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Senate

The Senate met at 10 a.m. and was called to order by the President pro tempore (Mrs. MURRAY).

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal spirit, You see our thoughts from a distance. You look not merely on our exteriors but also at our interiors. You know our desire to please You and to honor You with our lives. You know our remorse for neglected duties, missed opportunities, and selfish pursuits.

Lord, You are aware that we need strength for today and hope for tomorrow. Today, meet the needs of our lawmakers as they confront the challenges of our time. Give them faith to trust that Your sovereign providence will prevail. Remind them that they are never alone.

We pray in Your holy Name. Amen.

PLEDGE OF ALLEGIANCE

The President pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. WELCH). Under the previous order, the leadership time is reserved.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to resume consideration of the following nomination, which the clerk will report.

The senior assistant legislative clerk read the nomination of Margaret R. Guzman, of Massachusetts, to be United States District Judge for the District of Massachusetts.

RECOGNITION OF THE MINORITY LEADER

The PRESIDING OFFICER. The Republican leader is recognized.

CONGRESSIONAL DELEGATION

Mr. MCCONNELL. Mr. President, last week, Senate Republican colleagues and I visited our allies and partners in Europe. We both reassured them of America's commitment to strength and leadership but also urged them to invest and engage more in security and the transatlantic alliance.

Our allies are coming around to the realization that security assistance to Ukraine is not just helping one nation's citizens defend their sovereignty. It is also degrading Russia's ability to further threaten Europe or threaten America and sending a powerful deterrent signal to other potential aggressors.

From our own perspective, much of the money that is being described as American aid to Ukraine is actually being invested in our own defense industrial base here at home. We are procuring new versions of munitions and weapons for our own military to replace often decades-old versions that we have sent over to Ukraine.

And, after an ill-advised ''holiday from history,'' European allies are now following America's lead. NATO members are making historic investments in defense that will keep paying dividends long after Ukraine defeats Putin's aggression.

The West is priming the pump of the industrial capacity that will ensure we are prepared to meet the larger military challenges posed by systemic rivals like China.

The recent press reports that Beijing is considering providing weapons to Russia should not come as a surprise. China has plenty of reasons to fear a Russian defeat and plenty of reasons to hope Russia gets away with forcibly seizing another country's territory.

Yesterday, the Senate Armed Services Committee heard testimony from Keith Kellogg, a former adviser to President Trump and cochair of the Center for American Security at the America First Policy Institute.

Like the vast majority of Republican Senators, he complained that the Biden administration had been actually too slow in providing military assistance to Ukraine. He noted that the best way to end the conflict was to ''enable Ukraine to defeat the Russian army in Ukraine.''

And what about the claim that the West supporting Ukraine is somehow distracting us from the threats posed by the PRC?

Here is what Kellogg said:

Make no mistake: weakness against Russian aggression is weakness against the Communist-Chinese threat . . . Russian victory in Ukraine today almost certainly means war for Taiwan tomorrow.

Likewise, in Japan, senior officials are spelling out the clear link between the response to Putin and the prospects of deterring President Xi. They have taken historic steps to invest more in their own defense, and during our trip last week, Prime Minister Kishida announced that Japan plans to direct $5.5 billion in assistance toward Ukraine.

Other reports indicate that citizens of Taiwan are volunteering to fight alongside Ukrainians against Russia.

Let me say that again. There are reports that indicate citizens of Taiwan are volunteering to fight alongside Ukrainians against Russia.

The very people most threatened by the ambitions of the PRC tomorrow

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

understand the importance of Ukraine prevailing today.

Our friends and partners in the Middle East know the score as well. They have had to contend with Russia as an influential force in the region ever since President Obama failed to enforce his redline in Syria and Putin came rushing in to that conflict. Now our partners see the same Iranian missiles and UAVs that have struck their own cities being used by Russia to attack Ukraine. They know Moscow will repay Tehran soon somehow and that a victorious Russia will be less constrained in providing advanced capabilities to Iran.

So we have seen senior Israeli officials showing up in Kyiv. We have seen Saudi Arabia vote against Russia in the United Nations, pledge $400 million in assistance to Ukraine, and send its first official delegation to Kyiv in 30 years.

Clearly, America's friends all around the world know that the way we respond to today's threats will determine our readiness to face tomorrow's. They know it in Europe, they know it in the Indo-Pacific, and they know it in the Middle East.

And, here at home, Republicans know that the safest America is a strong—strong—and engaged America. That is why we will continue to push President Biden and his administration to move faster to exert our leadership, invest in our own defense, equip our friends, and keep America safe.

JUDICIAL NOMINATIONS

Mr. President, now, on another matter, the quality of President Biden's judicial nominees has been in the headlines recently—for all the wrong reasons. Recently, the White House celebrated their 100th judicial confirmation with a bizarre press release that spent less than one sentence talking about legal qualifications before devoting five paragraphs to the nominees' demographics.

Then, a newly published analysis pointed out that the nominees whom Democrats have been confirming have been significantly less likely to have clerked at the Supreme Court, clerked at a circuit court, or graduated law school with top academic honors compared to the judges that Republicans spent the previous 4 years confirming—fewer prestigious clerkships, fewer academic honors.

Not terribly surprising, it appears this qualifications gap may also be leading to a job performance gap. A law professor at the University of Iowa has found that the first 10 Biden-appointed appellate judges have written about 140 majority opinions between them, or an average of about 14 opinions each.

By contrast, the first 12 appellate judges confirmed during the previous administration had written 415 majority opinions—that is 140 for the Biden nominees and 415 for the previous administration's appointees—by February 2019, or 34 each, over a comparable period of time—14 opinions each for the Biden first 10, and 34 for the previous administration's first 10.

> It appears President Biden's Court of Appeals judges are publishing opinions . . . less frequently than other recent judges.

So tomorrow, our colleagues on the Judiciary Committee will meet for a markup to consider a slate of nominees, including the now-infamous nominee from Washington State who was actually unable to recall what article V or article II of the U.S. Constitution were about. This is not exactly the bar exam; this is basic constitutional literacy. And this person on whom President Biden wants to bestow a lifetime appointment flunked.

Democrats are also trying to push forward the nomination of Michael Delaney, an attorney from New Hampshire who threatened a teenage Jane Doe victim of sexual assault that he would fight to strip away her anonymity and make her name a national story if she and her family did not settle their civil suit against the powerful prep school before it went to trial. Even some of our Democratic colleagues seem troubled by this. Senator BLUMENTHAL says he ''has concerns'' about this nominee. Chairman DURBIN admitted Delaney had ''a rough hearing.'' Senator FEINSTEIN sent this nominee from her own party's White House a long list of detailed written questions.

This is the caliber of judicial nominees this administration is sending to the Senate—folks who couldn't pass a high school civics exam on the Constitution and folks who threaten a high school girl when she demands accountability for being attacked.

By the way, this brave young lady is outraged that President Biden is trying to reward her legal tormentor with a lifetime appointment and that our two Democratic colleagues from New Hampshire are actually backing this person. She just explained in a courageous op-ed for the Boston Globe how she received rape threats and death threats; how photos of her and her sisters were uploaded to hateful websites; how people took out inappropriate classified ads using her family's information—all because she dared to speak out and seek justice for what she had suffered.

This young lady wrote:

> Biden's nomination as well as the nominee's support from Senators . . . Shaheen and . . . Hassan of New Hampshire show me and other survivors that they approve of what Delaney and St. Paul's School put me and my family through. . . . Michael Delaney's nomination must be withdrawn.

That is from the victim.

The American people deserve the best and brightest. It appears the Democrats are producing something else.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

RECOGNITION OF THE MAJORITY LEADER

The majority leader is recognized.

RUPERT MURDOCH

Mr. SCHUMER. Mr. President, on Monday evening, reports came out that Rupert Murdoch, owner of FOX News, acknowledged in a deposition that hosts of the network promoted the false narrative that Donald Trump won the 2020 election.

Asked if he could have stepped in to prevent this, Mr. Murdoch acknowledged that he could have but chose not to—he could have stepped in but chose not to—and expressed regret for not doing so.

To this day, several FOX News hosts continue promoting the Big Lie. They keep spreading the Big Lie despite mounting evidence that, behind the scenes, many top hosts and executives at FOX have recognized that the stolen election narrative is entirely bogus. Nevertheless, they continue broadcasting it all the time.

This morning, Leader JEFFRIES and I wrote a letter to Mr. Murdoch demanding that he do what he should have done a long time ago: Order Tucker Carlson and other hosts on FOX News to stop spreading lies about the election. They need to stop giving a platform to dangerous and entirely unfounded conspiracy theories that eat at the wellspring of our democracy, and they need to admit on the air that they were wrong to engage in such negligent and destructive behavior.

Sadly, too much damage has already been done to our democracy. A significant segment of voters—by some measures, as much as 30 percent of the electorate—still do not believe that the 2020 election was legitimate. What FOX News hosts have done is flat-out dangerous—dangerous. When people doubt that elections are on the level, that is the beginning of the end of this wonderful democracy because elections are our wellspring. They are the core of what the Founding Fathers set up. It was the great novelty of the Constitution that has spread around the world.

When conspiracy theories like the Big Lie are allowed to grow, violence can ensue, as we all saw for ourselves on January 6.

Mr. Murdoch's testimony is all the more alarming after Speaker MCCARTHY is reportedly allowing Tucker Carlson to review highly sensitive security camera footage of the events surrounding the violent January 6 insurrection. Sharing that footage is a grave mistake that risks emboldening the supporters of the Big Lie.

