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SENATE

REPORT
110–456

NON-FOREIGN AREA RETIREMENT EQUITY ASSURANCE ACT OF 2008

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 3013

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



SEPTEMBER 11, 2008.—Ordered to be printed

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SEPTEMBER 11, 2008.—Ordered to be printed

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

R E P O R T

[To accompany S. 3013]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3013) to provide for retirement equity for Federal employees in non-foreign areas outside the 48 contiguous States and the District of Columbia, and for other purposes, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

I. PURPOSE & SUMMARY

Since 1948, federal employees in the non-foreign areas[1] of the U.S. have received a non-foreign cost of living allowance (COLA) to ensure that their pay reflects the high cost of living in those areas compared to the cost of living in Washington, DC. To determine COLA rates, the Office of Personnel Management (OPM) conducts annual cost surveys of the prices of over 200 items in the non-foreign areas and in the Washington, DC area. OPM publishes the results of these surveys and any recommended changes to the COLA rates in the Federal Register for comment. A COLA is not subject to federal taxes and it does not count as part of base pay for retirement purposes.

In 1990 Congress sought to close the pay gap between federal employees and workers in the private sector in metropolitan areas by providing locality pay to federal workers in the contiguous United States and the District of Columbia as authorized by the

[1] The term 'non-foreign area' generally refers to the non-contiguous U.S., including Alaska, Hawaii, territories, and possessions, and the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

Federal Employees Pay Comparability Act (FEPCA).[2] Unlike a COLA, locality pay is taxed and considered part of base pay, which is used to calculate an employee's retirement annuity. Another difference is while a COLA reflects the cost-of-living in a geographic area, locality pay reflects the cost of wages through a comparison of federal salaries to private sector salaries in specific geographic areas. A third difference is that U.S. Postal Service employees in the non-contiguous areas are eligible to receive COLA, which the Postal Service calls Territorial COLA (T–COLA). However, postal employees in the contiguous United States do not receive locality pay.

Because locality pay counts towards employees' retirement whereas COLA does not, federal workers in the non-foreign areas, who do not receive locality pay, are disadvantaged in their retirement compared to federal workers in the contiguous states. S. 3013 would address this problem by phasing in locality pay and phasing out COLA.

II. BACKGROUND

Non-Foreign COLA

In the 1940s, military departments and federal agencies began paying differentials to U.S. citizens recruited for white-collar civilian positions in Alaska and areas outside the continental U.S. to help speed up the recruitment of personnel in those locations. In 1946, in response to widespread reports of a lack of uniformity in the payment of these differentials, President Harry S. Truman directed the Civil Service Commission (CSC) and the Bureau of the Budget to prepare a report on pay differentials outside the U.S. CSC prepared a draft report that recommended standardizing pay practices and establishing two types of adjustments: one based on relative living costs and a second based on undesirable living conditions. These recommendations became the basis for the current COLA and post differential programs.

In 1948, President Truman issued an Executive Order that made federal employees in the non-foreign areas eligible to receive additional compensation in two separate programs: one based on living costs (i.e., the non-foreign area COLA program) and another based on conditions of environment (i.e., the post differential program).[3] That same year, Congress enacted legislation that codified this pay differential for employees outside the continental U.S. or in Alaska.[4]

This legislation, codified as Section 5941 of title 5, United States Code, provides for the payment of an allowance based on differences in living costs or on differences in conditions of environment, or both. The total payment, however, may not exceed 25 percent of basic pay. COLAs are payments designed to recognize substantially higher living costs in the non-foreign areas relative to those in the Washington, DC area. The government pays COLAs to

[2] P.L. 101–509.
[3] E.O. 10,000, 13 Fed. Reg. 5453, 5455 (Sept. 18, 1948).
[4] Independent Officers Appropriation Act, 1949, ch. 219, sec. 207 (1948) and Supplemental Independent Offices Appropriation Act, 1949, ch. 775, sec. 104 (1948). See also P.L. 89–554, 5 U.S.C. § 5941.

both local and non-local hires. Similar to other allowances,[5] a COLA is not subject to federal taxes and does not count toward an employee's retirement.

Post differentials are recruitment incentives designed to encourage people from other areas to go to work for the federal government in a non-foreign area that has (a) extraordinarily difficult living conditions, (b) excessive physical hardships, or (c) notably unhealthful conditions compared with the continental U.S. Since a post differential is a recruitment incentive to get people to move to a non-foreign area, the government does not pay post differentials to people who are local hires. Like COLAs, post differentials do not count toward retirement but, unlike COLAs, they are subject to federal taxes.

Post differentials are currently authorized for Guam, the Commonwealth of the Northern Mariana Islands (CNMI), American Samoa, and Johnston, Wake, and Midway Atolls. Non-local hired employees in Guam are eligible for a post differential of up to 20 percent while those in CNMI and the other areas are eligible to receive a 25 percent differential. Guam and CNMI are the only areas that are authorized for both a post differential and COLA, which when combined cannot exceed 25 percent of base pay. Employees in Guam and CNMI currently receive the same 25 percent COLA, but because of the cap do not receive a post differential.

By law, a COLA is required to reflect the differences in the living costs between the COLA area and Washington, DC. Many factors other than price level differences affect the cost of living in a particular place. Employees have long argued that the COLA methodology is deficient and violates federal law by considering only price level differences and failing to consider differences in non-price factors such as remoteness, isolation, and quantity or quality of goods and services needed or available. As a result, the COLA program has been the subject of litigation since 1981.[6]

In the early 1990s attorneys representing employees in the COLA litigation formulated a proposal to resolve all of the remaining controversies concerning the COLA program through what came to be known as the Safe Harbor Process. The name was chosen because, if an agreed methodology could be achieved, the government would receive a safe harbor against future litigation. In the interim, the plaintiffs filed four additional lawsuits that were stayed pending the conclusion of the Safe Harbor Process and court approval of a settlement agreement.[7] On June 20, 2000, the parties involved filed a joint stipulation for settlement of the litigation with the District Court for the Virgin Islands, which was approved.

