively. The law applies to executive branch agencies, the Library of Congress, and the Government Printing Office. The CSRA excludes from coverage members of the armed forces, Foreign Service employees, the FBI, CIA, GAO, National Security Agency, Tennessee Valley Authority, the Federal Services Impasses Panel, and the newly created Federal Labor Relations Authority (FLRA). The CSRA also gives the President the authority to exclude, in the interests of national security, any agency or subagency whose primary function involves investigative, intelligence, counterintelligence, or security work.

Under the CSRA, federal employees can bargain over the conditions of employment, but not over wages, benefits, or other matters set in law. Federal employees cannot strike. The CSRA lists both labor and management unfair labor practices. The CSRA requires unions to make regular financial reports available to members. Bargaining agreements must include negotiated procedures for resolving grievances. Grievance procedures must provide for binding arbitration. Union representatives are allowed official time for contract negotiations. Official time for other matters can be negotiated. The CSRA does not require bargaining unit members to pay dues.

The CSRA changed the administrative structure of federal labor-management relations. The CSRA replaced the CSC with the Office of Personnel Management (OPM) to administer and enforce civil service law and the Merit Systems Protection Board to hear and decide employee appeals of adverse personnel actions and other matters. The CSRA created the FLRA and retained the Federal Services Impasses Panel. The FLRA determines appropriate bargaining units, supervises union elections, and resolves complaints of unfair labor practices. To make the agency independent of other federal agencies, the three members of the FLRA are appointed by the President and confirmed by the Senate. No more than two members of the FLRA may belong to the same political party. The Office of General Counsel of the FLRA investigates and prosecutes charges of unfair labor practices.

Discussion

Recent legislation has given federal agencies greater flexibility in personnel matters. Legislation creating the Transportation Security Administration (TSA) gave the agency head the authority to exclude airport screeners from collective bargaining. Legislation creating the Department of Homeland Security (DHS) gave the President

different authority to exclude DHS agencies from collective bargaining. The Secretaries of DHS and the Department of Defense (DOD) have been given the authority to establish personnel systems for all or parts of their departments.

The Aviation and Transportation Security Act of 2001 (P.L. 107-71) created the TSA and shifted the responsibility for airport screening to the federal government. The act gave the head of the TSA, which was later transferred to DHS, the authority to determine the terms and conditions of employment for federally employed airport screeners. In January 2003, the head of the TSA announced that the agency would not bargain with airport screeners.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) gave the Secretary of DHS, in regulations issued jointly with the Director of OPM, the authority to establish a human resources management system for all or parts of the department. Any such system must allow employees to organize and bargain collectively. An agency or subagency transferred to the department can be excluded from collective bargaining if the agency was previously excluded by executive order or, if employees were not previously organized, the agency's primary function involves investigative, intelligence, counterintelligence, or security work, and the President determines that union representation is not in the national interest. An agency or subagency whose employees were previously represented by a union (or unions) can be excluded from collective bargaining if (a) the responsibilities of the agency change and a majority of the employees have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism; or (b) the President determines that union representation would have a substantial adverse impact on the ability of the department to protect homeland security and Congress is given a written explanation 10 days before the President takes action. An employee may be excluded from a bargaining unit if the employee's responsibilities change (or the individual is a new employee) and the employee's primary duty consists of intelligence, counterintelligence, or investigative work directly related to terrorism. The act also gave the Secretary of DHS the authority to create an internal process for hearing employee appeals of adverse personnel actions.

The Department of Defense Authorization Act of 2004 (P.L. 108-136, 117 Stat. 1621) gave the Secretary of Defense the authority, in collaboration with the Director of OPM, to create a human resources management system for all or parts of the department. The system must ensure that civilian employees have the right to organize and bargain collectively. The President retains the authority to exclude from collective bargaining any agency whose primary function involves investigative, intelligence, counterintelligence, or security work, if the President determines that union representation is not in the national interest. The act gives DOD the authority to establish, together with OPM, a labor-management relations system. The act allows DOD to bargain at a national level with employee unions (i.e., rather than bargaining with each local). The act gave the Secretary of Defense the authority to create an internal process for hearing employee appeals of adverse personnel actions.

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Gerald Mayer

(27) Antidiscrimination in Employment and Employees' Right to Petition Congress (Chapter 72; in Part III, Subpart F — Labor Management and Employee Relations).

Statutory Intent and History

The Civil Service Reform Act of 1978 (CRSA; 92 Stat. 1111), President Carter's plan for revamping the civil service system, included provisions to shift authorities between federal agencies with respect to enforcement of laws to eliminate employment discrimination. The intent of the act was to separate the conflicting roles of the Civil Service Commission (CSC) as both federal personnel manager and protector of employee rights and assign these tasks to two new agencies, the Office for Personnel Management (OPM) and Merit Systems Protection Board (MSPB), respectively. But principal responsibility for implementing equal employment opportunity (EEO) policy in the federal government was placed with the Equal Employment Opportunity Commission (EEOC). The act also created a minority recruitment program to insure that groups previously underrepresented in federal agencies would be actively encouraged to apply.

Historically, the concept of merit selection of employees began with a 19th century statute, the Civil Service Act of 1883 (the Pendleton Act), that required open, competitive examinations for public service jobs in which both men and women were eligible to compete, although categories of work were usually designated by sex. Civil service employment, like employment generally, remained largely sex (and race) segregated for many years. Federal concern with equal employment opportunity for government workers began incrementally in 1941, when President Franklin Roosevelt barred discrimination in federal programs concerned with defense production and set up a Committee on Fair Employment Practice. From this narrow base, in the decades following World War II, additional steps were taken by Congress, the courts, and the executive branch to extend equal employment opportunity more widely in both the public and private sectors.

When Congress enacted Title VII of the Civil Rights Act of 1964, prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin, the federal government was specifically excluded from the definition of *employer* covered by the act (42 U.S.C. § 2000e et seq.). Section 701 of the act did provide, however, that federal sector employment decisions were to be free from discrimination, and authorized the President to enforce this policy. The CSC was thereafter directed by Executive Orders 11246 and 11478 to protect federal employee rights by establishing comprehensive procedures for investigation and resolution of EEO charges. Doubts as to the efficacy of the CSC regulatory program, however, compounded by lack of a viable judicial remedy, eventually led Congress to adopt the Equal Employment Opportunity Act of 1972, adding section 717 to Title VII (42 U.S.C. § 2000e-16). Section 717 created a private right of action for executive branch employees to challenge discriminatory practices in federal court. It also strengthened CSC authority to devise "necessary and appropriate" remedies to enforce Title VII, "including reinstatement or hiring of employees with or without back pay." Authority for enforcing Title VII in federal employment was transferred to the EEOC by Reorganization Plan No. 1 of 1978 and the CSRA.

In later years, Congress expanded federal employee rights with passage of the Rehabilitation Act of 1973 (29 U.S.C. § 791), and amendments to the Equal Pay Act (1974; 20 U.S.C. § 206(d)) and the Age Discrimination in Employment Act (1978; 29 U.S.C. §§ 631, 633a), prohibiting, respectively, discrimination based on age, physical or mental impairment, and sex-based wage inequality. These statutes, in turn, define the kinds of discrimination forbidden by the CSRA (5 U.S.C. §§ 7201-7204). And to assure that equal employment opportunity was extended in fact, as well as in word, to certain groups whose options for federal employment had previously been limited, the CSRA mandated a recruitment program to eliminate underrepresentation of minorities within the various departments and agencies.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 72 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Section 7201 states that it is the policy of the United States to ensure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. This section also requires OPM to develop a continuing program for the recruitment of minorities for employment in federal agencies. Under this program, each executive agency is required to administer the antidiscrimination policy in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources. OPM is further required to conduct a continuing program of assistance to agencies in carrying out the program, as well as evaluation and oversight to determine the program's effectiveness in eliminating minority underrepresentation. The EEOC is charged with establishing guidelines for carrying out the program. OPM reports to Congress annually with data regarding the minority recruitment program in order to evaluate its effectiveness.

Section 7202 requires that the same benefits be provided in an executive agency or in the competitive service for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children, and vice versa.

Section 7203 prohibits discrimination because of a handicapping condition in an executive agency or in the competitive service if OPM believes the job can be performed by an individual with such a condition. An exception is made for any employment situation that might endanger the health or safety of the employee or others.

Section 7204 bans discrimination because of race, color, creed, sex, or marital status with respect to general schedule pay rates, prevailing rate systems, or appointments to positions classified above GS-15.

Subchapter II, Section 7211, “Employees’ Right to Petition Congress,” protects the right of employees, individually or collectively, to petition Congress, or a Member of Congress, or to furnish information to either house of Congress, to a committee or Member.

Discussion

Although the Civil Service Act of 1883 inaugurated the idea of a merit system for appointing federal employees, the principle of equal employment opportunity was expanded considerably by the great social and political changes of the second half of the 20th century. Current protections for federal workers are an amalgam of merit system principles and nondiscrimination requirements administered jointly by employing federal agencies, MSPB, and the EEOC. The first line of defense against federal workplace discrimination is an internal administrative process established by each federal agency to receive, investigate, and adjudicate employee complaints of unlawful discrimination. These internal agency rules have been much criticized both for perpetuating an inherent conflict of interest — by making the agency the judge of its own actions — and for encouraging large numbers of baseless complaints due to lack of substantive standards. The CSRA gave the EEOC exclusive jurisdiction to review agency decisions involving federal employees where only discrimination issues are alleged or no appeal rights to MSPB exist. Complicating the relationship between the MSPB and the EEOC is an election of remedies requirement in the CSRA, designed to avoid duplicative processing of complaints, though the agencies are required to work together. In “mixed cases,” involving a discrimination claim stemming from an adverse personnel action appealable to the MSPB, the board has concurrent jurisdiction, subject to EEOC review of the equal employment opportunity portion of the employee’s case. Thus, an MSPB decision adverse to the employee may be reviewed by the EEOC. Any difference of opinion between the agencies must be submitted to a statutory special panel for resolution.

A significant incentive for the federal employee EEO claims was provided by the Civil Rights Act of 1991 (42 U.S.C. §1981a(b)). Formerly, remedies for discrimination were limited to back pay, reinstatement, and injunctive relief. Under the 1991 act, the EEOC (and the federal courts) may award up to \$300,000 in compensatory damages to federal employees who prove “intentional” discrimination by their agencies violative of Title VII or the Rehabilitation Act of 1973. The damage award is meant to compensate for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” Jury trials may be had by federal employees seeking judicial relief in damages under the 1991 act.

A new law approved by Congress, effective October 1, 2003, may encourage earlier settlement of employment discrimination claims against federal agencies. Under prior law, agencies were responsible for paying out of their own funds settlements reached during the administrative stage of a discrimination or whistleblowing retaliation complaint. Once the complaint went to court, however, the judgment or settlement was paid from the government-wide judgment fund. Section 201 of the Notification and Federal Employee Anti-Discrimination and Retaliation Act (No FEAR Act; P.L. 107-174) holds the particular agency — rather than the government as a whole — fiscally accountable by requiring that

discrimination awards, judgments, and settlements be paid from the budget of the agency wrongdoer. The law also requires that applicants, employees, and former employees be given written notice and training about their rights, and that the information and statistics be posted on the agencies' Internet sites.

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Charles Dale

(28) Suitability, Security, and Conduct (Chapter 73; in Part III, Subpart F — Labor-Management and Employee Relations).