Mr. Murdoch, FOX News executives, and hosts all have a choice—a very important choice: They can continue broadcasting lies about our elections and further erode trust in our democracy or they can admit their mistake, start telling the truth, and move beyond this shameful chapter in their company's history by coming clean with their viewers and with the American people. We hope Mr. Murdoch

heeds our call. The survival of our democracy is too important.

RAILWAY SAFETY ACT OF 2023

Mr. President, on the new bipartisan bill, later today, a bipartisan group of Senators, including Senators BROWN and VANCE of Ohio and FETTERMAN and CASEY of Pennsylvania—a bipartisan group—plan to introduce the Railway Safety Act of 2023.

In the aftermath of the terrible accident in East Palestine, this is precisely the kind of proposal we need to see in Congress—a bipartisan rail safety bill, one that includes provisions relevant to the accident that happened a month ago.

I salute them for this fine bipartisan effort and commit to them that I am going to work with the sponsors of the bill to move this bill forward. We should pass it—a bipartisan bill—here in the Senate and hopefully in the House. I will do whatever I can to make sure that happens.

The bill is as smart as it is necessary. It includes provisions to increase safety protocols for trains with hazardous materials, new requirements for crews operating trains, and increases the fines that can be imposed on rail companies that engage in reckless behavior.

We must do more because an accident like the one in East Palestine didn't come out of the blue. On the contrary, the Chair of the NTSB said the Norfolk Southern derailment was 100 percent preventable. The fault here lies with rail companies that spent years lobbying to slash crucial safety regulations intended to keep people safe. It has created a dangerous culture where the profit motive is king above all others, even above the need to keep people safe.

There are countless small towns just like East Palestine across America with rail lines running through them. In my dear State of New York, there are lots of them, particularly in Upstate. They are all at greater risk when rail giants work together to slash safety, slash worker compensation, and place shareholder returns above everything else.

DEPARTMENT OF LABOR RULE REPEAL

Now on ESG, later today, my Republican colleagues will force a vote here on the floor to reverse a Labor Department rule allowing retirement fiduciaries to use ESG, if they so wish, when evaluating investments.

I will strongly oppose this ill-considered proposal. My reasons, which I will outline in a minute, are also outlined in an op-ed in the Wall Street Journal editorial page today.

Mr. President, I ask unanimous consent to have printed in the RECORD an op-ed from the Wall Street Journal editorial page.

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

[From the Wall Street Journal Feb. 28, 2023]

REPUBLICANS OUGHT TO BE ALL FOR ESG

(By Charles E. Schumer)

Investing in a free-market economy involves choice. There are 8,000 securities listed on U.S. stock exchanges alone. Investors take many different factors into account when evaluating their investment decisions. Three such factors—environmental, social and governance, also known as ESG—have recently gotten a lot of attention from some more conservative Republicans, including Florida Governor Ron DeSantis.

In the House, Republicans just passed a bill that would reverse a Labor Department rule recognizing that retirement fiduciaries may use ESG when evaluating investments. That bill will soon come before the Senate. I will strongly oppose this ill-considered proposal.

ESG opponents are trying to turn it into a dirty acronym, deploying attacks they have long used for elements of a so-called woke agenda. They call ESG wokeness. They call it a cult. They call it an incursion into free markets. We've heard it all before. I say ESG is just common sense.

Republicans conveniently ignore something very important: America's most successful asset managers and financial institutions have used ESG factors to minimize risk and maximize their clients' returns. In fact, according to McKinsey, more than 90% of S&P 500 companies publish ESG reports today.

This isn't about ideological preference. Investors and asset managers increasingly recognize that maximizing returns requires looking at the full range of risks to any investment—including the financial risks presented by increasingly volatile natural disasters, aging populations and other threats that the public doesn't normally associate with financial modeling.

Nothing in the Labor Department rule imposes a mandate. It simply states that if fiduciaries wish to consider ESG factors—and if their methods are shown to be prudent—they are free to do so. Nothing more, nothing less.

The present rule gives investment managers an option. The Republican rule, on the other hand, ties investors' hands.

Sen. Rick Scott asserted that the Labor Department rule ''allows Wall Street fund managers to make choices on behalf of Americans based on their own beliefs and social agenda.'' Yet his Republican colleagues have introduced bills requiring fiduciaries to consider factors that don't strictly relate to financial returns, including whether a particular investment has ties to Russia or the Chinese Communist Party.

For some Republicans, these are all perfectly fine extra-financial considerations. But when it comes to investing in workers, or hedging against the dangers of a changing climate, or guarding against risks of corporate malfeasance—suddenly that's a bridge too far. You can't have it both ways.

Republicans talk about their love of the free market, small government and letting the private sector do its work. But their obsession with eliminating ESG would do the opposite, forcing their own views down the throats of every company and investor. Republicans would prevent investors from adapting to the future, for their own good and the good of the country.

I say let the market work. If that naturally leads to consideration of ESG factors, then Republicans should practice what they've long preached and get out of the way.

Mr. SCHUMER. Republicans have been trying mightily to turn ESG into their newest dirty little acronym. They are using the same tired attacks we have heard for a while now—that this is more wokeness, that it is intrusion into the markets, and on and on and on.

But Republicans are missing or ignoring an important point: Nothing in the DOL rule imposes a mandate.

Again, let me repeat that: Nothing in the rule they seek to undo imposes a mandate.

It merely says that if fiduciaries wish to look at ESG factors and if their methods are shown to be prudent—it is a very narrow rule—then they have the freedom to do so—the freedom to do so. It is literally allowing the free market to do its work.

This isn't about ideological preference. It is about looking at the biggest picture possible for investors to minimize risk and maximize returns.

Why shouldn't you look at the risks posed by increasingly volatile climate incidents? Why shouldn't they consider aging populations or other trends that could impact their portfolio?

In fact, more than 90 percent of S&P 500 companies already publish ESG reports today.

The present rule gives investment managers an option. The Republican rule, on the other hand, ties investors' hands—no freedom for companies to choose what they think is right.

Republicans talk about their love of the free market, small government, ''let the private sector do its work,'' but their obsession with eliminating ESG would do the opposite, forcing their own views down the throats of every company and every investor.

I say: Let the market work. Let the market work. Mr. and Mrs. Free Market Republicans, what the heck are you doing here? Imposing your views on these companies?

If the market naturally leads to the consideration of ESG factors, then Republicans should practice what they have long preached and get out of the way.

AUTHORIZATIONS FOR USE OF MILITARY FORCE

AUMF—we have a lot to talk about today, and there are a lot of very important issues before us. I want to offer a brief but heartfelt thanks to Chairman MENENDEZ and Ranking Member RISCH, as well as Senators KAINE and YOUNG, who have worked so diligently for this proposal for so long, for reaching an agreement to mark up next week a long-awaited measure that many of us have waited for: a repeal of the Iraq AUMF.

I am glad that this effort has been, for the most part, bipartisan and bicameral. It was bipartisan and bicameral under full Republican control of government, under full Democratic control of government. And it is now every bit bipartisan under divided government. It is staying bipartisan. There is support on both sides of the aisle for this proposal.

Because both Democrats and Republicans have come to the same conclusion, we need to put the Iraq war

squarely behind us, once and for all, and doing that means we should extinguish the legal authority that initiated the war to begin with.

So thank you. Thank you, Chairman MENENDEZ, and thank you, Ranking Member RISCH, for moving forward with this repeal in your committee. And, again, kudos and accolades to Senators KAINE and YOUNG for their great work too. We haven't yet passed this, but their work gives us a real chance to see some light finally at the end of a long tunnel. It is my hope that we can bring this bill to the floor during this work period.

BUDGET PROPOSALS

Now, later today, I will join a number of Senate Democratic colleagues to talk about a new report that throws a spotlight on the dangerous ways the Republican budget proposals would harm average Americans.

As has been the case so many times this year, this report tells a story of contrasts. On the one hand, Democrats and President Biden have spent the last 2 years reducing the Federal deficit, lowering drug costs, lowering people's energy bills, and making sure the wealthiest pay their fair share.

But here are just a few of the things the Republican budget proposals would do. Listen to this. The American people ain't going to like it.

Republican proposals would push millions of Americans off Social Security benefits and raise the retirement age to 70.

Republican proposals would privatize Medicare, which would gut seniors' benefits, threatening their access to guaranteed services, and force those who are able to remain on Medicare to pay higher premiums.

Republican proposals would cut Medicaid by $2.2 trillion and end coverage for tens of millions of Americans, especially people with disabilities, seniors, and families living on lower incomes. A large part of Medicaid goes to help people who are in nursing homes and assisted living, and that takes a huge burden off 30-, 40-, 50-year-olds who want to care for their parents but those high costs are something beyond their budgets.

And Republican proposals would narrow healthcare eligibility for veterans and cut VA mandatory funding—and so much more, so much more.

These proposals are anathema, I believe, to the American people, for sure, but even to most Republicans. That is why we Democrats keep insisting that Speaker MCCARTHY answer the one question we have all been asking and gotten no answer to. The question we have been asking Speaker MCCARTHY is: Where is your plan?

We believe a plan this drastic will not get the votes in the Republican conference in the House. So, Speaker MCCARTHY, show us your plan. Speaker MCCARTHY, show us your plan.

Republicans love to tout themselves as the party of the average Americans, but actions speak louder than words. When Republicans help tax cheats; call for putting Social Security, Medicare, and Medicaid on the chopping block; and cut taxes for billionaires and megacorporations, there is no question where they truly stand with the wealthy, with the very well-connected, and with the biggest of corporations.