The settlement agreement provided for employee involvement with OPM in implementing the Safe Harbor Principles and to ensure local employee input for the future. It also provided for expanded employee access to materials supporting the regular price

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[5] Most payments received by U.S. government civilian employees for working abroad, including pay differentials, are taxable. However, certain foreign area allowances, cost of living allowances, and travel allowances are tax free. See IRS guidance entitled "Allowances, Differentials, and Other Special Pay," available at http://www.irs.gov/businesses/small/international/article/0,,id=97187,00.html (accessed Aug. 14, 2008).

[6] See Alaniz v. OPM, No. A81–072 (D. Alaska); Karamatsu v. United States, No. 224–85C (C1. Ct.); and Arana v. United States, No. 389–86C (C1. Ct).

[7] Angelet v. United States, No. 97–1378RU (D.P.R.), Caraballo v. United States, No. 1997–0027 (D.V.I.), Cruz v. United States, No. 98–00021 (D. Guam), and Matsuo v. United States, No. 97–01418 (D. Hawaii).

surveys and it established parameters for the conduct of future surveys. The settlement made a number of technical improvements to the methodology used to determine COLA rates, which brought it into conformance with modern cost of living comparisons—such as the weighting of prices, sources of data, collection of prices, and the method of measuring housing costs. Under the settlement, OPM could not reduce COLA rates under the new methodology until the last survey of all three regions was finalized and any reductions to COLA rates thereafter could not exceed one point per year. In addition the settlement provided for an award of back pay and interest in the amount of $234 million.

COLA rates in effect today are listed below:

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

Due to an increase in the cost-of-living in Washington, DC, the differential between Washington, DC and the COLA areas has decreased. Therefore, OPM expects COLA rates to decrease by one percent in Guam and in all of the Hawaii COLA areas late in the summer of 2009. Anchorage, Fairbanks, and Juneau, Alaska are expected to fall by one percent as well in the fall of 2008.

Creation of Locality Pay

Although the federal government's pay policy was supposed to set federal employee pay rates to be comparable with the private sector,[8] it became increasingly evident in the late 1980's that there was a large gap between federal salaries and the private sector across the country. These pay disparities seriously impeded the ability of federal agencies to recruit and retain highly-qualified employees. The Government Accountability Office (GAO) reported in 1990 that 78.3 percent of federal managers and personnel officers surveyed said that low pay was the reason employees left the federal government. The same GAO survey showed that 72.5 percent believed that job candidates declined job offers with the federal government because of the low pay offered.[9]

To address these disparities, Congress passed the Federal Employees Pay Comparability Act (FEPCA) of 1990. FEPCA requires the annual pay adjustment for General Schedule (GS) employees to be based on the Employment Cost Index (ECI), which measures change in private-sector wages and salaries. Under FEPCA, basic pay rates are to be increased.[10]

[8] 5 U.S.C. § 5301.

[9] Recruitment and Retention: Inadequate Federal Pay Cited as Primary Problem by Agency Officials, (GAO/GGD–90–117) at 4, September 1990.

[10] In the event of a national emergency or serious economic conditions the President may issue an alternative pay plan. See 5 U.S.C. §§ 5301–5303 and 5304–5304a.

Under FEPCA, federal employees also receive locality-based comparability payments. The locality pay procedure established by FEPCA provides that payments are to be made within each locality determined to have a nonfederal/federal pay disparity greater than five percent. When uniformly applied to GS employees within a locality, the adjustment is intended to make their pay rates substantially equal to those of non-federal workers in the same locality.

All GS federal employees employed within the continental U.S. are entitled to receive locality pay.[11] However, FEPCA specifically excludes federal employees in Hawaii and Alaska and the other non-foreign areas from receiving locality pay.[12] The legislative history is silent as to why Congress chose to exclude Hawaii and Alaska employees from receiving locality pay.

Not all employees received the full amount of the locality pay adjustment because of statutory maximum pay levels for GS level employees or because of other limitations in the law.[13] In addition, GS special rate employees receive either the special rate supplement or the locality payment, whichever is higher. Law enforcement officers receiving special base rates receive both special base rates and locality pay.

Under the law, the Bureau of Labor Statistics (BLS) conducts surveys under the National Compensation Survey (NCS) program that document non-federal rates of pay in each locality pay area. In January 2009 there will be 32 pay areas nationwide.[14] The BLS survey results are submitted to OPM, which serves as the staff to the Federal Salary Council[15] and the President's Pay Agent.[16] OPM documents federal rates of pay in each of the pay areas and compares non-federal and GS salaries by grade for each pay area. By law, the disparity between non-federal and federal salaries is to be reduced to five percent. The Federal Salary Council uses OPM's data to advise the President's Pay Agent on recommendations to the President on locality rates for each pay area.

FEPCA requires that a certain percentage of the adjusted gap between GS average salaries and non-federal average salaries in each pay area is to be closed each year. Twenty percent of the gap was closed in 1994, the first year of locality pay, as authorized by FEPCA. An additional 10 percent of the gap was supposed to be closed each year thereafter until January 2002, when pay rates should have been sufficient to reduce the pay disparity to five percent.

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[11] The President's Pay Agent has extended these payments to employees in other pay systems, including employees in senior level, scientific and professional positions, administrative law judges, administrative appeals judges, and contract appeals board members.

[12] 5 U.S.C. § 5304(f)(1)(A) and 5 U.S.C. § 5701(6).

[13] As of January 2008, basic pay cannot exceed $139,600 (EX Level V); basic pay and locality pay combined cannot exceed $149,000 (EX Level IV); and total compensation, including bonuses and allowances, cannot exceed $191,300 (EX Level I).