Statutory Intent and History

The 1966 Title 5 codification statute (80 Stat. 378) is the basic authority for Chapter 73, Suitability, Security, and Conduct. Additional authorities include provisions of a 1967 statute amending Title 5 and codifying recent law (81 Stat. 195 at 208) and the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197 at 235). The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 73 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

The chapter enumerates basic standards for conduct and behavior of federal employees. As such, its content relates essentially to law enforcement. Prohibitions against disloyalty, strikes against the government, advocating overthrow of the government, and improper gift-giving or acceptance, are admonitions to avoid activities that could lead not only to dismissal, but to prosecution as well.

Major Provisions

The President is authorized to promulgate standards governing federal employee conduct. Included are provisions related to loyalty and striking, security clearance, political activities (for a discussion of the provision relating to employee political activities, see this compendium's discussion of 5 U.S.C. Chapter 73, Subchapter III), and receipt of foreign gifts and decorations. Employee misconduct is also covered, including prohibition on gifts to superiors, drug abuse, and alcohol abuse and alcoholism.

The chapter sets forth employment limitations in the federal service, including prohibitions against those advocating overthrow of the government, participation in or advocacy of striking against the government, or inciting a riot or civil disorder. Regulations concerning those removed for national security reasons, including appointments elsewhere in the government for such individuals, are authorized.

The President, Vice President, Members of Congress, and federal employees are prohibited from accepting foreign gifts and decorations, except those of minimal value, certain travel expenses, an educational scholarship, or medical treatment. Gifts of more than minimal value become the property of the United States, and violation of these provisions subjects the individual to civil action by the government.

Federal employee misconduct provisions include solicitation of gifts for superiors or acceptance by superiors of gifts from subordinates. Excessive use of intoxicants is a bar to federal employment. The Office of Personnel Management

(OPM) is responsible for developing treatment programs for federal employees suffering from drug abuse and alcoholism.

Discussion

Chapter 73 is the major civil enforcement authority insofar as federal employee conduct and behavior are concerned. Its prohibitions on the right to strike or advocate a strike, gift acceptance restrictions, and misconduct proscriptions, ranging from engaging in riots and disorder to alcohol and drug abuse, are accompanied by prescribed penalties — the maximum being removal from the service — and rehabilitation options, such as treatment programs for drug and alcohol abuse. With the exception of national security breaches, little attempt has been made of late to modify this enforcement authority.

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Mitchel A. Sollenberger

(29) Political Activities (Chapter 73, Subchapter III; in Part III, Subpart F — Labor-Management and Employee Relations).

Statutory Intent and History

Chapter 73 political activities provisions derive from the Hatch Act, initially adopted in 1939 (53 Stat. 1147) and subsequently amended several times, the most recent major modifications being the Hatch Act Reform Amendments of 1993 (107 Stat. 1001). The intent of these laws is to regulate the political activities of certain federal employees and to provide penalties for violations.

Major Provisions

The Hatch Act and its amendments cover employees or officeholders in executive agencies or in positions within the competitive service that are not in executive agencies, as well as the U.S. Postal Service and Postal Rate Commission employees. District of Columbia government employees or office holders, other than the mayor, city council members, and the recorder of deeds, are also covered. The President, Vice President, General Accounting Office employees, and members of the uniformed services are not covered by this law.

Subchapter III of Chapter 73 provides that employees may take an active part in political management or in political campaigns, except as prohibited, and retain the right to vote as they choose and express their opinions on political subjects and candidates. Exceptions are noted, such as employees of the Criminal Division of the Department of Justice, Federal Bureau of Investigation, and administrative law judges.

The Office of Personnel Management (OPM) may prescribe regulations permitting employees, with certain exceptions, to take an active part in political management and political campaigns involving the municipality or other political jurisdictions in which they reside. However, employees are prohibited from being candidates for partisan political office. Restrictions are present regarding the solicitation and acceptance of political contributions.

The law provides that, if the Special Counsel (who heads a separate federal agency, the Office of Special Counsel) receives an allegation concerning any matter relating to prohibited political activities, withholding of information, political intrusion into personnel decisionmaking, and discrimination, the Special Counsel can investigate and seek corrective action under 5 U.S.C. § 1214 and disciplinary action under 5 U.S.C. § 1215 in the same way as if a prohibited personnel practice were involved. An employee or individual who violates Section 7323 or 7324, relating to prohibitions on the use of official influence or official information and solicitation, shall be removed from his or her position, and funds appropriated for the position from which the individual was removed thereafter may not be used to pay him or her. However, if the Merit System Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

Discussion

The modifications effected by the Hatch Act Reform Amendments of 1993 were adjusted slightly by the Legislative Branch Appropriations Act, 1997 (110 Stat. 2416), which modified 5 U.S.C. § 3303 with a provision stating: “An individual concerned in examining an applicant for or appointing him in the competitive service may not receive or consider a recommendation of the applicant by a Senator or Representative, except as to the character or residence of the applicant.”

In January 1998, OPM published final regulations on political activities of federal employees residing in designated localities. Spotsylvania County, Virginia, and St. Mary’s County, Maryland, were added as designated localities, thereby qualifying federal employees who reside in these counties to a partial exemption from the prohibition at 5 U.S.C. § 7323(a)(2)(3) on political contributions and running for election to a partisan political office.

In the 105th Congress, draft legislation prepared but not introduced by the House Civil Service Subcommittee chair, Representative Mica, would have authorized civil monetary penalties and debarment from employment for former federal employees convicted of Hatch Act violations during their federal employment.

In the 108th Congress, a provision at Section 1109 of H.R. 1588, the National Defense Authorization Act for FY2004, as passed by the House of Representatives, on clarification of the Hatch Act was dropped in conference. (A similar provision also was included in H.R. 1836, which was marked up by the House Committee on Government Reform, but has not seen further action.) It would have exempted a federal employee or individual who was employed by the Department of Defense Inspector General’s office before the act’s enactment date and transferred to a Special Court sponsored by the United Nations from the provisions of 5 U.S.C. § 7326. Section 7326 authorizes an employee’s removal from his or her position or 30 days’ suspension without pay for violating the prohibitions on federal employee political activities. The exemption would have no longer applied if the employee or individual subsequently became reemployed in the civil service. The provision would have provided that once employees in this specific category leave government service, they would no longer be covered by the Hatch Act restrictions on political activities by federal employees. H.R. 1509, which would have applied this provision to a broader category of employees, was referred to the House Committee on Government Reform, but has not seen further action as of this writing.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 73 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Questions about application of the Hatch Act to campaign activity by executive branch personnel and to soliciting campaign contributions in federal buildings are

especially raised during presidential election years. The Office of Special Counsel reiterates the law's provisions in providing guidance to federal employees.³⁸⁹

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Barbara L. Schwemle

³⁸⁹ See OSC's Hatch Act website at [<http://www.osc.gov/hatchact.html>], visited Dec. 22, 2003.

(30) Adverse Actions (Chapter 75; in Part III, Subpart F — Labor-Management and Employee Relations).***Statutory Intent and History***

The current system for adverse actions in the federal civil service generally was established under the Civil Service Reform Act of 1978 (P.L. 95-45; 92 Stat. 1134). The intent was to streamline and codify disciplinary procedures. The subchapter relating to national security was established under P.L. 81-733 (64 Stat. 476).

Major Provisions

This chapter prescribes the cause and procedure for suspension for 14 days or less; removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less; actions against administrative law judges; actions involving national security; and actions involving the Senior Executive Service. It authorizes an agency, under regulations promulgated by the Office of Personnel Management (OPM), to take these actions for such cause as will promote the efficiency of the service. An employee against whom an action has been proposed is entitled to certain procedures such as advance written notice, a reasonable time to answer orally or in writing and to furnish affidavits and other documentary evidence, representation by an attorney or other representative, and a written decision and specific reasons therefor.

An agency may remove, suspend, reduce in grade, reduce in pay, or furlough an administrative law judge only for good cause established and determined by the Merit Systems Protection Board on the record after an opportunity for a hearing before the board.

Notwithstanding other statutes, the head of certain defined agencies may suspend without pay an employee when the agency head considers suspension necessary in the interest of national security. Subject to certain procedural requirements, an agency head may remove such a suspended employee when, after such investigation and review as the head considers necessary, the head determines that removal is necessary in the interests of national security. After suspension and before removal, an employee who has a permanent and indefinite appointment, has completed a probationary period, and is a citizen of the United States, is entitled to a written statement of the charges against him; an opportunity to answer the charges and submit affidavits; a hearing, at the request of the employee, by an agency authority duly constituted for this purpose; a review of his case by the agency head or designee, before a decision adverse to the employee is made final; and a written statement of the decision by the agency head.

Under regulations prescribed by OPM, an agency is authorized to remove from the civil service or suspend for more than 14 days certain career appointees of the Senior Executive Service only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. An employee against whom such an action is proposed is entitled to certain procedures, including advance written notice, a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence, representation

by an attorney or other representative, and a written decision and specific reasons therefor. An employee against whom an action is taken also is entitled to appeal to the Merit System Protection Board.

Discussion

This chapter establishes the cause and procedural protections for various disciplinary actions in the civil service and specifies the individuals who are entitled to protection. It attempts to strike a balance between management rights and employee protection.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security (DHS) and Defense (DOD). Both laws permit changes from the Chapter 75 provisions for DHS and DOD. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

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Thomas Nicola

(31) Appeals (Chapter 77; in Part III, Subpart F — Labor-Management and Employee Relations).***Statutory Intent and History***

The current system for appeals in the federal civil service was established under the Veterans Preference Act of 1944 (P.L. 78-359; 58 Stat. 390) and the Civil Service Reform Act of 1978 (P.L. 95-454; 92 Stat. 1138). The intent was to uphold the merit system by ensuring protection of federal employees from arbitrary agency actions.

Major Provisions

An employee or applicant for employment may submit an appeal to the Merit Systems Protection Board (MSPB) from any action appealable to the board under any law, rule, or regulation. An appellant has a right to a hearing for which a transcript will be kept, and to be represented by an attorney or another representative.

MSPB may hear any case appealed to it, or may refer the case to an administrative law judge or other employee of MSPB designated by the board to hear cases. A decision must be made after receipt of written representations of the parties to an appeal and after an opportunity for a hearing. If an employee or applicant prevails in an appeal, the employee or applicant is granted the relief provided in the decision when it is made. The decision remains in effect pending the outcome of any petition for review unless certain circumstances are met.

An agency's decision is sustained only if it is supported by substantial evidence in the case of an action based on unacceptable performance or by a preponderance of evidence in any other case. Nonetheless, an agency's decision may not be sustained if the employee or applicant for employment shows harmful error in applying the agency's procedures, or shows that the decision was based on any prohibited personnel practice, or that the decision was not in accordance with law.

The law provides for procedures to be followed by the Office of Personnel Management (OPM), if it decides to intervene, as well as those conditions whereby the Equal Employment Opportunity Commission (EEOC) becomes involved when discrimination (so-called *mixed cases*) has been alleged. Procedures to be followed for judicial review of MSPB decisions when they are appealed are prescribed.

Discussion

Jurisdiction by both MSPB and EEOC over mixed cases has been controversial. Critics assert that dual jurisdiction is inefficient, expensive, and time-consuming; supporters argue that it is necessary to ensure adequate review. Proposals to streamline appeals by authorizing only the board or the commission (but not both), to hear them have been considered.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security (DHS) and Defense

(DOD). Both laws permit changes from the Chapter 77 provisions DHS and DOD. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

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(32) Services to Employees (Chapter 79; in Part III, Subpart F — Labor-Management and Employee Relations).***Statutory Intent and History***

The 1966 Title 5 codification statute (80 Stat. 378) is the basic statutory authority for Chapter 79, “Services to Employees.” Additional authorities include the Anti-Drug Abuse Act of 1986 (100 Stat. 3207) and the Federal Employees Clean Air Incentives Act (107 Stat. 1995). The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that Chapter 79 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

The chapter addresses federal employee health, safety, and commuting concerns. In addition to prescribing treatment programs for federal employees with alcohol and drug-related illness, provisions are set forth encouraging and mandating creation of proactive health and safety measures to prevent employee illness and disability.