NOMINATION OF PHILLIP A. WASHINGTON

Finally, I want to make a quick mention of an important nominee who is testifying before the Senate Commerce Committee.

Recently, President Biden announced Phil Washington as his nominee to lead the FAA, or Federal Aviation Administration. The FAA needs to have a leader as soon as possible. Americans cannot afford to go through another busy travel season like the one they went through last winter. When you have widespread computer failures, delays, and an inability to react quickly, not having an FAA head is terrible.

I look forward to seeing more in the coming weeks, but I thank my colleagues in the Commerce Committee, led by the very capable, very diligent, very hard-working MARIA CANTWELL, for holding their hearing today on Mr. Washington.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. THUNE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

The Republican whip.

NOMINATIONS

Mr. THUNE. Mr. President, in his State of the Union Address last month, the President expressed an encouraging desire for bipartisanship. But I said, at the time, that I hoped his words would be matched by his actions. After all, the President spoke about being a President for all Americans in his inaugural address. But his first 2 years in office were not exactly distinguished by bipartisanship.

So while I was encouraged by the President's words in his State of the Union Address, as I said, I am looking for them to be matched by his actions, and renominating a slew of extreme nominees, as the President has done so far this year, is no way to start.

So far this year, the President has renominated at least 16 individuals who were unable to get any bipartisan support in the last Congress. They include an individual with serious unanswered questions about his possible role in a movement to push out senior career officials at the Consumer Financial Protection Bureau in favor of Biden loyalists, multiple individuals aligned with Democrats' radical Green New Deal agenda, a nominee who has repeatedly embraced anti-police rhetoric, multiple abortion extremists, a leftist litigator who has called the U.S. Senate and the electoral college anti-democratic institutions and who has admitted that he is motivated by his hatred of conservatives, and the list goes on.

And then, of course, there is the nominee who recently appeared in front of the Senate Commerce Committee for the third time: Gigi Sohn. This is Ms. Sohn's third nomination to the Federal Communications Commission during the Biden administration. Her previous two nominations stalled thanks to her inability to garner any bipartisan support, and with good reason, because Gigi Sohn has to be the poster child for terrible Presidential nominees, although I suppose the Biden judicial nominee who couldn't explain article II of the Constitution should also be in the running for that title of worst Presidential nominee.

I have serious policy disagreements with Ms. Sohn on multiple issues. She not only wants to bring back the heavy-handed internet regulation of the Obama administration, but she wants to go further and have the FCC regulate broadband rates and set data caps. This would discourage broadband investment and threaten U.S. leadership in 5G, as well as diminish internet access opportunities for Americans outside of major urban and suburban areas.

As a resident of a rural State, I also have serious concerns about Ms. Sohn's position on rural broadband. She has been publicly hostile to the efforts of rural broadband companies to expand reliable internet access to rural areas, while at the same time she supported the use of scarce government dollars to overbuild networks in already well-served areas.

Her hostility to rural broadband led one former Democrat Senator to ask how Democrats can ''support rural broadband expansion and also support Gigi Sohn.''

But my concerns with Ms. Sohn don't end there. I not only have serious policy disagreements with Ms. Sohn. I have serious questions about her character and fitness for the office for which she is nominated.

The Federal Communications Commission has jurisdiction over radio, TV, and the internet, which means that it deals with a number of sensitive issues—notably, free speech issues. And, for that reason, it calls for Commissioners who are thoughtful, fair, and impartial.

Ms. Sohn is none of these. She is a virulent and unapologetic partisan known for speaking disparagingly of conservative media outlets—the same outlets, I would add, that she would be regulating—and the politicians who disagree with her.

Her nomination is opposed by a wide range of organizations, including the left-of-center Progressive Policy Institute, which opposes her due to a ''pattern of illiberal intolerance for voices on the left who dissent from her hard left orthodoxies.''

Ms. Sohn is the very opposite of fair and impartial, and I can think of few

candidates who would be more detrimental to the fair and impartial adjudication of media issues and the protection of free speech on public airwaves.

But the problems with her nomination don't even end there. Ms. Sohn has raised serious ethics questions recently with her political donations to several Democrat Senators at the same time that her nomination was before the U.S. Senate.

One of those donations was actually given to a member of the Commerce Committee, which, of course, is the committee considering her nomination.

Ms. Sohn may not have intended to influence Senators considering her nomination, but, at the very least, her decision to donate to these Senators while her nomination is before Congress gives the appearance of impropriety and raises serious questions about her judgment.

But her ethical issues don't end there.

She was less than forthcoming with the Commerce Committee about her time on the board of a company that was found to be operating in violation of copyright laws.

And questions remain about how she got the substantial settlement against her company drastically reduced.

Ms. Sohn has volunteered to recuse herself, if she is confirmed, on a variety of issues related to broadcasting and copyright violations because of her involvement with this company and the settlement.

But I am hard-pressed to understand why we would choose a Commissioner who would have to recuse herself from participating in substantial parts of the FCC's work.

Unfortunately, there is a lot more I could say about the problems with Ms. Sohn's nomination, but I will stop here.

Suffice it to say that I cannot think of a less appropriate candidate for this position.

Instead of continuing to attempt to place a virulent partisan like Ms. Sohn at the FCC, the President should nominate a qualified candidate who will do his or her job in a fair and impartial manner.

And as I said at the beginning, if the President truly wants to usher in an era of bipartisanship in this period of divided government, he could start by rethinking some of the highly partisan renominations he has made in this Congress and consider nominating individuals who are able to gain at least some bipartisan support.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. WARNOCK). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MANCHIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

DEPARTMENT OF LABOR RULE REPEAL

Mr. MANCHIN. Mr. President, I rise today to warn against our administration's unrelenting campaign to weaken our energy security, our national security, and our economic security to advance, truly, their environmental and social agenda.

The ESG rule that we are going to vote on later today is just another example of how our administration prioritizes a liberal policy agenda over protecting and growing—protecting and growing the retirement accounts of 150 million Americans that will be in jeopardy.

Our country is already facing economic uncertainty, record inflation, and increasing energy costs that keep Americans up at night and put a squeeze on their pocketbooks. And we all see it, no matter where you are. Whether it is Georgia or West Virginia, we are feeling the same pain.

The Inflation Reduction Act was written with the primary goal in mind—which has not been at all promoted from our administration. The Inflation Reduction Act was intended to be—and it still is—energy security for our Nation.

If we as a nation are not energy secure, if we have to depend on foreign supply chains, if we are not able to help our allies in need, we will not remain the superpower of the world, and that is what I was concerned about as we worked on the Inflation Reduction Act.

We were going to use all the fossil fuels that we have in America to maintain for the next 10 years energy independence, energy security, and be able to have the supply chain to help our allies, which the EU—if you want to see the devastating effect of what a war on energy can be, look no further than Ukraine, look no further than the EU, where this happened over there.

So we have talked about this, and we wrote a piece of legislation where we could walk and chew gum at the same time. We could basically invest and produce more oil, produce more natural gas, basically build pipelines that carry the products much safer than rails and roads, which we are seeing so much of the devastation happening by rails right now, which should be alarming to all of us—but basically to do it and do it in a much safer way.

But when people deny—and any denier of any kind, denying the reality of what is needed today, is dangerous. That is what is happening right now.

We have a significant investment in States like mine already that allows us to produce more energy here at home, and that means onshoring our energy supply chains, creating good-paying jobs, helping our economy, and hopefully start working ourselves out of the debt that we have accumulated.

The administration should be our partners in this effort. I have always said this. Government should be your partner, not your provider but your partner. It shouldn't make all your decisions, but it should have guardrails on to make good, sound decisions.

But when they try to basically infiltrate, such as with the ESG, the environmental-social guidance that this bill intends to do, if you don't weigh that with the geopolitical risks that are being taken around the world today that we are involved in, being the superpower of the world and the defender of freedom and democracy anywhere and everywhere in the world—if we don't acknowledge that and allow just one evaluation, I will guarantee it would make for very unsound decisions that will be very harmful.

And again I say, look no further than the EU. The UK has basically thrown all their environmental concerns out the window just to survive. They will burn anything they can get their hands on to keep from freezing, trying to keep their economy going. That is the geopolitical risk when things are topsy-turvy or unraveled, and that is what we are facing.

Instead of the administration basically continuing to take care of every opportunity we have to be energy secure, they are twisting the legislative text and cherry-picking the pieces that they want to advance.

And I have been very, very critical because I have been watching very carefully what is going on.

When you talk about electric vehicles, well, the reason that the Inflation Reduction Act said: Well, if we are going to give $7,500 to advance people buying electric vehicles, then we should get something as a country out of it—that means being totally, totally self-sufficient. We should not have to depend on Russia for 80 percent of the supply of the batteries that run electric vehicles when we never, in the history of the United States of America, relied on any foreign entity or supply chains for us to basically take care of our transportation needs, whether it be automobiles, whether it be trains, planes, whatever.

Now, all of a sudden, we want to switch to electric vehicles, knowing that we don't supply the main ingredients of running an electric vehicle, which is the battery. It makes no sense at all.

So what we said is, basically, you will get a credit of $3,750 if you secure the critical minerals it takes to produce that battery in North America or countries that have a free-trade agreement with America so we have a dependable, reliable supply chain that wouldn't be choked off by a country such as China, Russia, and whether it be Iran, North Korea, those that don't have any—any—relationship to our values whatsoever and do not wish us well, as I would say.

But with that, the other 3,750—that could equal $7,500 for a battery—would be that if the battery is basically manufactured in North America.