[14] The Federal Salary Council recommended that the 32 locality pay areas recommended for 2008 continue in 2009. In not recommending any new pay areas, the council noted that, were new areas to be proposed, criteria for their establishment would have to be developed and the BLS would need additional funding. According to the council, BLS has indicated that, based on its current funding and resources, it cannot expand its current NCS program to increase samples in existing locality pay areas or to cover more areas. See Federal Salary Council Memorandum for January 2009, p. 6.

[15] The council consists of nine members: Terri Lacy, chair; George Nesterczuk, vice-chair; Rudy J. Maestas; and representatives of the American Federation of Government Employees; the National Treasury Employees Union; the National Federation of Federal Employees; the Association of Civilian Technicians; and the Fraternal Order of Police.

[16] The Pay Agent is comprised of the Secretary of Labor, the Director of the Office of Management and Budget, and the Director of OPM.

However, FEPCA has never been implemented as originally enacted. The annual pay adjustment was not made in 1994 because the entire pay adjustment went to fund locality pay adjustments. During that year, federal employees in Alaska, Hawaii, and the other non-foreign areas did not receive a pay increase. For 1995 through 2008, reduced amounts of the locality payments were provided.[17] As of 2008, only 58.3 percent of the pay gap has been reduced. The amount needed to reduce this disparity to five percent averages 36.89 percent for 2009 and would cost approximately $12.1 billion.[18]

The problem and solution

Because locality pay, but not a COLA, is included in calculating retirement contributions and annuities, the exclusion of Hawaii and Alaska federal employees and those in the other non-foreign areas from receiving locality pay under FEPCA means that these employees are not able to contribute as much or receive as much matching contributions from their employing agency to their retirement accounts under the Thrift Savings Plan as similarly situated employees in the contiguous U.S. Additionally, these non-foreign area employees' base pay for determining their highest three years ("high 3") for calculating their retirement annuities is less than similarly situated contiguous U.S. employees who receive locality pay.

Since FEPCA's enactment, the exclusion of Hawaii and Alaska federal employees and those in the non-foreign areas has influenced federal employees' decisions about whether to move to the contiguous U.S. to receive locality pay.[19] As employees in the COLA areas near retirement, many consider and seek short term employment in the contiguous U.S. where their "high 3" salaries are boosted by locality pay.[20] As a result of this disparity, federal agencies in the non-foreign areas face staffing problems, especially for employees near retirement.

On June 22, 2005, federal employees in Hawaii and Alaska filed a class action lawsuit against the federal government alleging that FEPCA's exclusion of federal employees who work and reside in Hawaii and Alaska violates the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution. They also contend that federal employees have a property interest in their salary and that exclusion from locality pay violates their due process rights under the Fifth Amendment.[21] The lawsuit seeks locality pay for federal

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[17] The President usually includes a proposal on the federal civilian pay adjustment in the Budget of the United States issued in February of each year. The pay adjustment is considered annually by Congress, which may legislate an adjustment that is different from the one recommended by the President or that might be authorized by the President in an alternative plan. The January 1999, January 2000, and January 2002 through January 2006 overall pay adjustment amounts were set by Congress. P.L. 105–277, P.L. 106–58, P.L. 107–67, P.L. 108–7, P.L. 108–199, P.L. 108–447, and P.L. 109–115, respectively, provided the pay adjustments but reserved to the President the decision as to how the increases would be allocated between the annual and locality pay adjustments.

[18] Annual Report of the President's Pay Agent on Locality-Based Comparability Payments for the General Schedule, at 18 and 21, December 6, 2007.

[19] Matsuo v. U.S., No. 05–00398 at 5 (D–Hawaii, Jan. 30, 2008).

[20] Non-Foreign COLA: Finding an Equitable Solution, Hearing before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the Senate Committee on Homeland Security and Governmental Affairs, 110th Congress, May 29, 2008, (Statement of Chuck Grimes, Office of Personnel Management) at 3–4.

[21] Supra note 19 at 2.

employees who work in those jurisdictions dating back to the implementation of FEPCA.

On January 30, 2008, the U.S. District Court in Hawaii granted the government's motion to dismiss the case and urged Congress to rectify the situation. The Court said, "Congress has a legitimate interest in creating and managing compensation packages for its employees to compensate employees adequately, to recruit and retain employees, and to allocate limited resources among employees. That Congress may have discharged its legislative responsibilities imperfectly does not give this Court fiat to rewrite the legislation to rectify the current disparity. It suggests strongly instead that Congress should correct the incongruity made so evident by this case." [22] The plaintiffs filed an appeal of the decision on February 29, 2008.

In an effort to address the retirement inequity of employees in the non-foreign areas and the issues raised by the litigation, President George W. Bush in his fiscal year 2008 Budget proposed to extend locality pay to white-collar federal employees in the non-foreign areas. On May 30, 2007, OPM Director Linda Springer submitted the specific legislative proposal to Congress. Under the OPM proposal, COLA rates in effect on December 31, 2007, would be locked in place and OPM would no longer conduct COLA surveys. Beginning with the first pay period in January 2008, locality pay would begin to be phased in for federal employees in the non-foreign areas while the COLA program is phased out. This initial transition process would take seven years, with the locality rate for each area being phased in each year. In the first year, the locality pay rate for the "Rest of the U.S." (i.e., the default rate that applies outside of the metropolitan areas where specific rates are established) would be applied to all areas in order to give BLS and OPM time to work with the Federal Salary Council and the President's Pay Agent to determine the locality pay rates for each non-foreign area. OPM has estimated that the locality pay rate for the State of Hawaii would be 20.38 percent, the rate for the State of Alaska would be 27.68 percent, and the rate for the other non-foreign areas would be the Rest of the U.S. locality pay rate, which is currently set at 13.18 percent.[23] An employee would continue to receive some amount of COLA until the locality pay rate is more than the locked-in COLA rate.