Major Provisions

The provisions of Chapter 79 govern the establishment of agency health, safety, drug abuse, and alcohol abuse programs. They regulate the issuance of protective clothing and equipment for federal employees, and the creation of programs intended to encourage alternative means of commuting to the workplace, other than “single-occupancy motor vehicles.”

Agency heads are authorized to establish health service programs to promote and maintain the physical and mental fitness of their employees. Programs are limited to treatment of on-the-job illness and dental conditions requiring emergency treatment, pre-employment and other examinations, referral to private physicians and dentists, and preventive health programs.

The Secretary of Labor is responsible for creating safety programs covering federal employees within the agencies. The President may establish a safety council to advise the Secretary in administering the safety programs and to prevent injuries and accidents. Agency heads are responsible for the promotion of organized programs to reduce accidents, illness, and injuries, and to encourage safe practices and eliminate workplace hazards. Available appropriations may be used for purchase and maintenance of special equipment for protection of employees in performing assigned tasks.

Agency heads, in cooperation and consultation with the Office of Personnel Management (OPM) and the Secretary of Health and Human Services, are required to establish prevention, treatment, and rehabilitation programs for drug and alcohol abuse affecting employees within their agencies.

Agency heads are authorized to create programs to encourage employees and student volunteers to commute to and from work by means other than motor vehicles. In furtherance of such programs, options may include public transit passes or reimbursement therefor; furnishing space, facilities, and services to bicyclists; and offering other non-monetary incentives for alternative commuting options by employees. The President is required to designate one or more agencies to prescribe guidelines for alternative commuting programs, and such designees submit to the President and to Congress biannual reports on the number and type of agency programs, the extent of employee participation, and the costs to the government, and an assessment of environmental or other benefits resulting from such programs.

Discussion

Public health and safety programs have assumed increasing importance within the federal service in recognition of rapidly escalating costs of health care and the burdens placed on federal employee health insurance programs. A more proactive approach has long been advocated by federal agencies responsible for health and safety, notably the Department of Labor's Occupational Safety and Health Administration (OSHA), including strong emphasis on workplace safety, prevention of illness, influenza inoculation programs, and the like. Although the chapter cites the need for limited health care facilities within the agencies, emphasis still remains on referral to private sector practitioners, except in cases of medical emergency.

Encouragement of mass transit and other options, other than privately owned motor vehicles, for commuting to and from the workplace has long been advocated, but with modest results. In recent years, Congress has authorized agencies to use appropriated funds to provide monetary subsidies to employees in order to offset, at least partially, the cost of using mass transit for commuting.

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Mitchel A. Sollenberger

(33) Retirement (Chapter 83; in Part III, Subpart G — Insurance and Annuities).***Statutory Intent and History***

The Civil Service Retirement System (CSRS) was established in 1920 (42 Stat. 1047). The law had a dual purpose; to provide for an adequate retirement income for individuals who had devoted much of their work lives to government service, and to provide an efficient and humane method to remove from duty older employees whose productivity was diminishing due to age. The original CSRS law included a provision for mandatory retirement at age 70, a requirement eliminated in 1978, except for certain public safety occupations. The CSRS retirement system is a defined benefit system in that employees contribute a defined percentage of their income to the system, and receive in turn a defined percentage of their top three years of compensation annually upon retirement.

From 1920 to 1984, CSRS was the retirement plan covering most civilian federal employees. Coverage was extended to Members of Congress and congressional employees in 1946. In 1935, Congress enacted the Social Security system for private sector workers, and the Social Security Amendments of 1983 (97 Stat. 65) mandated that all workers hired into permanent federal positions on or after January 1, 1984, be covered by Social Security. Since Social Security duplicated some existing CSRS benefits, and because the combined employee contribution rates for Social Security and CSRS would have reached more than 13% of pay, it was necessary to design an entirely new retirement system for federal employment, using Social Security as the base. Congress enacted the Federal Employees' Retirement System Act of 1986 (FERS) (100 Stat. 514). CSRS was closed to new entrants at the end of 1983, and all new federal employees hired since then are covered by FERS. As turnover in the workforce occurs, the number of workers in CSRS will decline, and eventually it will cease to exist. Less than one-third of the federal workforce is currently covered by CSRS.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 83 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Subchapter II of Chapter 83 requires forfeiture of a civil service or military annuity by individuals convicted of crimes against the national security.

Subchapter III of Chapter 83 provides a CSRS annuity to “vested” employees. Vesting requires five years of federal civilian service. Most CSRS participants must pay 7% of their salary into the retirement system throughout their federal employment (certain occupational groups pay slightly more and receive higher benefits). An immediate annuity is provided for federal employees retiring at age 55

with 30 years of service, age 60 with 20 years of service, or age 62 with 5 years of service. Vested employees separating before retirement eligibility may draw a deferred annuity at age 62. In certain situations, including job abolishment or reductions-in-force, a reduced early retirement benefit is payable to workers retiring at any age with 25 years of service or at age 50 with 20 years. Different age and service criteria for retirement pertain to certain occupational groups. If the individual retires before age 55, his or her annuity is permanently reduced by 2% for each year of difference between the worker's actual age at retirement and 55.

Chapter 83 sets out the formulas for computing CSRS annuities. Special higher benefit formulas apply to Members of Congress and congressional employees, federal law enforcement officers, firefighters, and air traffic controllers. Regular federal employees retiring with 30 years of service receive an annuity of 56.25% of their average annual pay of their highest-paid 3 consecutive years ("high-3"). Members of Congress receive 75% of high-3 pay after 30 years; federal law enforcement officers, firefighters and air traffic controllers receive 50% of high-3 pay with 20 years of service.

Disabled workers who are unable to perform their federal jobs due to physical or mental impairment are provided disability retirement. Disability retirement benefits are calculated according to the same rules applicable to regular retirement, but there is a minimum benefit of 40% of high-3 pay.

Chapter 83 provides survivor benefits to spouses and dependent children of deceased CSRS workers and retirees. Retirees electing survivor coverage contribute up to 10% of their annuities in order to provide a spouse survivor benefit of up to 55% of the retiree's annuity.

CSRS annuities are adjusted annually by the rate of increase in the Consumer Price Index (CPI) over a one-year period.

Discussion

CSRS came under criticism in the 1970s for a number of reasons. Some argued that the system locked employees in the federal workforce, because the retirement benefits built up by employees were not portable. (The FERS program, by contrast, was designed to be portable.) Another criticism was that the automatic post-retirement cost-of-living adjustments (COLAs) were too generous and skewed federal pay benefits towards the retired workforce. Congress first enacted COLAs for CSRS in 1962. The purpose of COLAs is to protect the purchasing power of retirement income from erosion due to inflation. Critics indicated that few private pension plans offered COLAs. Additionally, COLAs are subject to congressional intervention, whereby Congress may eliminate, reduce, or delay COLAs for federal retirees.

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Patrick J. Purcell

(34) Federal Employees' Retirement System (Chapter 84; in Part III, Subpart G — Insurance and Annuities).***Statutory Intent and History***

From 1920 to 1984, the Civil Service Retirement System (CSRS) was the retirement plan covering most civilian federal employees. Coverage of CSRS was extended to Members of Congress and congressional employees in 1946. In 1935, Congress enacted the Social Security system for private sector workers, and the 1983 amendments to the Social Security Amendments Act (97 Stat. 65) mandated that all workers hired into permanent federal positions on or after January 1, 1984, be covered by Social Security. Because Social Security duplicated some existing CSRS benefits, and because the combined employee contribution rates for Social Security and CSRS would have reached more than 13% of pay, it was necessary to design an entirely new retirement system for federal employment, using Social Security as the base. Congress enacted the Federal Employees Retirement System (FERS) in 1986 (100 Stat. 514). CSRS was closed to new entrants at the end of 1983, and all new federal employees hired since then are covered by FERS. FERS now covers more than two-thirds of civilian federal employees.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 84 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Subchapter II of Chapter 84 provides a basic annuity for Federal Employees' Retirement System (FERS) participants. Employees are vested after five years of service. Most FERS participants contribute 0.8% of pay into the pension plan. Federal law-enforcement officers, firefighters, air traffic controllers, and congressional employees contribute 1.3% of pay. FERS participants may retire at age 55 with 30 years of service. The minimum retirement age is increasing to age 57 as the Social Security normal retirement age rises to 67. FERS participants may retire with a *reduced* annuity at age 55 (rising to 57) with 10 through 29 years of service. The annuity is permanently reduced 5% for each year between the individual's age at retirement and 62. FERS also provides disability retirement and survivor benefits. Post-retirement cost-of-living adjustments are paid to retirees age 62 or over (and to disability and survivor annuitants of any age). If the increase in the Consumer Price Index (CPI) is 3% or more, increases are limited to one percentage point less than the rate of increase in the CPI.

Subchapter III of Chapter 84 provides a Thrift Savings Plan (TSP). The government contributes to the TSP 1% of the pay of all FERS participants and matches up to 5% of pay voluntarily contributed by FERS workers. The maximum FERS employee contribution in 2004 is 14% of pay up to a maximum of \$13,000. The maximum employee salary deferral will increase by \$1,000 per year until it

reaches \$15,000 in 2006, after which it will be indexed to the CPI. At retirement, TSP accounts may be withdrawn as a lifetime annuity, as a lump sum, or in equal payments over a specific time period. Separating employees may withdraw their TSP account balance (subject to possible tax penalties) or roll it over to an individual retirement arrangement or another employer's qualified retirement plan.

Discussion

FERS was designed by Congress in the mid-1980s to be comparable to retirement plans offered by large employers in the private sector. As recently as 1988, 70% of employees in medium and large establishments in the private sector were covered under a defined benefit retirement plan, according to the Department of Labor. By 1997, however, only 50% of employees in medium and large establishments in the private sector were covered by a defined benefit plan. Moreover, in recent years, many large employers have converted their traditional defined benefit plans to "cash balance" plans that mimic the benefit accumulation patterns of a defined contribution plan, and typically pay a smaller benefit to career employees than they would have accumulated under a traditional defined benefit pension. As traditional defined benefit plans become less common in the private sector, Congress may decide to examine the structure of the Federal Employees' Retirement System to determine whether or not the retirement benefits offered to federal employees are still comparable to those offered in the private sector.

The Thrift Savings Plan (TSP) has proven to be a popular plan for savings by FERS participants. About four-fifths of eligible employees make voluntary contributions to the TSP. The FERS plan permits portability of retirement monies from the government to qualifying private plans.

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Patrick J. Purcell

(35) Health Insurance (Chapter 89; in Part III, Subpart G — Insurance and Annuities).***Statutory Intent and History***

Before 1959, the federal government did not provide health benefits to its civilian employees or retirees. The need for a government-wide health benefits program was recognized when Congress passed the Federal Employees Health Benefits Act of 1959 (P.L. 86-382; 73 Stat. 708) authorizing the Federal Employees Health Benefit Program (FEHBP). The program went into operation on July 1, 1960. The act and its subsequent amendments established eligibility for benefits and election of coverage by participants; the types of health benefit plans that may be offered; the types of benefits that may be provided; the role of the U.S. Office of Personnel Management (OPM); the level of government contributions; the establishment of an Employees Health Benefits Fund to pay for program expenses; the creation of an advisory committee; and provisions for studies, reports, and audits.