Now, what is wrong with bringing these types of jobs in manufacturing? If it is going to be our transportation

mode, don't you think we ought to have a dependable supply chain? That is all.

But, no, the Treasury Department has made a decision without even putting the rules and regulations out yet. They just made it on the whims and wishes of what they want to do, after we passed the piece of legislation we voted for. They basically said: OK. Now, we are going to basically allow people to continue to get the $7,500. Well, how can you do that when you have rules and regulations? But they cherry-picked it. They said: OK. We are going to basically say that if your income is less than 150—150,000 or less—or 300 total, then you can qualify for $7,500 if the car itself is within $55,000 or less for a car and if a truck is less than 80,000.

Let me even give you how much more egregious this is, even more than that. They have picked, basically, certain luxury vehicles called SUVs that are not trucks, but they want to classify them as trucks so they can qualify for $7,500 up to 80,000.

That is the kind of crap that we are putting up with right now that was not intended. It was never intended in that bill. It was not written in that bill, but that is how it is being interpreted.

So this is the thing that gets me upset because I know exactly what was in the bill because we had an awful lot of input in that bill to do the right thing for our country. It was energy security, supply chains here in America that we could count on. And it is just crazy. It is against the law, everything that we chose to do and everything we voted for.

The climate goal—I am as concerned as anybody about the climate. Every American, everybody who loves the opportunities in life we have and the quality of life should be concerned but also be a realist.

We are not going to be able to be fossil-free for quite some time, but we can sure use our fossil industry in a much cleaner way, and we have done that with the IRA. We are able to basically have carbon capture sequestration that will take us to another whole venue that we have never seen before. We have methane capturing, which has been harmful from the emission of natural gas. We are capturing all of that now. We are doing everything, but that is not good enough for some people on the far left. Oh, they want to go even further. Just shut it down. Stop it.

And I have said you cannot eliminate your way to a cleaner environment; you can innovate your way to it. And that is where America is going. With the IRA, we are bringing more investments from around the world than ever before. It is a transformational deal if the administration will just do the rules and regulations and administer the intent of the bill—energy security. That is the only purpose that we have, and we can do that and be able to mature the new technology that makes us even much better with our plan. But you can't eliminate something before you have something that will replace it that the American people depend on every day.

And if they are worried about what is happening, I can assure you, I am worried too. China is using more and doubling down on fossil, and India is using more and doubling down on fossil. So if you think they are going to take our lead because we put strangleholds on our economy and our people and make it difficult for us to survive in these very challenging times, I am sorry, that is not happening. This is not what I see the rest of the world doing right now.

We can lead them with the innovation technology we are creating right here in America, but leadership takes leadership. We have to be a leader to have leadership. In America, we have the opportunity, and the Inflation Reduction Act gives us a chance to continue to be a leader and the hope of the world.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

TEXAS INDEPENDENCE DAY

Mr. CRUZ. Mr. President, tomorrow is Texas Independence Day. On that day 187 years ago, the Texians declared our independence from Mexico and fired a shot for liberty.

In the fight for independence from Mexico, many would go on to give their lives for liberty at the Alamo, including William Barret Travis, Jim Bowie, and Davy Crockett. But shortly afterwards, after losing battle after battle after battle, the Texians won a decisive victory at the Battle of San Jacinto and formed the Republic of Texas. The rest is history.

After 9 years as a republic, our own nation, Texas officially became part of the United States in February of 1846.

Sam Houston, the founding father of the Lone Star State, was also born 230 years ago tomorrow. Tomorrow is Sam Houston's birthday.

Happy birthday.

Sam Houston was an extraordinary American. He was born in Virginia, spent many years in Tennessee, where he served in the U.S. House of Representatives and then became Governor of Tennessee. In Texas, he served as commander in chief of the Texian Army. He led the Texas Army to victory in the war for Texas independence. When Texas became an independent nation, Sam Houston served in the Texas House of Representatives and then as President of the Republic of Texas. When Texas joined the United States, he served in the U.S. Senate and finally as Governor of Texas.

I have always been a bit jealous that my colleague Senator CORNYN happens to occupy the seat that once was held by Sam Houston.

Sam Houston was a tireless, talented leader and a great statesman who believed passionately in freedom. His words, ''Govern wisely and as little as possible,'' remain true today, and the Lone Star State still follows that principle.

These great heroes, these great Texians, risked everything for freedom to make freedom a reality for generations of Texans. And tomorrow, we celebrate and honor their sacrifices.

Many years in the past, I have stood on the floor of the Senate and read Travis's letter from the Alamo to honor Texas Independence Day. This year, my colleague Senator CORNYN will read it since I read it last year.

COMMEMORATING THE BICENTENNIAL OF THE TEXAS RANGERS

Mr. President, I also want to take time today to thank another group of Texans for the incredible sacrifices they have made to the Lone Star State over the span of 200 years—the Texas Rangers. This year, 2023, marks 200 years since Stephen F. Austin formed the Texas Rangers to protect people who had settled in Texas—to protect them from outlaws and hostile attacks.

Over the years, the duties of the Texas Rangers expanded, and they played a key role in keeping Texas safe, from stopping an assassination attempt on President Taft, to tracking down the infamous outlaws Bonnie and Clyde, to doing the hard, painstaking work to arrest the cult leader Warren Jeffs. The Rangers are critical to law and order in Texas, where rural counties often don't have the resources they need to investigate crime. The Rangers are always ready to step in and serve.

There is an old line in the State of Texas: ''One Riot, One Ranger.'' That is who the Texas Rangers are.

I have been to the Texas Rangers Hall of Fame in Waco, TX, where the Rangers have done a wonderful job of preserving artifacts and telling the story of the Rangers. Anyone stopping through Waco should visit. The story of the Rangers is the story of Texas and, in many ways, the American West. It is a story about seeking freedom, and it is a story about courage.

That is why I am proud to introduce a resolution honoring the bicentennial of the Texas Rangers and in just a moment will propound a unanimous consent request in this body.

TRIBUTE TO MAJOR JAMES THOMAS

Mr. President, I am also proud to welcome here Major James Thomas to the Capitol. Major Thomas has served as a Ranger for 8 years, and he is the first Ranger to have a doctorate.

Major Thomas, thank you for being here today, and thank you for your years of distinguished service to the great State of Texas.

To all of the Rangers, as we celebrate with you your 200th anniversary, congratulations, and thank you for your incredible service to Texas.

And to every Texan, all 30 million, I wish you a very happy Texas Independence Day.

COMMEMORATING THE BICENTENNIAL OF THE TEXAS RANGER DIVISION OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY

Mr. CRUZ. Mr. President, as if in legislative session, I ask unanimous consent that the Senate proceed to the consideration of S. Res. 86, which is at the desk.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The bill clerk read as follows:

A resolution (S. Res. 86) commemorating the bicentennial of the Texas Ranger Division of the Texas Department of Public Safety, the oldest State law enforcement agency in North America, and honoring the men and women, past and present, of the Texas Rangers.

There being no objection, the Senate proceeded to consider the resolution.

Mr. CRUZ. Mr. President, I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, and that the motions to reconsider be considered made and laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The resolution (S. Res. 86) was agreed to.

The preamble was agreed to.

(The resolution, with its preamble, is printed in today's RECORD under ''Submitted Resolutions.'')

Mr. CRUZ. Mr. President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MARKEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

EXECUTIVE CALENDAR—Continued

NOMINATION OF MARGARET R. GUZMAN

Mr. DURBIN. Mr. President, today the Senate will vote to confirm Judge Margaret Guzman to the U.S. District Court for the District of Massachusetts.

Judge Guzman has had a lengthy and distinguished career in public service and is highly qualified to be a district court judge. Judge Guzman received her B.A. from Clark University and her J.D. from Boston University Law School. She then served as a public defender for 13 years and later as a solo practitioner for 4 years. Throughout her legal career, she tried more than 175 cases to verdict, judgment, or final decision. In 2009, Judge Guzman was appointed to be an associate justice of the District Court on the Commonwealth of Massachusetts Trial Court. Since 2017, she has been the first justice and a district court judge on the Ayer District Court in Middlesex County, MA. While on the bench, Judge Guzman has presided over more than 1,000 cases that have gone to verdict or judgment.

In addition to bringing professional diversity to the courts as a former public defender, Judge Guzman would also bring demographic diversity to the bench as the first Hispanic judge to serve on the District of Massachusetts. The American Bar Association's Standing Committee on the Federal Judiciary rated Judge Guzman ''qualified,'' and she has the strong support of her home State Senators, Mr. MARKEY and Ms. WARREN.

I urge my colleagues to support Judge Guzman's nomination.

Mr. MARKEY. Mr. President, I come to the floor today to speak in support of the nomination of Judge Margaret Guzman to serve as a U.S. district judge for the District of Massachusetts. Yesterday, the Senate invoked cloture on Judge Guzman's nomination, and in a few minutes, we will vote on her confirmation.

Margaret Guzman currently serves as a Massachusetts State district court judge. She is a Massachusetts native and a graduate of Clark University in Worcester and the Boston University School of Law.

In addition to Judge Guzman's more than 20 years of service on the Massachusetts State judiciary, her three-decade career in the law includes work as a solo practitioner handling civil cases and a public defender representing indigent criminal offenders. Judge Guzman will therefore bring to the Federal bench not only the knowledge and experience of a State court judge who has presided over more than 1,000 cases in her career that have gone to verdict or judgment but the wisdom of a public defender and solo practitioner, joining together precisely the kind of professional legal diversity that the Biden administration has made a priority and that the Federal judiciary badly needs.