Under this OPM proposal, the Federal Salary Council would have the authority to set locality rates in all the non-foreign areas, including areas such as Guam, American Samoa, and Wake Atoll, that are currently authorized for post differentials. Right now, only Guam and CNMI are authorized for both a COLA and a post differential. Absent OPM making any regulatory change, once the reduction of a COLA begins under the proposed legislation, the post differential will start to increase. When the Guam and CNMI COLA drops to zero, the post differential paid to non-local hires would be 20 percent in Guam and 25 percent in CNMI. OPM last

[22] Id. at 22.

[23] Supra note 20 at 6. The estimated pay gap in Anchorage, AK is 54.96 percent and in Honolulu, HI is 41.72 percent. Supra note 14 at 9.

reviewed the amount of and need for post differentials in 1995 and does not plan to review post differential rates at this time.[24]

To help address the adverse impact on a non-foreign employee's take home pay due to the increase in taxes and retirement contributions, OPM proposed that COLA be phased out at a slower rate than locality pay is phased in. Under this OPM proposal, the conversion to locality pay would be offset by a corresponding 85 percent reduction in COLA. Thus, for every dollar of locality pay that is phased in under the proposal, the employee's COLA would be reduced by 85 cents. After the initial seven-year phase in period, when 100 percent of locality pay would be provided, some fraction of the COLA rate could also continue to be paid until the locality pay rises high enough that subtraction of 85 percent would reduce the COLA payment to zero. According to OPM, this formula would protect the take home pay of federal workers at the GS–7 step 3 level and below.[25] Approximately 50 percent of the federal workers in Alaska and Hawaii are at or below this level.[26] Postal employees, other than Postal Inspectors and employees of the Postal Service Inspector General, would continue to receive the locked-in COLA rates, because similarly situated postal employees in the contiguous U.S. do not receive locality pay.

During the week of July 1–7, 2007, the Oversight of Government Management Subcommittee of the Committee on Homeland Security and Governmental Affairs conducted fact finding meetings on the OPM proposal on the islands of Oahu and Maui in Hawaii. Subcommittee staff met with close to 1,000 federal employees in over 20 agencies. The questions and concerns raised by the federal workers can be broken down into several themes.

First, employees were concerned about the impact on their take-home pay due to the conversion to locality pay. Given the current economic climate and the increasing gas prices, many federal workers stressed the importance of not reducing their take-home pay and believed that the 85 percent offset did not go far enough. The impact on take-home pay is one of the reasons that several employees have expressed an interest in retaining COLA and not converting to locality pay.

Second, with an estimated 59.3 percent of federal workers in Hawaii and 62.1 percent in Alaska retirement eligible,[27] many employees expressed concern over the seven year phase-in period, noting that they would have to work 10 additional years in order to take full advantage of locality pay. Several employees proposed an immediate conversion with no phase-in period or a two year phase in with the first year using the Rest of the U.S. locality rate.

Third, many employees raised concern over the scope of coverage. This included questions about which employees would be covered by the proposal, how the proposal would work in unique personnel systems such as the National Security Personnel System (NSPS) at the Department of Defense (DoD) and the system at the Postal

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[24] See Responses from OPM provided in 2007 to Senator Akaka's Frequently Asked Questions on the Administration's Proposal to Convert Non Foreign COLA to Locality Pay, available at: http://akaka.senate.gov/public/index.cfm?FuseAction=Issues.Home&issue=Non-Foreign%20COLA%20Update&content__id=33#Non-Foreign%20COLA%20Update (accessed August 14, 2008). See also information provided to Committee staff by OPM, June 16, 2008.

[25] Information provided to Committee staff at a staff briefing by OPM, June 4, 2007.

[26] Information provided to Committee staff by OPM, April 1, 2008.

[27] Information provided to Committee staff by OPM, May 1, 2008.

Service, and how the proposal would treat employees receiving special rates, since federal employees in the non-foreign areas may receive both COLA and special rates, but employees in the contiguous U.S. receive the higher of special rates or locality pay.

After considering the questions and concerns from employees and comments from federal agencies, Senators Daniel K. Akaka (D-HI), Ted Stevens (R-AK), Daniel K. Inouye (D-HI), and Lisa Murkowski (R-AK) introduced the Non-Foreign Area Retirement Equity Assurance Act of 2008, or the Non-Foreign AREA Act (S. 3013), on May 13, 2008. The legislation would apply to federal employees in all of the non-foreign areas, including Alaska, Hawaii, the Virgin Islands, Puerto Rico, Guam, CNMI, American Samoa, and Johnston, Wake, and Midway Atolls.

S. 3013 is similar to OPM's proposal, in that it would lock in current COLA rates and phase in locality pay as COLA is phased out. However, S. 3013 differs from the OPM proposal in several important ways. The bill will phase in locality pay over a period of three years, compared to seven under the OPM proposal. Moreover, the bill will offset the locality pay by subtracting 65 percent of that pay from the COLA, which is a lower percentage than under the OPM proposal (85 percent). The 65 percent offset is designed to better protect employees' take-home pay.

In addition, S. 3013 establishes that employees who receive special rates and would not receive locality pay will not lose any pay, because the bill provides that their special rates will increase like locality pay during the conversion from COLA to locality pay. In addition, the bill includes a provision expressing the sense of Congress that an employee's take home pay should not decrease as a result of the bill. For those employees who continue to oppose the conversion to locality pay, S. 3013 would allow current employees to make an irrevocable choice to continue to receive the locked-in COLA rates and not covert to locality pay. All future employees would be converted to locality pay.