While the law was periodically amended to extend eligibility for coverage to additional employee groups, the basic structure of FEHBP has undergone relatively few changes since the program began operation. However, the Health Benefits Insurance — Federal Contribution Act (P.L. 91-418; 84 Stat. 869) completely altered the way the government contribution toward employees health plan premiums was determined in an effort to “provide automatic indexing of the Government contribution to reflect increases in medical price inflation.” Beginning in 1971, the act established the formula for computing the government’s premium share as the average premium of the six largest plans. Subsequently, the government’s contribution increased from 40% to 50% of the average of the “Big Six” plan premiums in 1974, and to 60% in 1975 and thereafter. In 1997, the Balanced Budget Act (P.L. 105-33; 111 Stat. 251) replaced the Big Six formula with a formula setting the government’s share of premiums at 72% of the weighted average premium of all plans in the program, not to exceed 75% of any given plan’s premium. The new formula was effective in 1999.

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) and the National Defense Authorization Act for FY2004 (P.L. 108-136, 117 Stat. 1621) authorize the creation of new human resources management (HRM) systems for civilian employees of the Departments of Homeland Security and Defense. Both laws stipulate that the Chapter 89 provisions cannot be waived, modified, or otherwise affected by the new HRM systems. (See the discussions of the 5 U.S.C. Chapter 97 and Chapter 99 provisions in this compendium.)

Major Provisions

Participation in FEHBP is voluntary, and enrollees may change from one plan to another during designated “open season” periods. Active and retired Members of Congress may participate under the same rules as other federal employees. At the time of retirement, enrollees have a one-time election to continue to participate in FEHBP as retirees, provided they have been enrolled for at least five years immediately before retirement and are eligible for an immediate annuity.

FEHBP offers enrollees a choice of 6 fee-for-service (FFS) plans available government-wide, one consumer-driven option plan³⁹⁰ also offered government-wide, another 6 available to employees of certain small federal agencies, and about 240 health maintenance organizations (HMOs) serving limited geographic areas. Some plans are offering a “high” benefit and cost option and a “standard” option.

Although there is no core or standard benefit package required for FEHBP plans, all plans cover basic hospital, surgical, physician, and emergency care. Plans are required to cover certain special benefits including prescription drugs (which may have separate deductibles and coinsurance); mental health care with parity of coverage for mental health and general medical care coverage; child immunizations; and protection of enrollee out-of-pocket costs for “catastrophic” health care costs. Plans must include certain cost containment provisions, such as offering preferred provider organization (PPOs) networks as a component of the FFS plans, and hospital preadmission certification. There are variations in the amounts plans pay for benefits (as reflected in coinsurance provisions and deductibles), the availability of ancillary benefits (such as dental care or coverage of chiropractors), and the catastrophic cost protections.

OPM interprets the health insurance laws, writes regulations, and administers FEHBP. It approves qualified plans for participation in the program, negotiates yearly with plans to determine benefits and premiums for the following year, manages premium payments, and publishes information concerning plan options.

Discussion

FEHBP is the largest employer-sponsored health insurance program in the United States. Total annual cost of the program in FY2002 was about \$22.7 billion, including \$11.2 billion in enrollee and U.S. Postal Service payments. An issue sometimes raised regarding the design of the program is that the plans are not selected through competitive bidding, and, except for HMOs, most of the FFS plans in the program today have participated in the program for many years. Some plans have participated continuously since the start of the program. One concern about design of the programs is that enrollees must choose among several plans, which may be confusing. Others say choice helps ensure competition among plans, thus keeping premiums down. Still others say choice has no effect on costs, either to increase or decrease them. In recent years, fewer than 3% of enrollees changed plans during the annual open season. Another concern is that FEHBP plans compete for enrollees who are good risks (i.e., those who are less likely to experience health care costs in excess of the plan’s premium), potentially causing some plans to enroll a larger proportion of high-cost enrollees. However, OPM monitors enrollment trends and seeks to minimize adverse risk selection.

³⁹⁰ Beginning in 2003, a consumer-driven option plan was added to the FEHB program. This option provides beneficiaries with greater flexibility in health care spending through a personal care account (PCA) of \$1,000 for a self-only plan and \$2,000 for a family plan. Once the PCA has been exhausted, beneficiaries are responsible for paying for their own benefits, up to a prescribed amount. Traditional health care coverage begins after covered eligible expenses (paid out by the PCA and the member) total \$1,600 for self-only plans and \$3,200 for family plans.

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Hinda Ripps Chaikind

(36) Long-Term Care Insurance (Chapter 90; in Part III, Subpart G — Insurance and Annuities).

Statutory Intent and History

The Long-Term Care Security Act (114 Stat. 762; P.L. 106-265) authorizes a long-term care insurance program for federal workers and their families. The resulting program, sponsored by the Office of Personnel Management (OPM), is administered by Long Term Care Partners, a joint venture created for this purpose by the John Hancock Life Insurance Company and the Metropolitan Life Insurance Company. Long Term Care Partners offers insurance policies that can be individually modified with respect to amount of coverage (e.g., \$100 or \$150 a day), years of coverage, length of the elimination period (the period of time before benefits begin to be paid), inflation protection, and other features. Participation is voluntary, with premium costs paid by those who are enrolled, not the government. During an initial open season from July 1 through December 31, 2002, current employees and their spouse could enroll in the program with minimal underwriting (medical screening); retirees and other eligible people had to go through more extensive underwriting.³⁹¹ Since that time, all applicants aside from newly hired employees must complete the more extensive underwriting.

The federal employee long-term care insurance program has several objectives. The first is to encourage federal workers to consider purchasing long-term care insurance by making them aware of the cost of nursing home and community-based services and the limited assistance that most families can expect from Medicare, Medicaid, and private health insurance. Second, the program is designed to help participants choose coverage that is suitable for their needs and interests. Long-term care insurance is a complicated product for which it is useful to have an intermediary select an insurance carrier, choose a reasonable range of policy options, and prepare and distribute educational material. Finally, the federal program is intended to serve as a model for other employers to offer similar coverage. Compared to individual market policies, employment-based plans can have lower premiums due to administrative cost savings. The federal program was one of several proposals President Clinton made in January 1999 to help families with their long-term care needs.

The Long-Term Care Security Act has been amended four times through the end of 2003 to clarify and expand the list of eligible participants. P.L. 107-104 prohibits states from imposing taxes (other than general business taxes) on policy premiums.

Major Provisions

The Long-Term Care Security Act requires OPM to establish a program under which eligible individuals may obtain long-term care insurance. As amended, the act

³⁹¹ The earliest effective date for people enrolling during the open season was October 1, 2002. A short early-enrollment period was held in the spring of 2002; it was intended for people able to choose coverage without the educational material being prepared for the open season.

defines eligible individuals to include most federal and U.S. Postal Service employees,³⁹² active members of the uniformed services, employees of the Tennessee Valley Authority, District of Columbia government employees who were first employed before October 1, 1987, and employees of the District of Columbia courts. Also eligible are annuitants of those groups and surviving spouses who are receiving a federal survivor annuity. Eligible relatives include current spouses of employees and annuitants, adult children, parents, parents-in-law, and some step-parents.

The long-term care insurance contracts must be tax-qualified (i.e., comply with the conditions specified in Section 7702B of the Internal Revenue Code), fully insured (perhaps through reinsurance), and issued by a carrier that is licensed to issue long-term care insurance in all states. There is no guaranteed issue (i.e., policies do not have to be issued to all who apply), and it is explicitly provided that coverage need not be made available to individuals who would immediately qualify for benefits. As nearly as practicable, underwriting standards for a spouse must be like those for the eligible individual. More stringent underwriting may apply to individuals who declined coverage when they first had an opportunity to enroll. Contracts must be guaranteed renewable so long as premiums are paid. Coverage must be fully portable.

The act authorizes OPM to contract with qualified carriers without competitive bidding. It sets out terms and conditions for this master contract, which normally shall be for seven years. One requirement is that premiums should reasonably and equitably reflect the benefits provided, as determined by OPM, and not be adjusted during the term of the contract unless adjustment is mutually agreed to by OPM and the carrier.

Individuals obtaining coverage are responsible for 100% of the premiums. Withholding from pay or annuities is authorized. Administrative start-up costs may be paid out of the Employees' Life Insurance Fund, with reimbursement from the carriers within the first year. Subsequently, carriers are to make periodic contributions to a Long-Term Care Administrative Account within this fund to defray OPM expenses in administering the program.

Contract terms relating to the nature, provision, and extent of coverage or benefits supersede and preempt state or local laws or regulations. Cost accounting standards issued pursuant to Section 26(f) of the Office of Federal Procurement Policy Act do not apply.

The act provides for various reports and record keeping, including evaluations by the General Accounting Office (GAO) before the end of the third and fifth years of the program. Within 180 days after receiving the second GAO report, the President shall submit to Congress written recommendations as to whether the program should be continued without modification, terminated, or restructured.

³⁹² Federal and Postal Service employees generally may participate in the long-term care insurance program if they are eligible to participate in the Federal Employees Health Benefit (FEHB) program, whether or not they actually do.

OPM has authority to prescribe necessary regulations for the program. In consultation with the carriers, it is to provide periodic coordinated enrollment, promotion, and education efforts. In addition, OPM is to ensure that applicants are furnished information needed to evaluate the advantages and disadvantages of obtaining long-term care insurance, including information about costs and benefits, the effects of inflation, circumstances when premiums may be raised, and other matters.

Discussion

Long-term insurance can help protect the income and assets of people who need daily assistance due to frailty or chronic medical conditions. Coverage can also help people gain access to better-quality or additional services, either in nursing homes or in the community or at home. While there has been a steady increase in the number of long-term care policies sold over the last decade, only a small proportion of the generation nearing retirement has obtained coverage. One reason is cost: typically, long-term care insurance is purchased by people in their 50s or 60s, when the annual cost is higher than if bought earlier. Another reason is complexity: long-term care insurance is difficult even for financially astute people to understand. In addition, some people are concerned that premiums will increase at some point in the future and that they will be forced to drop their policies.³⁹³

The federal long-term care insurance program is designed to avoid some of these problems. By offering coverage to all federal employees and their families, not just those approaching retirement, the program attempts to enroll participants when annual costs are lower. There are also cost savings from reduced administrative costs, though these might be partially offset by cost increases from different underwriting standards. The program's educational material and clear information about costs are aimed at helping people make prudent choices about benefits. While there is no guarantee that premiums will not be raised in the future, OPM oversight (and the possibility of congressional review) may make this less likely than for insurance sold in the private market.

As of the end of 2003, a little over 200,000 policies had been obtained through the program.

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³⁹³ Long-term care insurance usually is sold for premiums that stay the same in subsequent years (unless the policy-holder later elects to purchase inflation protection); however, this is not guaranteed.

Long Term Care Partners. Information about the long-term care insurance program for federal workers is available through the company's website, at [<http://www.ltcfeds.com>], visited January 26, 2004.

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Bob Lyke

**(37) Personnel Flexibilities Relating to the Internal Revenue Service
(Chapter 95; in Part III, Subpart I — Miscellaneous).**

Statutory Intent and History

Subtitle C of the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 (112 Stat. 711) at Section 1201 amended Part III of Title 5, *United States Code*, by adding a new Subpart I — “Miscellaneous,” and Chapter 95 — “Personnel Flexibilities Relating to the IRS.” The legislation was based on the report of the National Commission on Restructuring the IRS, which recommended that the IRS and the Department of the Treasury be given more flexibility to hire qualified personnel needed to implement modernization. The intent of the law was to make various personnel rules and procedures on hiring, evaluating, promoting, and firing employees more flexible; to foster creativity, innovation, and quick problem resolution among employees; and to increase the accountability of IRS managers and employees and their focus on the mission, goals, and objectives of the agency. The law also was designed to revitalize the IRS workforce and change the culture of the agency so that it would be an efficient, modern, and responsive organization designed to meet the needs of taxpayers.