But there is more to Margaret Guzman than this impressive legal resume. Her personal story has also shaped her and her outlook from the bench. In 1999, during a challenging time for her family, she became the guardian and custodian to six of her nieces and nephews, then age 3 to 15. During this time, she also took on a caretaker role for her ailing mother. These daunting personal experiences helped Judge Guzman understand and appreciate the difficulties that so many people—especially those who are involved in the criminal justice system—face in their day-to-day lives.

Her lived experience has led her to always show compassion and understanding to her own clients as a practicing attorney and to the litigants who appear before her as a judge and to ensure that those who must navigate our judicial system—especially the indigent and marginalized—are always treated fairly and with dignity and respect.

Finally, Judge Guzman will be a trailblazer. When confirmed, she will be the first Latina to serve on the U.S. District Court for the District of Massachusetts—a long overdue milestone in a State that has nearly 1 million Latinos who call Massachusetts their home. Out of our 7 million residents, 1 million are Latino.

Senator WARREN and I are proud to recommend Judge Guzman as a nominee to President Biden and proud to have that nomination before the whole Senate today. Judge Guzman leaves me with no doubt that she will serve the people of Massachusetts with distinction as a Federal district court judge. I urge all of my colleagues to vote yes on her confirmation today.

Senator WARREN and I give you our assurances that she will be a superior district court judge representing our entire country.

I yield the floor.

VOTE ON GUZMAN NOMINATION

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the Guzman nomination?

Ms. SMITH. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. FEINSTEIN), the Senator from Pennsylvania (Mr. FETTERMAN), and the Senator from Oregon (Mr. MERKLEY) are necessarily absent.

Mr. THUNE. The following Senator is necessarily absent: the Senator from Idaho (Mr. CRAPO).

(Mr. HICKENLOOPER assumed the Chair.)

The VICE PRESIDENT. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 48, nays 48, as follows:

[Rollcall Vote No. 32 Ex.]

YEAS—48

Baldwin	Hickenlooper	Rosen
Bennet	Hirono	Sanders
Blumenthal	Kaine	Schatz
Booker	Kelly	Schumer
Brown	King	Shaheen
Cantwell	Klobuchar	Sinema
Cardin	Luján	Smith
Carper	Manchin	Stabenow
Casey	Markey	Tester
Coons	Menendez	Van Hollen
Cortez Masto	Murphy	Warner
Duckworth	Murray	Warnock
Durbin	Ossoff	Warren
Gillibrand	Padilla	Welch
Hassan	Peters	Whitehouse
Heinrich	Reed	Wyden

NAYS—48

Barrasso	Daines	Lummis
Blackburn	Ernst	Marshall
Boozman	Fischer	McConnell
Braun	Graham	Moran
Britt	Grassley	Mullin
Budd	Hagerty	Murkowski
Capito	Hawley	Paul
Cassidy	Hoeven	Ricketts
Collins	Hyde-Smith	Risch
Cornyn	Johnson	Romney
Cotton	Kennedy	Rounds
Cramer	Lankford	Rubio
Cruz	Lee	Schmitt

Scott (FL)	Thune	Vance
Scott (SC)	Tillis	Wicker
Sullivan	Tuberville	Young

NOT VOTING—4

Crapo	Fetterman
Feinstein	Merkley

The VICE PRESIDENT. On this vote, the yeas are 48, the nays are 48.

The Senate being equally divided, the Vice President votes in the affirmative, and the nomination is confirmed.

The nomination was confirmed.

The VICE PRESIDENT. Under the previous order, the motion to reconsider is considered made and laid upon the table, and the President will be immediately notified of the Senate's action.

CLOTURE MOTION

The PRESIDING OFFICER (Mr. HICKENLOOPER). Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The senior assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 24, Colleen R. Lawless, of Illinois, to be United States District Judge for the Central District of Illinois.

Charles E. Schumer, Richard J. Durbin, Richard Blumenthal, Christopher A. Coons, Benjamin L. Cardin, Tina Smith, Christopher Murphy, Mazie K. Hirono, Tammy Baldwin, Margaret Wood Hassan, John W. Hickenlooper, Sheldon Whitehouse, Catherine Cortez Masto, Brian Schatz, Gary C. Peters, Alex Padilla, Michael F. Bennet.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Colleen R. Lawless, of Illinois, to be United States District Judge for the Central District of Illinois, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. FEINSTEIN), the Senator from Pennsylvania (Mr. FETTERMAN), and the Senator from Oregon (Mr. MERKLEY) are necessarily absent.

Mr. THUNE. The following Senator is necessarily absent: the Senator from Idaho (Mr. CRAPO).

The yeas and nays resulted—yeas 53, nays 43, as follows:

[Rollcall Vote No. 33 Ex.]

YEAS—53

Baldwin	Cardin	Duckworth
Bennet	Carper	Durbin
Blumenthal	Casey	Gillibrand
Booker	Collins	Graham
Brown	Coons	Grassley
Cantwell	Cortez Masto	Hassan
Heinrich	Murphy	Smith
Hickenlooper	Murray	Stabenow
Hirono	Ossoff	Tester
Kaine	Padilla	Tillis
Kelly	Peters	Van Hollen
King	Reed	Warner
Klobuchar	Rosen	Warnock
Luján	Sanders	Warren
Manchin	Schatz	Welch
Markey	Schumer	Whitehouse
Menendez	Shaheen	Wyden
Murkowski	Sinema	

NAYS—43

Barrasso	Hagerty	Risch
Blackburn	Hawley	Romney
Boozman	Hoeven	Rounds
Braun	Hyde-Smith	Rubio
Britt	Johnson	Schmitt
Budd	Kennedy	Scott (FL)
Capito	Lankford	Scott (SC)
Cassidy	Lee	Sullivan
Cornyn	Lummis	Thune
Cotton	Marshall	Tuberville
Cramer	McConnell	Vance
Cruz	Moran	Wicker
Daines	Mullin	Young
Ernst	Paul	
Fischer	Ricketts	

NOT VOTING—4

Crapo	Fetterman
Feinstein	Merkley

The PRESIDING OFFICER (Ms. CORTEZ MASTO). On this vote, the yeas are 53, the nays are 43. The motion is agreed to.

The motion was agreed to.

EXECUTIVE CALENDAR

The PRESIDING OFFICER. The clerk will report the nomination.

The legislative clerk read the nomination of Colleen R. Lawless, of Illinois, to be United States District Judge for the Central District of Illinois.

Thereupon, the Senate proceeded to consider the nomination.

The PRESIDING OFFICER. The Senator from West Virginia.

BIDEN ADMINISTRATION

Mrs. CAPITO. Madam President, I rise today really to take a moment and evaluate the repeated and unfortunately habitual overreach of the Biden administration.

When our Founding Fathers established our Nation, they were certain to build a government that rejected undivided sovereignty, or the rule of a single person. They had the monarchy, and they didn't like it. This structure features three distinct branches of government: the legislative branch, where we are here, to create and pass laws; an executive branch, responsible for enforcing the laws; and a judicial branch to make certain these laws and actions hold just with our Constitution.

Typically, this is a lesson we all learn in high school, but it seems like President Biden and his administration must have missed that lecture on balance of powers because their actions throughout the last 2 years have shown a lot of disrespect for our Constitution—and disregard.

A recent analysis by the American Action Forum found that in just 2 years, the Biden administration has imposed 517 regulatory actions—517—creating $318 billion in total costs—a figure that massively outweighs the regulatory costs generated by the last two Presidential administrations.

Executive overreach has become synonymous with the Biden administration and has created a desperate need for oversight from our Republican colleagues here in the Senate, and certainly that is occurring across the way in the House of Representatives.

We have seen overreach from the Biden administration in areas that impact just about everything, whether it is how we heat our homes or whether we are going to have a gas stove or not, how we fuel our cars, how we educate our children, how we move goods across the country, how we spend private investments, how we enforce law and order, even how we define ''water.''

Plain and simple, President Biden and unelected bureaucrats in Washington are continuously overstepping their boundaries, creating hurdles and interfering with how we live our everyday lives.

On top of this, congressional Democrats continue to obstruct critical oversight efforts on these harmful policies, and they are blocking opportunities for the American people to hear directly from the administration about policies that impact us directly every day. It is kind of—it is not ''kind of''—it is very unfair, and it is a disservice to folks across the Nation who want the leaders to be held accountable.

In the face of such rampant overreach, my Senate Republican colleagues and I continue to push back on President Biden's out-of-touch mandates and bring the voices of the American people to the table.

My colleague from Tennessee, Senator BILL HAGERTY, has introduced a bill that blocks Washington, DC's dangerous and irresponsible rewrite of their Criminal Code that lessens punishment for violent crimes.

My colleague from South Dakota, Senator JOHN THUNE, has introduced a bill to prohibit the President from canceling outstanding Federal student loan obligations due to a national emergency.

Another tool at our behest against this unprecedented expansion of the administrative state is called the Congressional Review Act of disapproval. It sounds kind of bureaucratic, and it is, but it can be very, very meaningful.

As you know, through a Congressional Review Act of Disapproval, or CRA, Congress can vote to overturn rules from the executive branch that are classified as overreach. My colleague from Indiana, Senator MIKE BRAUN, has introduced a CRA that would block a recent Department of Labor rule allowing retirement plan fiduciaries to consider climate change and other ESG—or environment, social, and governance—factors in their investment decisions. I don't know about you, but I think most people who are retired or beginning to retire and looking at their accounts that they are going to be living on, they would rather see the returns come in the most

profitable way possible so that they can live out their life. In the end, that is better for all of us.