In addition to having a shorter phase in period, S. 3013 allows employees who retire within the three year phase in period to elect to treat any amount of COLA they receive during that period as part of their base pay (as if it were locality pay), up to the full amount of locality pay in place for that area notwithstanding the phase-in limitations. The employee would be required to pay additional retirement contributions on the additional amounts they elect to be part of their base pay.

According to OPM, 62.1 percent of federal employees in Alaska and 59.3 percent of federal employees in Hawaii are eligible to retire within six years or less. In addition, it is well known that federal employees in the non-foreign areas seek out employment in the contiguous U.S. late in their careers to help improve their retirement annuity.[28] OPM testified that agencies have succession plans and recruitment and retention strategies in place to address the impending retirement wave facing federal agencies across the country and the unique staffing problems facing federal agencies in the non-foreign areas.[29] The Committee believes that a three year phase in with an opportunity for employees close to retirement to

[28] Supra note 20.
[29] Id. Draft transcript, response from Mr. Grimes, at 34–36.

buy into the locality pay system would help those employees subject to mandatory retirement laws and those planning to retire in the next three years without adversely affecting the staffing of agencies in the non-foreign areas.

The Federal Salary Council and the President's Pay Agent have recommended that the number of locality pay areas should remain at 32 for 2009, noting that, were new areas to be proposed, criteria for their establishment would need to be developed and BLS would need more funding to expand its current NCS program to cover more areas.[30] However, the Committee believes that upon enactment of this Act, the number of locality pay areas should be increased by two—one covering the entire State of Alaska and one covering the entire State of Hawaii—because of the high cost of living in those areas, and S. 3013 states the sense of Congress that BLS should conduct surveys pursuant to the establishment of the two new locality pay areas.

S. 3013 also provides that all current and future employees in the non-foreign areas who are eligible to receive a COLA, whether or not they actually do receive it, are covered by this legislation and would therefore receive locality pay under the bill. This includes GS employees, administrative law judges, members of the Senior Executive Service, senior level and senior technical (SL/ST) employees, administratively determined employees, GS employees in the non-foreign areas that do not receive COLA, and employees in agencies with unique personnel systems such as the Transportation Security Administration, DoD, the Federal Aviation Administration, the Department of Veterans Affairs, and those agencies covered by the Financial Institution, Reform, Recovery and Enforcement Act.[31] According to DoD it already has broad flexibility with regard to setting and changing pay rates for non-appropriated fund (NAF) employees. As such, should COLA be phased out and locality pay phased in, DoD would increase pay rates for those NAF employees who currently receive a COLA to offset the loss of that adjustment.[32]

Following OPM's submission of its proposal, many postal employees in the non-foreign areas expressed concern over how they would be treated, because postal employees in the contiguous U.S. generally do not receive locality pay. (Only employees of the Postal Service Inspector General and Postal Inspectors receive it.) Many postal employees outside of the contiguous U.S. expressed a desire to be treated like all other workers in the non-foreign areas, as they were concerned about ending up as the only group of employees receiving COLA. S. 3013 as introduced would have allowed all postal employees to transition from T–COLA to Territorial Pay in the same manner that GS workers were converting from COLA to locality pay. (As noted earlier, "T–COLA" refers to Territorial COLA, which is the Postal Service's term for COLA, and "Territorial Pay" is similar to locality pay.) The Postal Service, while agreeing that the proposal in the OPM draft legislation was not a long term solution, expressed opposition to the provisions in S. 3013 over the cost, estimated to be $12.5 million per year, and the

[30] Supra note 14.
[31] P.L. 101–73.
[32] Supra note 20. Draft transcript, response from Mr. Bunn, at 29–30.

precedent it would set for other postal workers.[33] To address this concern, S. 3013 was amended to allow Postal Inspectors and employees of the Postal Service Inspector General in the non-foreign areas to transition to locality pay like other federal employees in the non-foreign areas. Other postal employees in the non-foreign areas, both current and future employees, would continue to receive T–COLA; however, the 25 percent cap would be lifted and employees would receive the greater of the locked in T–COLA rate in effect for the area or an amount equal to the locality pay rate in effect for the area. Consistent with current law, the T–COLA rates would not be subject to collective bargaining

III. Legislative History

S. 3013 was introduced by Senators Akaka, Stevens, Inouye, and Murkowski on May 13, 2008, and was referred to the Committee on Homeland Security and Governmental Affairs. The bill was referred to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia (OGM) on June 19, 2008.

On May 29, 2008, the OGM Subcommittee held a field hearing on the legislation and the Administration's proposal at the Oahu Veterans Center in Honolulu, Hawaii. Witnesses included Mr. Chuck D. Grimes, Deputy Associate Director, Strategic Human Resources Policy Division, OPM; Mr. Bradley Bunn, Program Executive Officer, NSPS, DoD; Ms. Jo Ann Mitchell, Manager, Accounting Services, United States Postal Service; Ms. Joyce Matsuo, President, Oahu COLA Defense Committee, Inc.; Ms. Sharon Warren, President, COLA Defense Committee of Anchorage, Inc.; Mr. Manuel Q. Cruz, President, COLA Defense Committee of Guam; Mr. Michael Fitzgerald, President, Chapter 187, Naval Facilities Engineering Command Hawaii, Federal Managers Association; and Ms. Terry Kaolulo, President, Hawaii State Association of Letter Carriers.

On June 24, 2008, OGM favorably polled out S. 3013 and on June 25, 2008, the Committee considered S. 3013. Senators Akaka and Stevens offered an amendment that made technical corrections to the bill. Senator Thomas R. Carper offered an amendment to change the treatment of most postal employees under the legislation. Under the amendment, all current and future postal employees in Alaska, Hawaii, and the non-foreign areas would continue to receive T–COLA, but the way T–COLA is calculated would change. Specifically, postal employees would receive the greater of the T–COLA rates in effect on December 31, 2008, or the locality pay rate in effect for that area. No employee would receive less than their current T–COLA rate, and the 25 percent cap on T–COLA would be removed. Employees of the Postal Service Inspector General and Postal Inspectors would transition from T–COLA to locality pay. Senator Akaka offered a second degree amendment making a technical correction to the Carper amendment. All three amendments were accepted and the bill, as amended, was ordered reported favorably by voice vote. Members present were Senators Lieberman,

[33] Letter to Senator Akaka from Marie Therese Dominguez, Vice President, Government Relations and Public Policy, May 16, 2008.