Major Provisions

A summary of some of the major provisions follows.

Under Section 9501, the personnel flexibilities are to be exercised in a manner consistent with Title 5, *United States Code*, provisions on merit system principles; prohibited personnel practices; veterans’ preference; and, except as otherwise specifically provided, labor-management relations. Employees within a unit to which a labor organization is accorded exclusive recognition shall not be subject to various flexibilities unless the IRS and the labor organization enter into a written agreement which specifically provides for the exercise of the flexibility. The written agreement may be imposed by the Federal Services Impasses Panel.

When the Secretary of the Treasury seeks a grant of critical pay authority for one or more positions at the IRS, the Office of Management and Budget, under Section 9502, may fix the basic pay rate at any rate up to the Vice President’s salary (\$198,600 as of January 2003). The Secretary of the Treasury is authorized, under Section 9503, to establish, fix the compensation of, and appoint individuals to, designated critical administrative, technical, and professional positions in the IRS until July 22, 2008 (10 years after enactment of the law). The positions are those that require expertise of an extremely high level in an administrative, technical, or professional field and are critical to the IRS’s successful accomplishment of its mission. Exercise of the authority is necessary to recruit or retain an individual exceptionally well qualified for the position. The number of critical positions may not exceed 40 at any one time. The terms of such appointments may not exceed four years. Total annual compensation for critical positions may not exceed the highest total annual compensation payable to the Vice President.

The Secretary of the Treasury is authorized, under Section 9504, subject to approval by the Office of Personnel Management (OPM), to provide for variations

from current law on recruitment, relocation, and retention incentives until July 22, 2008 (10 years after enactment of the law). IRS senior executives with program management responsibility over significant IRS functions may be paid a performance bonus if the Secretary of the Treasury, under Section 9505, finds the award warranted by the executive's performance. This authority continues until July 22, 2008 (10 years after enactment of the law). The bonus is not subject to 5 U.S.C. § 5384(b)(2), which limits Senior Executive Service performance awards to no less than 5% or more than 20% of basic pay. The executive's performance will be evaluated by the Secretary's taking into account contributions toward the successful accomplishment of goals and objectives specified in certain laws and by performance metrics or plans. Any award that exceeds 20% of an executive's basic pay rate must be approved by the Secretary. A performance bonus award may not be paid to an executive in a calendar year if, or to the extent that, the executive's total annual compensation will exceed the maximum amount of total annual compensation payable to the Vice President.

In applying 5 U.S.C. § 3132, *career reserved position* in the IRS means a position which may be filled only by a career appointee; or a limited emergency appointee or a limited term appointee who, immediately upon entering the career-reserved position, was serving under a career or career-conditional appointment outside the Senior Executive Service (SES); or whose limited emergency or limited term appointment is approved in advance by OPM (Section 9506). The number of positions filled by limited emergency or limited term appointees may not exceed 10% of the total number of SES positions in the IRS. The term of a limited emergency or limited term appointee may not exceed three years.

The exercise of any of the flexibilities under Sections 9502 through 9510 shall not affect the Secretary of the Treasury's authority, under Section 9507, to implement a demonstration project for the IRS, subject to 5 U.S.C. Chapter 47. The law specifies various requirements for a demonstration project.

Under Section 9508, the Secretary of the Treasury established a performance management system for the IRS in lieu of a system established under 5 U.S.C. § 4302. The system will maintain individual accountability by establishing one or more retention standards for each employee related to his or her work and expressed in terms of individual performance. The standards will be communicated to employees. Periodic determinations of whether each employee does or does not meet his or her established retention standards will be made. With respect to any employee whose performance does not meet established retention standards, actions could be taken including denying basic pay increases, promotions, and credit for performance during a reduction in force. The performance system will establish goals or objectives for individual, group, or organizational performance (or any combination thereof) that are consistent with IRS performance planning procedures and also will provide for communicating goals or objectives to employees and will use such goals and objectives to make performance distinctions among employees or groups of employees. An employee's performance will be considered "unacceptable" if it fails to meet a retention standard.

The Secretary of the Treasury may establish an awards program designed to provide incentives for and recognition of organizational, group, and individual

achievements. It will provide for awards to employees who, as individuals or members of a group, contribute to meeting performance goals and objectives by such means as superior individual or group accomplishment, a documented productivity gain, or sustained superior performance.

The notice period for actions based on unacceptable performance or adverse actions is 15 days. An IRS employee may not appeal the denial of a periodic step increase to the Merit Systems Protection Board.

The Secretary of the Treasury, under Section 9509, may, subject to OPM criteria, establish one or more broad-banded systems covering all or any portion of the IRS workforce. Such a system has been established for IRS managers and supervisors. *Broad-banded system* means a system for grouping positions for pay, job evaluation, and other purposes that differs from the General Schedule classification system as a result of combining grades and related ranges of rates of pay in one or more occupational series. The law specifies requirements for the OPM criteria.

An IRS employee may be selected for a permanent appointment in the competitive service in the IRS through internal competitive promotion procedures, under Section 9510, subject to meeting certain conditions stated in the law. The Secretary of the Treasury may establish category rating systems for evaluating applicants for IRS positions in the competitive service. Qualified candidates will be divided into two or more quality categories on the basis of relative degrees of merit, rather than assigned individual numerical ratings. Each applicant who meets the minimum qualification requirements for the position to be filled shall be assigned to an appropriate category based on an evaluation of his or her knowledge, skills, and abilities relative to those needed for successful performance in the job to be filled. Within each quality category, preference eligibles shall be listed ahead of other individuals. For other than scientific and professional positions at or higher than GS-9 (or equivalent), preference eligibles with a compensable service-connected disability of 10% or more, and who meet the minimum qualification standards, will be listed in the highest quality category. An appointing authority may select any applicant from the highest quality category. If fewer than three candidates have been assigned to the highest quality category, the individual may be selected from a merged category consisting of the highest and second highest quality categories. The appointing authority may not pass over a preference eligible in the same or a higher category from which the selection is made, unless the requirements of 5 U.S.C. § 3317(b) or § 3318(b) are satisfied.

The Secretary of the Treasury may detail employees among IRS offices without regard to current law, which limits details and renewals of details to 120 days. A probationary period of up to three years may be established by the Secretary of the Treasury for IRS positions that require a longer period for the incumbent to demonstrate complete proficiency. The IRS Commissioner was authorized to pay voluntary separation incentive payments (VSIP) up to \$25,000 to any employee who voluntarily separated (whether by retirement or resignation) before January 1, 2003 (Section 1202).

Section 1203 of the act authorizes the IRS Commissioner to terminate any IRS employee if there is a final administrative or judicial determination that the employee committed any act or omission in performing his or her official duties. The termination shall be a removal for cause on charges of misconduct. The acts or omissions which could result in termination are the following.

- willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets;
- providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;
- with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of — (A) any right under the Constitution of the United States; or (B) any civil right established under — (i) Title VI or VII of the Civil Rights Act of 1964; (ii) Title IX of the Education Amendments of 1972; (iii) the Age Discrimination in Employment Act of 1967; (iv) the Age Discrimination Act of 1975; (v) Section 501 or 504 of the Rehabilitation Act of 1973; or (vi) Title I of the Americans with Disabilities Act of 1990;
- falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;
- assault or battery on a taxpayer, taxpayer representative, or other IRS employee, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;
- violations of the Internal Revenue Code of 1986, Department of the Treasury regulations, or IRS policies (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other IRS employee;
- willful misuse of the provisions of Section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry;
- willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;
- willful understatement of federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and
- threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

The IRS Commissioner, at his or her sole discretion, may take a personnel action other than termination for an act or omission and may establish a procedure which will be used to determine whether an individual should be referred to the Commissioner for a determination on a personnel action. Any determination of the Commissioner may not be appealed in any administrative or judicial proceeding.

Under Section 1204 of the act, the IRS shall not use records of tax enforcement results to evaluate employees or to impose or suggest production quotas or goals with respect to such employees. The IRS shall use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance. Each appropriate supervisor shall certify quarterly by letter to the IRS Commissioner whether or not tax enforcement results are being used in a manner prohibited by this section. The IRS Commissioner implemented an employee training program under Section 1205 of the act. The law specified requirements for the training plan.

Discussion

Among issues related to implementation of the law, those on employee misconduct, training, and critical pay authority have been closely followed. Recent audits conducted by the Treasury Inspector General for Tax Administration (TIGTA) found that allegations of employee misconduct were accurately reported; training data are not adequate or reliable enough for the IRS Oversight Board to perform an assessment (costs of training courses and allocation of training resources cannot be determined); and the Secretary of the Treasury and the board need to exercise additional scrutiny to ensure that the critical pay authority is used appropriately. In its 2003 review of the IRS, the Joint Committee on Taxation determined that serious employee misconduct remains at low levels (more than 90% of the Section 1203 violations involve employee tax compliance), and anxiety about Section 1203 contributes to a decline in enforcement activity. The IRS reported to the Joint Committee that the streamlined critical pay authority has resulted in the recruitment of talented executives with wide-ranging skills.

Various bills were introduced in the 106th and 107th Congresses to amend the Section 1203 provisions on termination of employment for misconduct. In the 108th Congress, the following bills are pending: H.R. 1528, Taxpayer Protection and IRS Accountability Act of 2003, as passed by the House, and H.R. 1661, Taxpayer and Fairness Protection Act of 2003, both to amend Section 1203 with regard to disciplinary actions and to add a reporting requirement that misconduct allegations be summarized by category; S. 1637, Jumpstart Our Business Strength (JOBS) Act, as reported to the Senate, to prohibit an individual who violates Section 1203 from receiving a tax collection contract; S. 882, Tax Administration Good Government Act, to amend Section 1203 and to provide that the use of critical pay authority be approved by the IRS Oversight Board; and H.R. 3625, Department of the Treasury Inspector General Consolidation Act of 2003, to add a requirement that the Inspector General's report include misconduct cases.

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Barbara L. Schwemle

(38) Department of Homeland Security (Chapter 97; in Part III, Subpart I — Miscellaneous).

Statutory Intent and History

The Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2229) authorized the creation of a new human resources management (HRM) system for employees of the Department of Homeland Security (DHS). In the aftermath of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, and the discovery of anthrax in Washington, DC, and other cities, Congress and the Administration determined that a new Cabinet-level department was needed to coordinate efforts to protect the nation from terrorist attacks. As part of creating that new department, the Administration believed strongly that, to meet the exigencies of national security and emergency situations, a flexible and modern HRM system for DHS was mandated. The President frequently referred to the requirements of that system as putting the right people in the right place at the right time. (See the discussion at 5 U.S.C. Chapter 99 for information on the new HRM system at the Department of Defense.)

Major Provisions

Title VIII, Subtitle E, Section 841 of the Homeland Security Act amends Title 5 *United States Code* by adding a new Chapter 97 — “Department of Homeland Security” to Part III, Subpart I. The new Section 9701(a) of Title 5 *United States Code* provides that, notwithstanding any other provision of Part III, the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, an HRM system for some or all of the organizational units of DHS.