This effort would nullify the Department of Labor rule and prevent similar rules from taking effect. Actions like these have direct impact on energy-producing States like mine by steering capital away from the American energy sector. We should be investing in our American energy sector.

I, too, have introduced my own CRA in response to a repeated overreach from the Biden administration. Last December, the Biden administration launched its latest round of regulatory overreach through the waters of the United States, which we refer to here as the WOTUS rule. It marked the third major change to the definition of what waters are in this country and which ones are subject to Federal jurisdiction. It is the third time this has changed over the last 8 years. Think about if you are in agriculture or if you are in construction—big impacts.

Like many regulations from this administration, it is very overreaching. It is misguided, and it is just not necessary. Even worse, it places an undue burden of uncertainty directly on America's farmers, on America's ranchers, on America's miners, on America's infrastructure builders, and, quite simply, American landowners.

The Biden WOTUS rule repeals the 2020 Navigable Waters Protection Rule that provided predictability and certainty and protected our waters. Most importantly, it properly implemented the Clean Water Act by protecting our waterways through coordination and cooperation from States and the Federal Government.

You may hear that without this new definition, some waters may go ''unprotected.'' That is not true. It is an insult to our State officials who know their local ecosystems and have jurisdiction over their territorial waters.

So what does the new definition really do? It requires more people to get more permits who can't get permits, and it causes fear of EPA enforcement actions and frivolous lawsuits from environmental groups.

This all comes at a time when we should be streamlining our Nation's permitting and review process. Instead, the administration is using their classic overreach tactics to make more projects subject to Federal permitting requirements and add more bureaucratic redtape.

My CRA gives every Member of Congress the chance to stand with our farmers, our ranchers, our landowners, our miners, and our builders. It is also a chance for us to protect future transportation, infrastructure, and energy projects all across the country.

For this particular rule, CRA, we have seen widespread support both in the House and the Senate in an effort to overturn this rule, and I look forward to having that here on the Senate floor.

As ranking member of the EPW Committee, I have made it a priority to ensure that the historic investments that we have made in infrastructure are being implemented as Congress intended.

The Infrastructure Investment and Jobs Act—we call it here IIJA; we have an acronym for everything—that we passed in 2021 and the President signed will benefit all communities by providing our States with the flexibility needed to upgrade, expand, or modernize our Nation's core transportation infrastructure. That is why ensuring that the letter of the law is followed, as we intended it, will be and has continued to be a high priority for me. We do not want to miss this moment.

That being said, the Federal Highway Administration, or FHWA, released a memo a little over a year ago in December that found its way into numerous guidance documents attempting to enact a wish list of policies we—when I say ''we,'' I mean the bipartisan EPW Committee—intentionally negotiated out of the final law.

I, along with the House Transportation and Infrastructure Committee chair, SAM GRAVES, had announced our intention to formally challenge this rule. The FHWA heard what we were saying and also heard what their State transportation folks were saying. So just last Friday, FHWA released a substantially revised replacement, reversing course from that December 2021 memo.

The new memo removes the policies that Congress rejected—because it is not administrative policy, it is congressional law—and issued a revised memo. And the administration basically admitted that they were wrong in their attempts to undo the flexibility provided to States in the law by establishing preferences for certain policies. Building highways, maintaining highways, creating bypasses, however you want to do your State—it is different in Nevada; it is different in Indiana; it is different in West Virginia—we need to give our States the flexibility.

This is a good example, I think, of the Biden administration knowing they were overreaching, and they actually corrected that. I am grateful for that.

As my colleagues and I highlight the continuous level of overreach this administration has grown comfortable with, I would suggest that the President reference a U.S. history book and leave the legislating to the legislators. Until then, my colleagues and I will continue to stand for the way of life outside the beltway and provide solutions that strengthen our families and communities instead of having setbacks.

With that, I yield the floor.

I see my fellow Member of the Senate from Indiana, Senator BRAUN, is here to talk on this topic.

Thanks for coming.

The PRESIDING OFFICER. The Senator from Indiana.

DEPARTMENT OF LABOR RULE REPEAL

Mr. BRAUN. Madam President, I come here today—we are going to vote later this afternoon—on something else that involves overreach of the Federal Government, and I have witnessed it a lot.

I have been here just a little over 4 years. I jump in—I come from Main Street America—when it just doesn't make sense. The last time I was engaged in this was at the tail end of the COVID saga, when a rule from the Biden administration was going to force the vaccination on all Americans working, if you work for a company down to 100 employees. That is a lot of people.

We weighed in on that. It was bipartisan. The Supreme Court jumped in a week and a half or two later and, thank goodness, said enough is enough there.

Here, we are talking about something you hear the acronym, ESG—environment, social, and governance. In a nutshell, that just means now, when we are looking at hard-earned money that you save, your retirement—let me tell you how much it is going to impact: $11.7 trillion, 152 million Americans.

I really am OK with what you want to invest in, as long as it is going to push the best rate of return. Over the long run, if something changes, that is different. But, currently, this rule now allows the criterion of using those ESG goals, which would be simplified, being able to push a certain ideology, a certain point of view, into how retirement earnings are invested.

You have got to remember, this is a fiduciary thing. Most people, when they give money to their financial adviser, their broker, you would think they would think that it is going to get the best return. Bloomberg tracked it. If you would actually invest according to ideology over the last few years, it would have been the difference between an 8.9-percent return and a 6.3-percent return.

Imagine trying to explain that in a way where someone trusted that you would be doing the best thing with their hard-earned money to get the best financial return. That is nearly a 30-percent cut in what you would have had otherwise. I have got to believe everybody would be thoroughly upset with that.

It is a step too far. It is injecting the Federal Government, and how it has enterprised over the last couple of years, into many different arenas. I think it is a wake-up call.

We are going to vote on this later this afternoon. Everyone will be able to, I think, hopefully, vote in a way that they would tell their constituents would make sense, give me the best rate of return. Figure out all this other stuff here on the legislative floor, but don't make it impact hard-earned retirement funds.

The House just last night passed this in a bipartisan way. Hopefully, we will do the same thing later this afternoon. It makes sense to Hoosiers. It makes sense to Americans.

I yield the floor.

The PRESIDING OFFICER (Ms. ROSEN). The Senator from Wyoming.

DEMOCRATIC PARTY

Mr. BARRASSO. Madam President, I come to the floor today to talk about the priorities, misguided priorities, of the Democrat majority in the Senate.

So far this year, Senate Democrats have ignored the most important issues that are facing our country. Democrats are focused on cramming through Joe Biden's radical leftwing nominees.

Looking at the Senate floor, you would think that everything is going well in the world and well across the United States. I have news for Joe Biden and for CHUCK SCHUMER: People all across this country are not happy. The country is heading in the wrong direction.

In meeting after meeting in Wyoming last week, as I traveled the State, people talked about sky-high prices, the sky-high debt that we have as a nation, and China's spy balloon.

Under Joe Biden, America is in crisis—inflation crisis, energy crisis, crime crisis, and a spending crisis.

Inflation went up again in January. The numbers came out Friday. The headlines don't lie. They said inflation remains entrenched—entrenched—and that is what people are feeling all across the country.

In addition to inflation, drugs are pouring across the southern border, killing record numbers of people, even in my home State of Wyoming. When the numbers are like they are in Wyoming, that tells you every State is a border State.

Crime is out of control in Democrat strongholds in cities like Washington, DC. We see it here. We see yesterday in Chicago, the mayor didn't even make it through the primary process—didn't finish first, didn't finish second, not even in the runoff. And according to people I have talked to from that State and watching the news reports, the No. 1 issue is crime; the No. 2 issue is crime; and the No. 3 issue is crime.

Internationally, Chinese President Xi Jinping is reportedly going to Moscow. Why? Well, to strengthen his ties with Vladimir Putin.

The list goes on and on of failures and crises that this administration is facing and, for the most part, has caused and created. Democrats are doing nothing to deal with it.

There is a lot we should be doing in the U.S. Senate. We should be unleashing American energy. We should stop the reckless tax and spending that the Democrats continue to promote. We should secure the border. Stop this flow of illegal drugs. We need to crack down on the criminals who are terrorizing communities. We need to put China on notice. Yet the Democrats are disinterested and ignoring it all.

Senate Republicans are going to force a vote today that will actually help people. We are going to vote to protect America's retirement savings accounts.

The American people know that Joe Biden continues to spread lies about Social Security and Medicare. If Joe Biden is so concerned about people's retirements, he needs to look in the mirror. The only politician meddling with people's retirements is Joe Biden. That is right. The only politician actually meddling with people's retirements is President Biden.

The Biden administration wants retirement plan managers to invest people's retirement funds based not on the best return for the money—nope—but based on woke ideology. Democrats want this so they can funnel trillions of dollars to their climate elites.

It is called ESG: environmental, social, and governance. The more accurate name might be ''extreme socialist greed.'' Now, this is going to rob American people of a lot of money. ESG is legalized theft from American workers.

Numerous studies have shown that these woke investments are bad investments. People wanting to maximize their savings and their investment and the investment income to benefit their families long term are being held hostage by these new regulations coming out of the Joe Biden administration.

Bloomberg analysts looked at these numbers of the people who invest in this ESG. What did they find? Well, they found that the return for the ESG investments fell way behind the general market—way behind. Year after year, that means less money growing in your retirement account.

This is a slap in the face to the working men and women of the country who are trying to save for their future. I am proud of the State of Wyoming because we have actually sued the Biden administration to stop this.