Akaka, Carper, Pryor, McCaskill, Tester, Collins, Stevens, Coleman, Coburn, and Sununu.

IV. SECTION-BY-SECTION ANALYSIS

Section 1 states that the legislation may be cited as the "Non-Foreign Area Retirement Equity Assurance Act of 2008" or the "Non-Foreign AREA Act of 2008."

Section 2(a) amends section 5304 of title 5 by including the non-foreign areas in the list of areas where locality pay is paid to federal employees and clarifying that members of the Senior Executive Service in the non-foreign areas are eligible to receive locality pay regardless of whether their agencies are participating in an OPM-certified performance appraisal system under section 5382 of title 5.

Section 2(b) amends section 5941 of title 5 to retain a COLA that is phased out as locality pay is phased in. Paragraph (1) adds a provision freezing the COLA rates that are in effect on December 31, 2008. Paragraphs (2) and (3) add further provisions adjusting these frozen COLA rates downward as locality pay is phased in pursuant to section 4 of the bill. This downward adjustment is governed by a formula in the legislation under which, for every dollar of locality pay that the employee receives, the employee will give up only 65 cents of the COLA that the employee would receive under the end-of-2008 COLA rate, thereby helping to mitigate the additional cost burdens to employees due to the fact that locality pay is subject to federal income taxes and retirement contributions. (To achieve this result, the formula in the legislation will calculate the employee's COLA in four steps: (1) start with the COLA rate frozen as of the end of 2008, (2) subtract 65 percent of the applicable locality pay rate, (3) divide the resulting percentage by the sum of 1 plus the applicable locality pay rate, and (4) multiply this resulting percentage times the employee's basic pay, which is comprised of both base salary and the applicable locality-based payment.)

Section 3 states that employees in the non-foreign areas who receive special rates shall not receive locality pay, but shall have their special rates increased by the same amount as locality pay increases for other federal employees in the non-foreign areas who do not receive special rates. The increases for special rates would continue until the employees' COLA rates have been completely phased out. The Director of OPM, who regulates special rates generally, and the Secretary of Veterans Affairs, who regulates special rates for the Department of Veterans Affairs, may temporarily raise statutory limitations on special rates until the end of the transition period, at which time any special rate pay in excess of the cap shall be converted to a retained rate under section 5363 of title 5.

Section 4 states that non-foreign COLA shall be phased out and that locality pay shall be phased in over a period of three years starting the first pay period beginning on or after January 1, 2009. During the first year, 2009, the amount of locality pay phased in shall be based on using one-third of the locality pay percentage for the rest of the U.S. locality pay area. The second year, 2010, the phased-in amount shall be based on using two-thirds of the applicable comparability payment approved by the President for each non-

foreign area. The third year, 2011, and each subsequent year shall be based on the full amount of the applicable comparability payment for each non-foreign area.

Section 5(a) expresses the sense of Congress that the application of the Non-Foreign AREA Act to any employee not result in a decrease in the take home pay of that employee.

Section 5(b) states that it is the sense of Congress that the Bureau of Labor Statistics will conduct separate surveys pursuant to the establishment by the President's Pay Agent of one new locality area for the entire State of Hawaii and one new locality area for the entire State of Alaska, and that upon completion of the phase-in period no employee shall receive less than the rest of the U.S. locality pay rate.

Section 5(c) states that employees who currently receive a special rate and continue to remain stationed in a non-foreign area shall receive an increase in the special rate consistent with increases in the special rate schedule. The minimum step rate for any grade of a special rate shall be increased at the time of an increase in the applicable locality rate percentage for the area by not less than the dollar increase in the locality payment for a non-special rate employee. In addition, this section states that if an employee currently receives a COLA and would receive a rate of basic pay and locality pay that would be in excess of the maximum rate limitation set under 5304(g) of title 5, United States Code, the employee would continue to receive the COLA rate in effect for the area until the employee leaves the allowance area or is eligible to receive a basic pay at a higher rate.

Section 6(a) defines who is an employee covered by this Act. Covered employees include any current and future employee eligible to receive a COLA, whether or not they actually received it. This includes employees at the Transportation Security Administration, intelligence community employees, and postal employees. In addition, employees who receive locality pay as a result of the application of this Act shall not be eligible to bargain over the amount of locality pay they receive under this Act and shall not have any amount of locality pay provided under this Act reduced on the basis of the performance of that employee.

Section 6(b) states that the provisions of this Act (converting T–COLA to locality pay) will apply to Postal Inspectors and employees of the Postal Service Inspector General, but will not apply to other postal employees such as mail handlers, letter carriers, and postal supervisors. Those postal employees in the non-foreign areas will continue to receive T–COLA. However, the method for calculating the T–COLA rate will change and the cap on the amount of T–COLA an employee may receive will be lifted. Under the Act, current and future postal employees will receive a T–COLA rate that is the greater of the frozen T–COLA rate on December 31, 2008, or the applicable locality pay percentage for the area.

Section 7 states that employees who retire from federal service between January 1, 2009, and December 31, 2011, and who file an election with OPM by December 31, 2011, may count a certain amount of COLA they receive during that time period before they retire as if it is locality pay for purposes of computation of their retirement annuity. The limit on the amount of COLA an employee may count as locality pay is the amount of locality pay that would

be in effect for that area if not for the phase in provisions in section 4 of this Act.