The HRM system must be flexible and contemporary. It cannot waive, modify, or otherwise affect:

- the public employment principles of merit and fitness at 5 U.S.C. § 2301, including the principles of hiring based on merit, fair treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;
- any provision of 5 § 2302 relating to prohibited personnel practices;
- any provision of law referred to in 5 U.S.C. § 2302(b)(1), (8), and (9); or any provision of law implementing any provision of law referred to in 5 U.S.C. § 2302(b)(1), (8), and (9) by providing for equal employment opportunity through affirmative action; or providing any right or remedy available to any employee or applicant for employment in the civil service;
- Subparts A (General Provisions), B (Employment and Retention), E (Attendance and Leave), G (Insurance and Annuities), and H (Access to Criminal History Record Information) of Part III of Title 5, *United States Code*; and Chapters 41 (Training), 45 (Incentive Awards), 47 (Personnel Research Programs and Demonstration Projects), 55 (Pay Administration), 57 (Travel, Transportation, and

Subsistence), 59 (Allowances), 72 (Antidiscrimination, Right to Petition Congress), 73 (Suitability, Security, and Conduct), and 79 (Services to Employees) of Title 5; or

- any rule or regulation prescribed under any provision of law referred to in any of the statements in bullets immediately above.

The use of a category rating system for evaluating applicants for positions in the competitive service is permitted under the new system.

Nothing in the new Section 9701 constitutes authority to:

- modify the pay of any employee who serves in an Executive Schedule position or a position for which the rate of basic pay is fixed in statute by reference to the Executive Schedule;
- fix pay for any employee or position at an annual rate greater than the maximum amount of cash compensation allowable under 5 U.S.C. § 5307 in a year; or
- exempt any employee from the application of 5 U.S.C. § 5307.

It is the sense of the Congress that employees of DHS are entitled to fair treatment in any appeals that they bring in decisions relating to their employment. In prescribing regulations for any such appeals procedures, the Secretary of Homeland Security and the Director of OPM should ensure that employees of the department are afforded the protections of due process and, toward this end, should be required to consult with the Merit Systems Protection Board (MSPB) before issuing any such regulations. Any regulations which relate to any matters within the purview of Chapter 77 (on appeals) must be issued only after consultation with the MSPB and must ensure the availability of procedures which must be consistent with requirements of due process and provide, to the maximum extent practicable, for the expeditious handling of any matters involving DHS. Any regulations must modify procedures under Chapter 77 only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of DHS.

The law also includes provisions related to labor management relations and collective bargaining. (See 5 U.S.C. Chapter 71 in this compendium.)

Effective five years after the conclusion of the transition period defined under Section 1501 of the act (a 12-month period beginning 60 days after the act's enactment date of November 25, 2002), all authority to issue regulations under the section (including regulations which would modify, supersede, or terminate any regulations previously issued under the section) must cease to be available.

Except as otherwise provided in the Homeland Security Act, the transfer, under this act, of full-time personnel (except special government employees) and part-time personnel holding permanent positions must not cause any such employee to be separated or reduced in grade or compensation for one year after the date of transfer to DHS. A person who, on the day preceding his or her date of transfer to the new department, held a position compensated on the Executive Schedule, and who, without a break in service, is appointed in DHS to a position having duties

comparable to the duties performed immediately preceding such appointment, must continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of service in the new position. Any exercise of authority under the new Chapter 97, including under any system established under the chapter, must be in conformance with these requirements.

In authorizing the establishment of an HRM system for the new department, Congress stated that —

[I]t is extremely important that employees of the Department be allowed to participate in a meaningful way in the creation of any human resources management system affecting them;

[S]uch employees have the most direct knowledge of the demands of their jobs and have a direct interest in ensuring that their human resources management system is conducive to achieving optimal operational efficiencies;

[T]he 21st century human resources management system envisioned for the Department should be one that benefits from the input of its employees; and

[T]his collaborative effort will help secure our homeland.

Discussion

On April 1, 2003, Secretary of Homeland Security Tom Ridge and OPM Director Kay Coles James announced that they were launching the process for designing a new HRM system for DHS. The following process is being used to create the system:

- A Design Team conducted research and outreach to provide a full range of options for a Senior Review Committee to consider. The team included DHS program managers from all directorates and disciplines, union and employee representatives, and human resource specialists from DHS and OPM. Expert consultants from the private sector also supported the team.
- A Senior Review Committee (SRC) is developing personnel system options to be considered by the Secretary and the Director and their senior staff. The committee included, among others, the Under Secretary for Management, department program leaders, officials from OPM, and major union leaders. A small number of academics and policy experts served as ex officio members who advised the committee on specific issues.

The design team began work on April 1, 2003, and conducted field meetings in several cities, including New York City, Miami, Detroit, El Paso, Atlanta, Seattle, and Salt Lake City, locales with the largest concentrations of DHS employees. Testimony was received from more than 2,000 DHS employees, including 44 employee focus groups and 10 manager focus groups. The field meetings concluded in late June 2003. On July 25, 2003, the design team reported to the SRC on these field meetings. Pay, performance management, and labor-management relations were among the issues discussed.

On October 3, 2003, the design team presented its final report with 52 options for the new HRM to the SRC.³⁹⁴ None of the options represents the consensus of the design team and none covers the Senior Executive Service (SES). Modifications to Title 5 *United States Code* pay and performance management provisions for the SES will be addressed through a separate process. The options are grouped into two categories: (1) Pay, Performance Management, and Classification and (2) Labor Relations, Adverse Actions, and Appeals. Among the options in the first category are those which would continue or amend the current General Schedule pay system; establish a compensation system based on pay bands; create a system based on longevity, competency, and performance; and continue or amend the existing performance management system. Options under the second category include continuing the current labor relations procedures, providing for national level bargaining, continuing or amending the current adverse actions and appeals procedures, creating an Ombudsman Office, and establishing procedures for alternative dispute resolution. The SRC examined and deliberated the options at a public meeting conducted October 20 through October 22, 2003. A summary of the proceedings was published on December 5, 2003.³⁹⁵ The committee will “present a refined range of options to the Secretary and the Director,” who will then issue proposed rules. Employee representatives and Congress will be notified, and any differences will be reconciled. The Secretary and the OPM Director jointly issued proposed regulations for the new human resources management system on February 20, 2004.³⁹⁶

While there is consensus on the broad principles that should govern a new HRM system, DHS employees, some Members of Congress, and knowledgeable HRM observers are beginning discussions about the rules that will implement the new system. To this point, discussions have focused only on the design team process.

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³⁹⁴ See [http://www.opm.gov/Strategic_Management_of_Human_Capital/HC_Systems/DHS/index.asp], visited Dec. 16, 2003.

³⁹⁵ See [http://www.opm.gov/Strategic_Management_of_Human_Capital/HC_Systems/DHS/SeniorReview_CommitteeMeeting.asp], visited Dec. 16, 2003.

³⁹⁶ For more information, see CRS Report RL32261, *Homeland Security: Proposed Regulations on Job Evaluation, Pay, and Performance Management Compared with Current Law*, by Barbara L. Schwemle.

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Barbara L. Schwemle

**(39) Department of Defense National Security Personnel System
(Chapter 99; in Part III, Subpart I — Miscellaneous).**

Statutory Intent and History

The National Defense Authorization Act for FY2004 (P.L. 108-136, Section 1101; 117 Stat. 1621) authorizes the creation of a new human resources management (HRM) system, to be called the National Security Personnel System (NSPS), for civilian employees (some 735,000) of the Department of Defense (DOD). The NSPS provisions were included in a DOD proposal entitled “The Defense Transformation for the 21st Century Act” that was submitted to Congress in April 2003.³⁹⁷ According to the proposal, DOD’s responsibility to defend the security of the nation requires that the department’s HRM system incorporate enhanced flexibilities to recruit, develop, assess, compensate, assign, and separate employees. With the new authority under the NSPS, DOD stated that it will be able to fold innovations from its ongoing demonstration projects as well as best practices from throughout the federal government into its strategic plan for civilian human resources management.

Major Provisions

Section 1101(a)(1) of the National Defense Authorization Act amends Part III, Subpart I, of Title 5, *United States Code*, by adding a new Chapter 99 entitled “Department of Defense National Security Personnel System.” The new Section 9902(a) provides that notwithstanding any other provision of Part III, the Secretary of Defense may, in regulations prescribed jointly with the OPM director, establish, and from time to time adjust, an HRM system for some or all of the organizational or functional units of DOD. The system must be flexible and contemporary and, under the new Section 9902(b), cannot waive, modify, or otherwise affect:

- the public employment principles of merit and fitness at 5 U.S.C. § 2301, including the principles of hiring based on merit, fair treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;
- any provision of 5 U.S.C. § 2302, relating to prohibited personnel practices;
- any provision of law referred to in 5 U.S.C. § 2302(b)(1), (8), and (9); or any provision of law implementing any provision of law referred to in 5 U.S.C. § 2302(b)(1), (8), and (9) by providing for equal employment opportunity through affirmative action; or providing any right or remedy available to any employee or applicant for employment in the public service.

The new Section 9902(d) lists various subparts and chapters of Part III of Title 5, *United States Code* (including applicable rules and regulations) which cannot be waived, modified, or otherwise affected in the new HRM system as follow:

³⁹⁷ See [<http://www.defenselink.mil/dodgclrs/docs/Transformation.pdf>], visited Dec. 18, 2003.

- Subpart A — General Provisions, including Chapter 21, Definitions; Chapter 23, Merit System Principles; Chapter 29, Commissions, Oaths, Records, and Reports;
- Subpart B — Employment and Retention, including Chapter 31, Authority for Employment; Chapter 33, Examination, Selection, and Placement; Chapter 34, Part-time Career Employment Opportunities; Chapter 35, Retention Preference (RIF), Restoration, and Reemployment;
- Subpart E — Attendance and Leave, including Chapter 61, Hours of Work; Chapter 63, Leave;
- Subpart G — Insurance and Annuities, including Chapter 81, Compensation for Work Injuries; Chapters 83 and 84, Retirement; Chapter 85, Unemployment Compensation; Chapter 87, Life Insurance; Chapter 89, Health Insurance; Chapter 90, Long Term Care Insurance;
- Subpart H — Access to Criminal History Record Information, including Chapter 91 for individuals under investigation;
- Chapter 41 — Training;
- Chapter 45 — Incentive Awards;
- Chapter 47 — Personnel Research Programs and Demonstration Projects;
- Chapter 55 — Pay Administration, including biweekly and monthly pay periods and computation of pay, advanced pay, and withholding of taxes from pay, except that Subchapter V of Chapter 55 on premium pay (overtime, night, Sunday pay), apart from Section 5545b, may be waived or modified;
- Chapter 57 — Travel, Transportation, and Subsistence;
- Chapter 59 — Allowances, which includes uniforms, quarters, overseas differentials;
- Chapter 71 — Labor Management and Employee Relations;
- Chapter 72 — Antidiscrimination, Right to Petition Congress, including minority recruitment, antidiscrimination on the basis of marital status and handicapping condition, furnishing information to Congress;
- Chapter 73 — Suitability, Security, and Conduct, including security clearance, political activities (Hatch Act), misconduct (gifts, drugs, alcohol);
- Chapter 79 — Services to Employees, including safety program, protective clothing and equipment; or

Other requirements for the HRM system include that it shall:

- ensure that employees could organize, bargain collectively as provided for in the proposed Chapter 99, and participate through labor organizations of their own choosing in decisions that affect them, subject to the provisions of the proposed Chapter 99 and any exclusion from coverage or limitation on negotiability established pursuant to law; and
- include a performance management system. Requirements for the system are specified in the law.

The NSPS shall not apply with respect to various DOD laboratories before October 1, 2008, and shall apply on or after October 1, 2008, only to the extent that the Secretary determines that the flexibilities provided by the NSPS are greater than the flexibilities already provided to these laboratories.

Nothing in Section 9902 shall constitute authority to modify the pay of any employee who serves in an Executive Schedule position. Except for this provision, the total amount of allowances, differentials, bonuses, awards, or other similar cash payments paid under Title 5 in a calendar year to various senior executives may not exceed the total annual compensation payable to the Vice President (\$198,600 as of January 2003).