Retirement accounts are not for promoting a political agenda. They are for helping people retire with money in the bank. They are about giving people some safety, some security, and peace of mind. If woke investors want to promote a political agenda, then they should do it with their own money, not force investors to do so. The only people who benefit from ESG are the climate elites and the professional activists. Everyone else loses money.

Now, let me point out that the analysts from Bloomberg not only said that the return is much less but that the expenses of investing in those programs, with the management fees, is much higher. So you get hammered at both ends: lower returns and higher expenses.

ESG means you can't invest in things like oil, gas, coal, American energy. It means less American energy for people in our country. It means higher energy costs. It means fewer energy jobs and less money in people's retirement accounts.

This is an all-around disaster for the American people, but it is what the Biden administration and so many Democrats want. Democrats know the American people would never vote for this; it would never become law. That is why the Democrats attack American energy through the bureaucracy and through the courts, through their wealthy friends on Wall Street.

Now, Democrats have friends on Wall Street who have been doing their bidding for years. A couple of examples: Goldman Sachs, Morgan Stanley, Chase, Wells Fargo, Citibank. They refuse to finance oil and gas projects near the Arctic. Citibank refuses to fund coal mining. HSBC refuses to fund any oil, gas, or coal projects.

The American people need to remember this next time Democrats say they oppose the big banks. Democrats and the big banks are practically joined at the hip.

Citigroup won't give a loan to a coal company, yet Citibank is happy to do business with China. Some Chinese companies have higher ESG scores than American companies. These include Chinese companies using slave labor.

This tells you ESG is a scam by the radical left. Now, Joe Biden wants the ESG scam at every bank in America—every bank, every savings account, every investment. That would mean trillions of dollars funneled to politically driven, woke investments. People who have saved their entire lives under this Democrat scheme would actually retire with less money in their accounts.

So I am going to join all of my Republican colleagues today to vote to stop this. Republicans are ready to stand up and say no to Joe Biden and the administration and this reckless policy. No more command and control from Biden's bureaucratic bullies, no to defunding American energy, no to woke corporations, and no to Democrats meddling in people's retirements.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nebraska.

EMISSIONS REGULATION

Mrs. FISCHER. Madam President, my colleagues are here today to shine a light on the Biden administration's obsession with unhelpful and unnecessary regulations. We know that excessive redtape devastates our economy, and it harms communities. That is why the President's agenda needs to be stopped, and we can do it right here in the U.S. Senate.

I have introduced legislation this Congress to push back against the administration's misguided rule intensifying emissions standards for heavy-duty vehicles.

In my home State of Nebraska, 1 in 12 people are employed by the trucking industry, making it the third largest industry in our State. In the United States as a whole, over 3 million people work as commercial truckers, and American truckers transported almost 11 billion tons of freight in the year 2021. Consumers all across the country rely on trucking to bring goods to markets quickly and affordably.

Truckers play an essential role in our communities and our economy, but the Biden administration doesn't seem to agree with that fact. Instead, our

President routinely chooses to prioritize excessive environmental regulations over people's livelihoods.

Nowhere is this clearer than in the Environmental Protection Agency's recent rule establishing stricter emissions standards for heavy-duty vehicles. The Biden administration—well, they want to saddle hard-working drivers with an onerous regulation that is going to increase vehicle costs and is going to deal a serious blow to good-paying jobs. This aggressive EPA rule will hit mom-and-pop truck operations the hardest. For trucks to be compliant with the new overregulation, it will be cost prohibitive for small business owners.

Don't get me wrong. Nebraskans—over a quarter of whom work jobs related to agriculture—care deeply about environmental stewardship, but the EPA's emissions rule wouldn't actually accomplish its stated purpose of cleaning up our environment. The EPA itself estimates that the technology required to meet this new rule's standards will cost between approximately $2,500 and $8,500 per vehicle. This means that many truckers will choose to keep their old heavy-duty vehicles, which do have higher rates of emissions, instead of buying vehicles that are both affordable and more climate-conscious.

During a period of high inflation and supply chain disruptions, the last thing this country needs is more expensive freight costs and fewer truckers. Congress needs to vote to overturn this excessive rule—one that will hurt both the transportation sector and consumers at large.

The bottom line is that we have an obligation to stand up and push back against out-of-touch, far-left policies. I appreciate the work so many of my colleagues are doing toward this goal.

Senator BRAUN is leading the charge to overturn the President's new environmental, social, and corporate governance rule on retirement funds. The Biden administration should not be playing games with Americans' hard-earned money like this.

My friend Senator TUBERVILLE is pushing back on the administration's Veterans Affairs rule that would funnel taxpayer dollars toward abortions.

As Senator CAPITO shared earlier, she is leading us in resisting the Obama-era WOTUS rule implemented late last year. The WOTUS rule, which I have been fighting since my first term here in the U.S. Senate, is the Federal Government at its worst. It encroaches on families, on communities, and on businesses by its brazen intrusion into States' precious water resources.

The Biden administration has a track record of prioritizing politically charged regulations over the financial and economic well-being of Americans. My colleagues and I are here to stop these rules from taking effect on more and more Americans' lives before they damage the livelihoods of even more Nebraskans and more Americans across this country.

As long as I have the honor of working in the U.S. Senate, I will continue to oppose radical, far-left rules and promote commonsense solutions instead. My colleagues on both sides of the aisle should join me.

I yield the floor.

The PRESIDING OFFICER. The Senator from Tennessee.

Mrs. BLACKBURN. Madam President, I ask unanimous consent that Senator YOUNG and I each be able to speak for 5 minutes prior to the scheduled vote.

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

INTERNAL REVENUE SERVICE

Mrs. BLACKBURN. Madam President, last year, Senate Democrats used the budget reconciliation process to pass the Inflation Reduction Act. They did this without a single Republican vote. Included in that monstrosity was an $80 billion payday for the Internal Revenue Service—more than 6.5 times the amount of funding the IRS would normally receive in any given year.

After this happened, I had a lot of Tennesseans ask me: Why does the IRS need that much money? Many of them are really fearful that the IRS is going to come after them and their small businesses. And you know what. They are probably right.

The Biden administration insists they are going to use this $80 billion to help the IRS answer the telephones because they are only answered about 20 percent of the time, but we know that it means more audits for small businesses, small business manufacturers, and Main Street merchants. This administration has never once passed up an opportunity to expand government power, and they aren't about to stop now. We know this expansion will lead to needless harassment. That is the nature of Big Government.

But I am equally concerned about the sheer amount of data the IRS has scraped up during investigations. The IRS already collects far more data than they need. In 2022, they hired a contractor to block taxpayers from accessing government services unless they handed over sensitive biometric data. They already have your name, address, and Social Security number, but now they want to collect a picture of your government ID, your fingerprints, and a selfie photo. Why in the world would we allow the IRS to collect this data? The answer, of course, is that most people wouldn't let them have it if they had a choice. But the IRS wants to force this on the American people.

To make matters worse, we know that they are completely incapable of protecting the data they have access to. Let's just take a moment and look at some of the instances where the IRS has shown their disregard for your data security.

In 2015, hackers exposed more than 700,000 taxpayers' Social Security numbers. In 2017, the IRS notified Congress that hackers had accessed more than 100,000 Federal student aid accounts. In 2021, the infamous ProPublica leak unlawfully exposed financial information on many prominent Americans. In 2022, the 990–T leak exposed the sensitive info of more than 100,000 taxpayers not once but twice.

But even on a good day, the top men at the IRS have refused to prioritize data security.

They still haven't responded to inquiries I made about what security protocols they implemented as part of their ''work from home'' policy.

The IRS should be collecting the minimum amount of information required to do their job, and they should be doing all they can to protect your information. Instead, this Agency has a giant flashing sign out front inviting hackers to browse their files. These bad actors already know the IRS is vulnerable, and we will not be able to control that threat until the IRS abandons its latest power grab and prioritizes data security.

This is what the Biden administration needs to focus on before it spends 80 billion taxpayer dollars harassing the American people.

I yield the floor.

The PRESIDING OFFICER. The Senator from Indiana.

INFLATION

Mr. YOUNG. Madam President, in recent weeks, the Biden administration has reassured Americans that our economy is historically strong and that their policies are the reason why. But far away from the White House, most people, I have to say, are unpersuaded. The cost of their bills and the state of their savings simply don't match the rosy picture that the administration presents.

There is a reason the rhetoric of this administration is so disconnected from the reality. This administration claims it is investing in America's economy, but, at the same time, it strangles our economy with unnecessary and ideologically motivated rules and regulations.

Just ask Hoosier farmers. The latest in their deluge of redtape, the rewritten waters of the United States rule, will make it much harder and significantly more expensive for our farmers to help feed the rest of the world.

Look at what they have had to navigate over just the past few years: a global pandemic, a supply chain stoppage, inflation, and the increased price of inputs.

In an industry that is so fundamental to America's prosperity, where margins for generations have been razor thin, why would we create even more uncertainty for our Nation's farmers? Because the priorities of environmental ideologues in Washington, DC, are evidently more important to this administration than the needs of the people who actually work the land—the people who provide our food supply.

This isn't part of an agenda that helps Americans. No, it is a bare-knuckle attempt to expand the reach

of the Federal Government over the lives and activities of regular people.

Now, my office has recently heard from James Ramsey from Rush County, IN. James and his family farm corn, soybeans, and wheat in the east central part of our State. They have been farming and maintaining the same land since the 1860s. They also run a small business helping farmers and counties with drainage installation, ditch digging, and land clearing, improving water quality and soil health in the process.