Section 8 states that current employees may make an irrevocable election no later than 60 days after the enactment of this Act to continue to receive COLA at the rate in effect on December 31, 2008, or phase into locality pay as provided under this Act. All future employees will be covered by the provisions of this Act and will not be able to opt out. To the greatest extent practicable, OPM shall provide timely notice of the election which may be filed under this section.

Section 9 states that the Director of OPM shall prescribe regulations to carry out this Act, including rules for special rate employees, employees who are not entitled to receive locality pay, and for setting and adjusting retained rates. In addition, the administrator of a pay system not administered by OPM shall prescribe regulations with the concurrence of the Director of OPM that is consistent with OPM's regulations issued under this Act.

Section 10 states the effective dates of this Act as the date of enactment, except as provided in sections 2 and 4 of the Act, which shall take effect on the first day of the first applicable pay period beginning on or after January 1, 2009.

V. ESTIMATED COST OF LEGISLATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 29, 2008.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3013, the Non-Foreign AREA Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Amber Marcellino.

Sincerely,

ROBERT A. SUNSHINE
(For Peter R. Orszag, Director).

Enclosure.

S. 3013—Non-Foreign AREA Act of 2008

Summary: S. 3013 would phase in the use of locality-based comparability payments ("locality pay") to replace cost-of-living allowances (COLAs) for federal employees in certain areas of the United States (Alaska, Hawaii, and the U.S. Territories).

The bill would affect the amount of pay received by certain federal employees and the amount of future retirement benefits those employees receive. By increasing some salaries, S. 3013 would result in additional agency payments for employees' retirement benefits and payroll taxes. In total, CBO estimates that discretionary spending would increase by $2.2 billion through 2018, assuming appropriation of the necessary amounts. The legislation also would increase the amount of pay included in the calculation of retirement and Social Security benefits, thereby increasing direct spending by an estimated $302 million over the 2009–2018 period. Fur-

thermore, including additional pay in the calculation of retirement benefits would increase revenues—from higher employee contributions towards those benefits and from additional tax receipts—totaling an estimated $1 billion over the 2009–2018 period.

S. 3013 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no cost on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 3013 is shown in the following table. The direct spending impacts of the bill fall within budget functions 600 (income security) and 650 (Social Security); the discretionary costs fall within many other budget functions.

	By fiscal year, in millions of dollars—											
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2009–2013	2009–2018
CHANGES IN SPENDING SUBJECT TO APPROPRIATION (On-Budget)												
Salary Payments and Other Discretionary Spending:												
Estimated Authorization Level	35	117	181	175	170	167	164	163	163	163	677	1,498
Estimated Outlays	35	117	181	175	170	167	164	163	163	163	677	1,498
Employer Contributions[1]:												
Estimated Authorization Level	17	51	78	78	80	82	84	88	90	93	304	741
Estimated Outlays	17	51	78	78	80	82	84	88	90	93	304	741
Total Changes in Spending Subject to Appropriation:												
Estimated Authorization Level	52	168	259	253	250	249	250	251	253	256	981	2,239
Estimated Outlays	52	168	259	253	250	249	250	251	253	256	981	2,239
CHANGES IN DIRECT SPENDING (OUTLAYS)												
Total Changes in Direct Spending	2	7	13	21	28	35	42	47	52	56	71	302
On-Budget Spending	2	7	12	21	28	34	41	46	50	54	70	295
Off-Budget Spending	0	0	*	*	*	1	1	1	2	2	*	7
CHANGES IN REVENUES												
Total Changes in Revenues	24	70	106	105	109	112	116	119	123	127	415	1,011
On-Budget Revenues	19	54	82	81	84	86	89	91	94	97	321	778
Off-Budget Revenues	5	16	24	24	25	26	27	28	29	30	94	233
Memorandum:												
Total Intragovernmental Collections from Employer Contributions[1]	−17	−51	−78	−78	−80	−82	−84	−88	−90	−93	−304	−741
On-Budget	−12	−35	−54	−54	−55	−56	−57	−60	−61	−63	−210	−508
Off-Budget	−5	−16	−24	−24	−25	−26	−27	−28	−29	−30	−94	−233

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

Basis of estimate: For this estimate, CBO assumes that S. 3013 will be enacted near the beginning of fiscal year 2009 and that the necessary amounts will be appropriated for each year. The bill would affect approximately 46,000 federal employees working in Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands.

Currently, federal employees in those areas receive a COLA to offset higher costs of living in those areas. (In contrast, federal employees in the contiguous 48 states receive locality pay under the General Schedule to narrow the pay gap between comparable federal and non-federal positions.) S. 3013 would phase in the use of locality pay for employees in the specified areas over three years and would phase out the COLA, in most cases, over a longer period of time. Such changes would affect the federal budget because, while the COLA is not subject to federal income or payroll taxes and is not used to calculate federal retirement benefits, locality pay is both taxable and creditable for retirement benefits.

Spending subject to appropriation

S. 3013 would increase discretionary spending by $2.2 billion over the 2009–2018 period, assuming the appropriation of necessary amounts, primarily for increased salary payments and agencies' payments for retirement benefits and payroll taxes.

Salary payments and other spending. Raising salaries for federal employees in the designated jurisdictions would result in $1.5 billion in additional discretionary spending over the 2009–2018 period, CBO estimates.

The conversion to locality pay for approximately 38,000 eligible federal employees would increase salaries by $1.5 billion over the next 10 years. For those employees, a provision in S. 3013 provides for a phase-out of COLAs over time, intended to preserve the take-home salaries of those employees as their non-taxable COLA pay is replaced with taxable locality pay. As a result, salaries would increase to maintain the take-home pay of affected employees.

A small amount of savings—$2 million over 10 years—would result from discontinuing the surveys currently used by OPM to calculate the COLA adjustments for non-foreign areas.