To the maximum extent practicable, the rates of compensation for civilian DOD employees shall be adjusted at the same rate, and in the same proportion, as are rates of compensation for members of the uniformed services. In addition, to the maximum extent practicable, for FY2004 through FY2008, the overall amount allocated for compensation of the civilian employees of an organizational or functional unit of DOD that is included in the NSPS shall not be less than the amount of civilian pay that would have been allocated for compensation of such employees for such fiscal year if they had not been converted to the NSPS.

The law requires the Secretary of Defense and the Director of the OPM to provide a written description of the proposed personnel system or any adjustments to such system to the labor organizations representing employees in the department. The measure identifies a collaboration procedure that must be followed by the Secretary, Director, and employee representatives. The Secretary is authorized to engage in any collaboration activities at an organizational level above the level of exclusive recognition. The Secretary is given similar authority to engage in collective bargaining with employee representatives at a level above the level of exclusive recognition. Finally, the Secretary and Director are authorized to establish and adjust a labor relations system for the department. Collaboration with employee representatives on the development of the system is required.

The new Section 9902(h) authorizes the Secretary of Defense to establish an appeals process that provides fair treatment for DOD employees who will be covered by the NSPS. Regulations for the appeals process, applicable to employee misconduct or performance that fails to meet expectations, may not be prescribed until after the Secretary consults with the Merit Systems Protections Board (MSPB) and must afford due process protections and conform to public employment principles of merit and fitness set forth in 5 U.S.C. § 2301. A qualifying employee subject to some severe disciplinary actions shall have a right to petition the MSPB for review of the record of the department's decision. The board is authorized to dismiss any petition that does not raise a substantial question of fact or law and to order corrective action only if the board finds that the department's personnel decision did not meet some prescribed standards. An employee adversely affected by a final decision or order of the board shall be able to obtain judicial review.

A new Section 9902(i) authorizes the Secretary of Defense, without review by OPM, to offer (1) early retirement to employees who are age 50 or older with 20 years of service or any age with 25 years of service and (2) separation incentive pay of up to \$25,000 to DOD employees who retire or resign. The law also includes provisions on re-employment within DOD without loss of annuity.

The Secretary may apply the NSPS (1) to an organizational or functional unit that includes up to 300,000 civilian DOD employees and (2) to more than 300,000

DOD civilian employees, if the Secretary determines that the department has in place a performance management system that meets the criteria specified in the law.

The law also allows the Secretary to appoint personnel from outside the civil service and uniformed services to positions in DOD without regard to any Title 5 provisions governing such. The Secretary may provide allowances and benefits that would be comparable to those provided to members of the Foreign Service or to personnel of the Central Intelligence Agency to certain civilian DOD employees who are engaged in hazardous activities or specialized functions and assigned to activities outside the United States.

Discussion

During testimony before the House Committee on Government Reform and the Senate Committee on Governmental Affairs and their relevant subcommittees, DOD officials discussed the department's Best Practices Initiative and referred Members of Congress to an April 2, 2003, *Federal Register* notice for additional details on the types of HRM flexibilities the department is implementing at its science and technology reinvention laboratories and would seek to implement under the NSPS. Authority for streamlined recruitment and candidate ranking, universal pay banding for five career groups, merit-based pay, and simplified appointment procedures were among the flexibilities DOD requested.

The General Accounting Office (GAO) testified about the NSPS proposal before the House Committee on Government Reform's Subcommittee on Civil Service and Agency Organization and the Senate Committee on Governmental Affairs' Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. GAO emphasized that DOD's performance appraisal system, as currently designed, does not support meaningful performance-based pay; that personnel management flexibilities currently available should be used fully as appropriate; that many of the features of the NSPS, including pay banding and pay for performance, should be considered for application government-wide; and that DOD should work together with labor representatives and stakeholders in implementing the new HRM system (something that was not done as the NSPS proposal was developed and submitted to Congress).

The conference agreement on H.R. 1588 incorporated some of the provisions of S. 1166, the National Security Personnel System Act, as reported (without written report). These provisions, among others, related to requirements for a performance management system, appellate procedures, and labor management relations and collective bargaining. All of these features were in contention and widely debated before agreement was reached. Another contentious provision that would have authorized the Secretary to waive the requirement that the HRM regulations be jointly prescribed by DOD and OPM for reasons of national security was dropped in conference. (Earlier, provisions included in H.R. 1836, the Civil Service and National Security Personnel Improvement Act, as reported, were added to H.R. 1588 during House Committee on Armed Services markup.) The conference agreement directs the Secretary to implement an evaluation system that better links individual pay to performance and provides an equitable method for appraising and compensating employees. Regulations to implement the system are, among other

features, to provide for grouping employees into pay bands and establishing performance factors to be used to evaluate whether performance objectives are accomplished. The conference agreement also states that the provisions on collective bargaining should not be construed as expanding the scope of bargaining under 5 U.S.C. Chapter 71.

In a November 2003 briefing document, DOD announced that the NSPS will be built through coordination with OPM and collaboration with employee representatives. There will be a minimum 90-day period of discussion, mediation, and notification to Congress of differences. Discussions began in January 2004, and they continue. Implementation of the NSPS will begin in FY2005 and will continue for at least a two-year period.³⁹⁸

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³⁹⁸ See [<http://www.cpms.osd.mil/nsps/index.html>], visited Dec. 18, 2003.

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Barbara L. Schwemle

B. Ethics in Government Act

Statutory Intent and History

Passage of the Ethics in Government Act of 1978 (92 Stat. 1824; 5 U.S.C. App.) culminated years of efforts to provide uniform financial disclosure requirements for key officers of the federal government. These efforts gathered momentum in the 1970s, following the Watergate scandal; revelations of impropriety by a number of government officials; polls showing a lack of confidence in public officials; and publication in 1976 of the recommendations of the President's Commission on Executive, Legislative, and Judicial Salaries, which recommended salary increases for top government officials, as well as ethical reforms, including annual public financial disclosure reports.

Major provisions of the act established (1) annual public financial disclosure requirements, (2) an Office of Special Prosecutor (subsequently called the Independent Counsel) to investigate allegations of wrongdoing by top officials in the executive branch, (3) the Office of Government Ethics to monitor executive branch financial disclosure reports and potential conflicts of interest, and (4) the Office of Senate Legal Counsel.

Major Provisions

Titles I through III of the act contain the financial disclosure requirements for the three branches of government, including which officers and employees are covered, contents of the reports (including provisions for reporting the income from trusts), accessibility of reports, review procedures in each branch of government, and penalties for failure to file.³⁹⁹ Though the provisions were almost uniform, their interpretation was left to designated officials in each branch.

Title IV originally established the Office of Government Ethics (OGE) within the Office of Personnel Management. OGE became an independent agency in 1989 (102 Stat. 3031). OGE is charged with enforcement of standards of conduct, assisting in the confirmation of presidential appointees, providing guidance to agencies on procedures for monitoring financial disclosure reports, the issuance of standards of conduct and advisory opinions, and developing ongoing ethics programs to educate employees.

Title V revised 18 U.S.C. § 207 to broaden the major conflict of interest provisions governing restrictions on post-service activities by officers and employees of the executive branch by extending existing prohibitions and establishing additional ones for matters on which former employees worked. The purpose is to prevent former officers and employees from using information gathered during their government service, or exercising undue influence on former colleagues.

³⁹⁹ In the Ethics Reform Act of 1989, discussed elsewhere in this compendium, the disclosure provisions for the three branches of government were combined into one title.

Title VI amended 18 U.S.C. § 28 (now expired) by adding provisions for the appointment and duties of a special prosecutor when the Justice Department had a conflict of interest in investigating wrongdoing by the President, Vice President, Cabinet-level officials, or senior White House or Justice Department officials. This provision was the result of the recommendations of the Senate Watergate Committee, and expired in 1999. It has not been reauthorized by Congress since that time.

Title VII established the Office of Senate Legal Counsel to defend the constitutional powers of the Senate in proceedings before the courts and conferred jurisdiction on the courts to enforce Senate subpoenas.

Discussion

Although the Ethics in Government Act was the product of long-term efforts to reform government ethics laws, and OGE has been an integral part of the executive branch ethics program, several provisions in the act have been problematic over the years. There was continuing debate over the wisdom and efficacy of the special prosecutor/independent counsel provisions. In addition, the financial disclosure provisions of the act, particularly as applied to the executive branch, have been viewed by some as making the presidential appointment process unnecessarily long, burdensome, and complex. A number of studies have shown that, in some cases, the ethics laws have been a deterrent to the recruitment of qualified appointees, and there is concern over the increasing amount of time taken to nominate and confirm high-level executive branch appointees.⁴⁰⁰

Several bills have been introduced in Congress to streamline the financial disclosure requirements for high-level nominees and employees and to require new appointed officials who have not complied with an ethics agreement within the original specified time to file monthly progress reports until all terms of the agreements have been met. These include S. 1811 in the 107th Congress, and S. 765 and H.R. 1603 in the 108th Congress.

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⁴⁰⁰ U.S. Congress, Senate Committee on Governmental Affairs, *Presidential Appointments Improvement Act of 2002*, report to accompany S. 1811, 107th Cong., 2nd sess., S.Rept. 107-152 (Washington, GPO, 2002), pp. 2-3.

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Mildred Amer

C. Ethics Reform Act of 1989

Statutory Intent and History

The Ethics Reform Act of 1989 (103 Stat. 1716) expanded the coverage of the earlier Ethics in Government Act (1978; 92 Stat. 1824). At the time of passage of the Ethics Reform Act, national attention was directed at what were perceived to be large honoraria earnings by some Members of Congress and the need to clarify existing ethics rules and regulations.

The impetus for the Ethics Reform Act (ERA89) was widely shared. In Congress, task forces in both the Senate and the House offered ethics recommendations. In the 1988 presidential election, candidate George H.W. Bush had promised to make ethics a top priority of his Administration. Soon after his inauguration, President Bush appointed the President's Commission on Federal Ethics Law Reform. Many of its 27 recommendations, including uniformity in ethics regulations in the three branches of government, found their way into the ERA89. Also, a number of recommendations of the private National Commission on the Public Service, established in 1987 and chaired by Paul Volcker, were considered and included. The Volcker Commission was especially concerned about provisions to develop a capable executive talent base in government.

The bill was intended to provide for automatic pay increases for Members of Congress and senior officials in the executive and judicial branches. Previously, annual congressional approval of compensation was often delayed, and compensation was often frozen due to political considerations.

Major Provisions

Major provisions of the ERA89 included:

- pay increases for Members of Congress and senior officials of the other two branches of government and provisions for a 25% adjustment in 1991, as well as annual pay adjustments for these individuals, based on Employment Cost Index (ECI);
- post-employment (“revolving door”) lobbying restrictions on Members of Congress, officers, and designated employees of the legislative branch;
- elimination of the so-called “grandfather clause” in federal election law that allowed Members of Congress in office prior to 1980 to convert excess campaign contributions to personal use;
- limitations on outside earned income for Members of Congress and noncareer officers and employees in the three branches of government compensated above a GS-15 level;

- prohibition on honoraria for Members, officers, and employees of the House of Representatives, as well as officers and employees of the executive and judicial branches;⁴⁰¹ and
- establishment of a Citizen’s Committee on Executive, Legislative, and Judicial Salaries to make recommendations to the President for salary rates for top government officials in the three branches.

Discussion

ERA89 is probably best known for its provision on government salaries and its total prohibition on honoraria. The honoraria prohibitions applied to income from speeches and writings, even if unrelated to an official’s and employee’s government work. Although the provisions applied to all officers and employees in the three branches of government, the initial target was Members of Congress. They were criticized because earning honoraria was viewed as diverting Members’ attention from official duties, and was perceived as a way for special interests to gain access to Members.

The automatic annual pay adjustments provided in the act for Members of Congress and other senior officials in the three branches of government were seen as a means for Members to avoid what was considered to be the “painful” act of having to vote on their own salaries. However, Congress has denied itself the annual pay adjustments five times since 1993, denials that also placed a “cap” on top executive branch officials.

Immediately after the ERA89 was enacted, several executive branch employees filed suit against the Justice Department, alleging that the honoraria ban violated the First Amendment right of free speech. In 1995, the Supreme Court overturned the provisions prohibiting honoraria for government employees (*National Treasury Employees Union v. United States*, 115 S.Ct. 1003 (1995)). The Senate, however, still has an honoraria ban for its officers and employees.

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⁴⁰¹ The Senate initially exempted itself from the honoraria and compensation prohibitions. Subsequently, with the enactment of the Legislative Branch Appropriations Act of 1992 (105 Stat. 447), Members, officers, and employees of the Senate could no longer earn honoraria and were subject to the same outside earned income restrictions as the rest of the government. Note: when the House adopted the rules for the 106th Congress, it voted to permit designated employees to earn honoraria for activities not related to their official duties (House Rule XXVI).

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Mildred Amer

D. Lobbying with Appropriated Monies Act

Statutory Intent and History

Many Members of Congress have long been concerned about the practice of federal agencies using appropriated funds to stimulate public support for or opposition to pending legislation. Legislators do not want to be on the receiving end of constituent pressures manufactured by agency telephone calls, telegrams, departmental threats and coercion, and other stimuli originating from within an administration.

To prohibit this practice, Congress passed legislation in 1919, and this statutory restriction (known as the Lobbying with Appropriated Moneys Act) remains part of permanent law. Debate in the House of Representatives reveals that some Members were offended by bureau chiefs and departmental heads “writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation.” Statutory language was drafted to “absolutely put a stop to that sort of thing.”⁴⁰²

Major Provisions

As currently codified (18 U.S.C. § 1913), the Lobbying with Appropriated Moneys Act provides that “No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation.” Section 1913 does not prevent officers or employees from communicating to Members of Congress “on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.” If an officer or employee violates or attempts to violate Section 1913, this person “shall be fined under this title or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.”

Discussion

The Justice Department has never prosecuted anyone for violating the Lobbying with Appropriated Moneys Act. However, the Justice Department has pointed out that the right of citizens to lobby Congress does not mean a right to federal funds for this purpose: “Although private persons and organizations have a right to petition Congress and to disseminate their views freely, they can be expected, within the

⁴⁰² Rep. James Good, remarks in the House, *Congressional Record*, vol. 58 (May 29, 1919), p. 403.

framework established by the Constitution, to do their lobbying at their own expense. They have no inherent or implicit right to use federal funds for that purpose unless Congress has given them that right.” (5 Op. Off. Legal Counsel 180, 185 (1981)).

Statutory sanctions against executive lobbying have had limited effect because of uncertainty about the law and Justice Department interpretations. Due to conflicting statutes, the General Accounting Office (GAO) has at times hesitated to find a violation of agency activity. Former Comptroller General Elmer B. Staats once explained, “The reason for this is that agencies are authorized and, in some cases, specifically directed to keep the public informed concerning their programs. Where such authorized activities involve, incidentally, reference to legislation pending before Congress, it is extremely difficult to draw a dividing line between the permissible and the prohibited.”⁴⁰³

Since Section 1913 is a criminal statute, GAO regards its enforcement as “the responsibility of the Department of Justice and the courts. Therefore, GAO will not ‘decide’ whether a given action constitutes a violation. GAO will, however, determine whether appropriated funds were used in a given instance, and refer matters to the Justice Department in appropriate cases.”⁴⁰⁴ Because a violation of Section 1913 constitutes an improper use of appropriated funds, such a violation “could form the basis of a GAO exception or disallowance. However, GAO can take no action unless the Justice Department or the courts first determine that there has been a violation.”⁴⁰⁵

Although the Justice Department has never prosecuted anyone for violating Section 1913, it has indicated the type of executive activity that would be impermissible. A memorandum in 1977 stated that “a campaign to contact a large group of citizens by means of a form letter prepared and signed by a federal official would be improper.”⁴⁰⁶ In 1989, the Justice Department restricted Section 1913 to “a significant expenditure of appropriated funds to solicit pressure on Congress” and a “substantial” grassroots lobbying campaign.⁴⁰⁷

Judging from the few judicial decisions that have been handed down, it is apparent that the courts are reluctant to adjudicate in the area of executive lobbying.

⁴⁰³ Letter from Comptroller General Elmer Staats to Congressman Thomas B. Curtis, September 7, 1967, cited in Richard L. Engstrom and Thomas G. Walker, “Statutory Restraints on Administrative Lobbying — ‘Legal Fiction’,” *Journal of Public Law*, vol. 19 (1970), p. 98.

⁴⁰⁴ U.S. General Accounting Office, *Principles of Federal Appropriations Law*, 2nd ed., vol. 1 (Washington: GAO, 1991), p. 4-158.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert J. Lipshutz, Counsel to the President, “Statutory Restraints on Lobbying Activities by Federal Officials,” Nov. 29, 1977, p. 10, note 21.

⁴⁰⁷ Memorandum for Dick Thornburgh, Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, “Constraints Imposed by 18 U.S.C. § 1913, on Lobbying Efforts,” Sept. 28, 1989; 13 *Op. Off. Legal Counsel* 362 (prelim. print).

They seem inclined to defer to Congress and the executive branch on actions to be taken against improper lobbying by executive officials.⁴⁰⁸

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Louis Fisher

⁴⁰⁸ *Grassley v. Legal Service Corporation*, 535 F.Supp. 818 (D.D.C. 1982); *National Treasury Employees Union v. Campbell*, 654 F.2d 784 (D.C.C. 1980); *American Trucking Etc. v. Department of Transportation*, 492 F.Supp. 566 (D.D.C. 1980); *American Public Gas Association v. Federal Energy Administration*, 408 F.Supp. 640 (D.D.C. 1976); *National Association for Community Development v. Hodgson*, 356 F.Supp. 1399 (D.D.C. 1973).

E. Federal Tort Claims Act

Statutory Intent and History

Until the Federal Tort Claims Act (FTCA) was enacted in 1946,⁴⁰⁹ a person who suffered personal injury or property damage as the result of a federal employee's negligence or misconduct had no judicial remedy. Such a person's only remedy was to seek to have a private claim bill introduced in Congress. This situation existed because of the common law doctrine of sovereign immunity, under which the United States may not be sued without its consent. Congress alone has the power to give this consent, and, by enacting the FTCA, Congress waived sovereign immunity for some tort suits. With exceptions, it made the United States liable for the torts of its employees committed in the scope of employment, just as private employers are liable for the torts of their employees committed in the scope of employment.

The FTCA makes the United States liable for the torts of its employees (but not of government contractors) in accordance with the law of the state where the employee's act or omission occurred. Thus, for example, state laws placing caps on non-economic damages apply in cases brought under the FTCA. However, the FTCA contains exceptions under which the United States may not be held liable even though a private employer could be held liable under state law. And punitive damages are not permitted under the FTCA, regardless of state law.

One of these exceptions is known as the *intentional tort exception*; it prohibits suits "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." In 1974, in response to controversial "no-knock raids" by federal narcotics agents, Congress amended the FTCA to allow suits against the United States for the first six torts on the list of intentional torts just quoted, if they are committed by an "investigative or law enforcement officer of the United States Government."

In 1950, in *Feres v. United States* (340 U.S. 135), the Supreme Court held that military personnel may not sue under the FTCA for injuries sustained incident to service. Federal civilian employees also may not sue under the FTCA for on-the-job injuries, because they are covered by the Federal Employees' Compensation Act.

In 1988, the FTCA was amended to make federal employees acting within the scope of their employment immune from suit under state tort law — even in cases in which the United States may not be sued either (28 U.S.C. § 2679(b)(1)).

The most recent amendments to the FTCA provide that no person convicted of a felony who is incarcerated may sue the United States "for mental or emotional injury suffered while in custody without a prior showing of physical injury" (P.L. 104-134, § 806 (1996)), and that suits may be brought under the FTCA to recover damages to property seized under a federal forfeiture statute if the claimant is not convicted and is entitled to return of the property (P.L. 106-185, § 3 (2000)).

⁴⁰⁹ 60 Stat. 842; 28 U.S.C. §§ 1346(b), 2671-2680.

Major Provisions

United States district courts “shall have exclusive jurisdiction of civil actions on claims against the United States...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred” (28 U.S.C. § 1346).

Prior to filing suit under the FTCA, a claimant must present his claim to the federal agency out of whose activities the claim arises (28 U.S.C. § 2675). This must be done within two years after the claim accrues (28 U.S.C. § 2401). If, within six months after receiving a claim, the agency mails a denial of the claim to the claimant, then the claimant has six months to file suit in federal district court (28 U.S.C. §§ 2401, 2675). No period of limitations applies to a plaintiff if the agency fails to act within six months after receiving his claim. Suits under the FTCA are tried without a jury (28 U.S.C. § 2402).

Attorneys may not charge more than 20% of a settlement agreed to by a federal agency, or more than 25% of the amount of a court judgment or a settlement agreed to by the Attorney General (28 U.S.C. § 2678). The United States shall not be liable under the FTCA, regardless of state law, “for interest prior to judgment or for punitive damages” (28 U.S.C. § 2673).

The United States may not be held liable under the FTCA solely because the statute or regulation under which a federal employee acted was invalid. The United States may not be held liable under the FTCA, even if a federal employee engaged in a negligent or wrongful act or omission in the scope of employment, if the act or omission involved a “discretionary function,” which means essentially the exercise of a policy judgment. The United States may not be held liable under the FTCA for claims that arise in a foreign country. The United States also may not be held liable for claims arising out of, among other things, “the loss, miscarriage, or negligent transmission of letters or postal matter”; “the assessment or collection of any tax or customs duty”; “the fiscal operations of the Treasury or ... the regulation of the monetary system”; or “combatant activities of the military or naval forces, or the Coast Guard, during time of war.” All the exceptions to the FTCA noted in this paragraph appear at 28 U.S.C. § 2680.

Discussion

One aspect of the FTCA that has been controversial is the application of the *Feres* doctrine — prohibiting military personnel from suing for injuries sustained incident to service — to medical malpractice cases. One reason for the *Feres* doctrine is to prevent civilian courts from second-guessing military decisions, and some have argued that this rationale does not apply in medical malpractice cases, as when a military doctor is negligent in delivering a servicewoman’s baby. The Supreme Court held, however, in *United States v. Johnson* (481 U.S. 681 (1987)), that the *Feres* doctrine applies even to suits brought by military personnel for injuries caused by employees of *civilian* federal agencies; this suggests that the “second-

guessing” rationale is not crucial. More significant may be the potential effects of suits by military personnel on military discipline, and the alternative compensation system available to military personnel. Nevertheless, four dissenting justices in *United States v. Johnson* favored overturning *Feres* altogether as not mandated by Congress in the FTCA.

As noted, the FTCA, since 1988, has made federal employees immune from suits under state law for torts committed within the scope of their employment. (They may be sued for violating the Constitution or for violating a federal statute that authorizes suit against an individual.) This immunity has been extended to various volunteers in federal programs; more than fifty statutes, including those establishing VISTA and the Peace Corps, provide that volunteers in programs the statutes establish shall be considered federal employees for purposes of the FTCA.

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