Employer contributions. Similar to the rise in employees' contributions due to the transition to locality pay (which is creditable towards retirement), federal agencies' costs for payroll taxes and retirement contributions also would increase. Assuming appropriation of the necessary amounts, CBO estimates that spending for those contributions would increase by $741 million through 2018. Those payments are intragovernmental transactions that are recorded as offsetting receipts elsewhere in the budget.

Direct spending

Increased retirement benefits (a product of increases in salaries) would accrue to approximately 13,000 federal employees anticipated to retire between 2009 and 2018. As a result, CBO estimates that direct spending would increase by a total of $302 million over 10 years—$295 million for additional retirement benefits and $7 million for higher Social Security benefits.

Under S. 3013, an estimated 8,000 employees of the U.S. Postal Service (USPS) would not convert to locality pay and would con-

tinue to receive COLAs, but a provision of the bill would adjust the COLA calculation. If enacted, future calculations of COLAs for those employees would equal the greater of either the COLA in effect on December 31, 2008, or the locality pay applicable to other federal employees (that is, those who converted to locality pay under this bill) for that year and jurisdiction. CBO estimates that the provision could result in an increase in direct spending of about $50 million (off-budget) over the 2009–2018 period. However, CBO assumes that any increase would be offset by additional receipts from postage rates charged by the USPS over the same period, and would have no net effect on the budget.

Revenues

S. 3013 would increase the portion of salary on which employees must pay taxes and would increase the amount of pay used to calculate employees' contributions for federal retirement benefits. Accordingly, the legislation would increase revenues by a total of $1 billion over the next 10 years from additional income and payroll tax collections and from additional retirement contributions from employees, CBO and the Joint Committee on Taxation estimate. That total revenue change represents both on- and off-budget activity. Additional on-budget revenues would total $778 million, including $739 million from Medicare payroll taxes and income tax collections and $39 million from higher contributions from employees toward retirement benefits. The increase in off-budget revenues would total $233 million from additional Social Security tax receipts.

Intergovernmental and private-sector impact: S. 3013 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no cost on state, local, or tribal governments.

Estimate prepared by: Federal costs: Amber G. Marcellino (retirement), Sheila M. Dacey (Social Security); Impact on federal revenues: Zach Epstein; Impact on state, local, and tribal governments: Elizabeth Cove; Impact on the private sector: Paige Piper/Bach.

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

VI. Evaluation of Regulatory Impact

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

VII. Changes in Existing Law

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

TITLE 5, UNITED STATES CODE: GOVERNMENT ORGANIZATION AND EMPLOYEES

PART III—EMPLOYEES

CHAPTER 53—PAY RATES AND SYSTEMS

Subchapter I—Pay Comparability System

SEC. 5304. LOCALITY-BASED COMPARABILITY PAYMENTS.

* * * * * * *

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

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

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

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

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

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

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

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

(A) positions under subparagraphs (A)–(C) of subsection (h)(1); [and]

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

[B]*(C)* any positions [under subsection (h)(1)(D)] *under subsection (h)(1)(E)* which the President may determine.

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

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

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

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

(C) a position to which section 5372a applies (relating to contract appeals board members); [and]

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

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

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

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

(iii) a position to which subchapter II applies (relating to the Executive Schedule) *stationed in the 48 contiguous States and the District of Columbia, or stationed within the United States, but outside the 48 contiguous States and the District of Columbia, in which the incumbent the day before the date of enactment of the Non-Foreign Area Retirement Equity Assurance Act of 2008 was not eligible to receive a cost-of-living allowance under section 5941; and;*

(iv) a Senior Executive Service position under section 3132;

(v) a position in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service under section 3151; or

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

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

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

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

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

(C) Notwithstanding subsection (c)(4) or any other provision of law, but subject to paragraph (3), in the case of a category with positions that are in more than 1 Executive agency, the President may, on his own initiative, provide that each employee who holds a position within such category, and in the locality involved, shall be entitled to receive comparability payments. No later than 30

days before an employee receives comparability payments under this subparagraph, the President or the President's designee shall submit a detailed report to the Congress justifying the reasons for the extension, including consideration of recruitment and retention rates and the expense of extending locality pay.

(3) Comparability payments under this subsection—

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

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

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

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

CHAPTER 59—ALLOWANCES

Subchapter IV—Miscellaneous Allowances

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

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

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

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

(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies. *Notwithstanding any preceding provision of this subsection, the cost-of-living allowance rate based on paragraph (1) of this subsection shall be the cost-of-living allowance rate in effect on December 31, 2008, except as adjusted under subsection (c).*

(b) This section shall apply only to areas that are designated as cost-of-living allowance areas as in effect on December 31, 2008.

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

(A) January 1, 2009; and

(B) on January 1 of each calendar year in which a locality-based comparability adjustment takes effect under section 4 (2) and (3) of the Non-Foreign Area Retirement Equity Assurance Act of 2008.

(2)(A) In this paragraph, the term "applicable locality-based comparability pay percentage" means, with respect to calendar year 2009 and each calendar year thereafter, the applicable percentage under section 4 (1), (2), or (3) of Non-Foreign Area Retirement Equity Assurance Act of 2008.

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

(i) subtracting 65 percent of the applicable locality-based comparability pay percentage from the cost-of-living allowance percentage rate in effect on December 31, 2008; and

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

(I) one; and

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

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

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

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

TITLE 39, UNITED STATES CODE: POSTAL SERVICE

PART III—PERSONNEL

CHAPTER 10—EMPLOYMENT WITHIN THE POSTAL SERVICE

Subchapter I—Pay Comparability System

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

* * * * * * *

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

(2) On and after the date of enactment of the Non-Foreign Area Retirement Equity Assurance Act of 2008—

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

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

○