They started out doing minor projects back in 2008 but have since grown, acquiring their own wheel trencher and commercial plow. Through hard work and through a lot of planning, James, his father, his brother, and others have expanded this business. They have clients now throughout the State of Indiana, and they have eight employees.

It is a real American success story—exactly the type WOTUS will interrupt. James, like many other farmers and small business owners across the country, knows what these newly revised, overly complex rules will accomplish. They will accomplish increased overhead, prolonged permitting processes, slowed or even stopped projects, and, ultimately, laid-off employees.

James has never had to let a single employee go because of a lack of demand. Instead, he regards his employees as family. They have their own families to feed. They have their own mortgages to pay, their own homes to heat. And James understands this.

This is why one of his greatest fears is having to one day—sometime soon, perhaps—walk into his shop and tell one of his guys that he can't keep everyone because of these new regulations. If this new definition of WOTUS stands, that has a strong chance of becoming reality. James might have to make that walk that he so wants to avoid.

Listen, our farmers don't want to clear the land or harm its creeks and streams. They want to take care of the soil—what they have been doing for generations. They want to continue to work hard on behalf of their families and ensure that they can continue in this noble profession that their fathers and grandfathers have been involved in. They want to pass this on to their children and grandchildren.

I have to say, our farmers also know quite a bit more about their land than the bureaucrats who wrote this WOTUS rule. As James pointed out, much of Indiana is not naturally drained. Because it was cleared long ago, rain empties into manmade streams and tile drains. We have the highest percentage of subsurface drainage in the entire nation in the State of Indiana.

Drainage systems are central to the productivity of our farms. Tangling them up with greater Federal regulation could be disaster for our agriculture industry. Farmers like James have been through so much over the past few years. They have hung in there nonetheless.

Now, just when they think they have turned another corner, WOTUS resurfaces, and, as James said, there is a real fear that these new regulations will have an even greater long-term impact than the pandemic or supply chain crisis.

Right now, our farmers are asking for clarity, for an even-handed approach to regulation that, at once, respects the environment and allows them to continue to grow. If the Biden administration is serious, if they are genuinely serious about strengthening the economy, they will reverse course and give our farmers this clarity and certainty they so desire.

We should rescind this rule.

I yield the floor.

CLOTURE MOTION

The PRESIDING OFFICER. Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The senior assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 35, Jonathan James Canada Grey, of Michigan, to be United States District Judge for the Eastern District of Michigan.

Charles E. Schumer, Richard J. Durbin, Richard Blumenthal, Christopher A. Coons, Benjamin L. Cardin, Tina Smith, Christopher Murphy, Mazie K. Hirono, Tammy Baldwin, Margaret Wood Hassan, John W. Hickenlooper, Sheldon Whitehouse, Catherine Cortez Masto, Brian Schatz, Gary C. Peters, Alex Padilla, Michael F. Bennet.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Jonathan James Canada Grey, of Michigan, to be United States District Judge for the Eastern District of Michigan, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. FEINSTEIN), the Senator from Pennsylvania (Mr. FETTERMAN), and the Senator from Oregon (Mr. MERKLEY) are necessarily absent.

Mr. THUNE. The following Senator is necessarily absent: the Senator from Idaho (Mr. CRAPO).

The PRESIDING OFFICER (Ms. BALDWIN). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 52, nays 44, as follows:

[Rollcall Vote No. 34 Ex.]

YEAS—52

Baldwin	Heinrich	Rosen
Bennet	Hickenlooper	Sanders
Blumenthal	Hirono	Schatz
Booker	Kaine	Schumer
Brown	Kelly	Shaheen
Cantwell	King	Sinema
Cardin	Klobuchar	Smith
Carper	Luján	Stabenow
Casey	Manchin	Tester
Collins	Markey	Van Hollen
Coons	Menendez	Warner
Cortez Masto	Murkowski	Warnock
Duckworth	Murphy	Warren
Durbin	Murray	Welch
Gillibrand	Ossoff	Whitehouse
Graham	Padilla	Wyden
Grassley	Peters	
Hassan	Reed	

NAYS—44

Barrasso	Hagerty	Risch
Blackburn	Hawley	Romney
Boozman	Hoeven	Rounds
Braun	Hyde-Smith	Rubio
Britt	Johnson	Schmitt
Budd	Kennedy	Scott (FL)
Capito	Lankford	Scott (SC)
Cassidy	Lee	Sullivan
Cornyn	Lummis	Thune
Cotton	Marshall	Tillis
Cramer	McConnell	Tuberville
Cruz	Moran	Vance
Daines	Mullin	Wicker
Ernst	Paul	Young
Fischer	Ricketts	

NOT VOTING—4

Crapo	Fetterman
Feinstein	Merkley

The PRESIDING OFFICER. On this vote, the yeas are 52, the nays are 44.

The motion is agreed to.

EXECUTIVE CALENDAR

The PRESIDING OFFICER. The clerk will report the nomination.

The senior assistant legislative clerk read the nomination of Jonathan James Canada Grey, of Michigan, to be United States District Judge for the Eastern District of Michigan.

LEGISLATIVE SESSION

PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES CODE, OF THE RULE SUBMITTED BY THE DEPARTMENT OF LABOR RELATING TO ''PRUDENCE AND LOYALTY IN SELECTING PLAN INVESTMENTS AND EXERCISING SHAREHOLDER RIGHTS''

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to legislative session and proceed to the immediate consideration of H.J. Res. 30, which the clerk will report.

The senior assistant legislative clerk read as follows:

A joint resolution (H.J. Res. 30) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Labor relating to ''Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights''.

The PRESIDING OFFICER. The senior Senator from Hawaii.

Mr. SCHATZ. Madam President, there is a group of elected officials in

our country today who are engaged in an anti-capitalist crusade. But they are not socialists; they are mostly congressional Republicans.

This CRA is gross government overreach on U.S. capital markets. It is designed to prevent pension plans from pursuing environmental, social, and governance—or ESG—investing. But make no mistake, it is only the latest step in a campaign to prevent American financial institutions from making money from the clean energy revolution, and it should offend anyone who supports free markets.

The reason this is happening is that the fossil fuel industry faces a risk wall, where the risks associated with climate change are clear enough that retirement plan sponsors may want to consider them when investing assets. The Trump administration banned them from doing so, implementing a rule that pension fund managers couldn't consider ESG investing. The Biden administration's rule merely reverses this ban, going back to a neutral stance—going back to be a neutral stance. It is not telling them to do environmental, social, and governance goals; it is just saying: Do whatever you want. It is none of our business. The Federal Government has no business in determining how pension funds deploy their resources.

But rather than own up to the risks or reduce their emissions, the fossil fuel industry is trying to remove climate-related elements from risk consideration, and the Republican Party is helping.

This closely coordinated effort is being driven by a network of dark money organizations fronting for climate denial groups. One attacker of ESG investing is the Rule of Law Defense Fund—the political arm of the Republican State Attorneys General Association, which urged people to come to the Capitol on January 6 and aid in the attempted overthrow of our democracy.

This dark money helps to win elections, and the fossil fuel industry is becoming more aggressive because of the increase in green investing. Right now, more than $8 trillion in U.S. assets is under management employing sustainable investing strategies. ESG investing is expected to represent more than 20 percent of all global assets in the next 5 years, and this growth is occurring for one simple reason: It is profitable. It is profitable.

Some asset managers are pursuing sustainable investing at the behest of their clients. Others have determined sustainable investing fits a long-term strategy to grow retirement savings. Any plan sponsor considering sustainable investing is simply meeting the moment.

But here is the real point: It is their call. It is not our call. That is just capitalism in action, and the climate deniers are getting their butts kicked in the free market, and they are mad about it, and so they want to make a law to stop the bleeding.

Imagine an elected official telling an investment firm they can't offer large cap or small cap or emerging market funds or funds even that are exclusively for fossil energy. That would be preposterous. Why? Because people get to decide how to deploy their resources, and pension funds get to decide how to deploy their resources. But Republicans have decided that for this issue and only this issue, we should be telling pension fund managers how they can and can't invest.

The real reason for this is the Inflation Reduction Act has made it so profitable to invest in clean energy that they are losing, and they want an intervention from the Congress, so they decided to categorize ESG investing as something nefarious, as something tricky, as something woke. Come on. They are just losing. People don't want to invest in fossil fuel anymore, and so they are asking the Congress to intervene on their behalf.

This is not how the free market should work. If this passes, it will force financial firms to punish Americans on behalf of the fossil fuel industry. We cannot be intimidated. We have to reject this.

I yield the floor.

The PRESIDING OFFICER. The senior Senator from Massachusetts.

Ms. WARREN. Madam President, I rise today in opposition to Republican efforts to nullify the Department of Labor's rule that protects retirees and affirms decades of precedent. This rule allows those investing retirees' savings the freedom to direct those funds where the retirees want them to go. It lets them protect those funds from costly risks posed by worsening environmental disasters or unsafe and unfair working conditions and seek out promising, sustainable, long-term investment opportunities.

Republicans' latest front in their wholly made up culture war is an attack on ''woke capitalism,'' and American retirees are apparently their targets. In particular, Republicans have set their sights on retirees who choose to invest their money with environmental, social, and governance—ESG—factors in mind.

Now, investors have actually been doing this for decades. The Department of Labor has repeatedly said that under the Employment Retirement Income Security Act of 1974, known as ERISA, retirement plan managers may consider all—all—relevant economic factors when making investment decisions if it is in the best interest of the plan's participants. That includes ESG factors, like how a company treats its workers or whether the company is sufficiently protected from climate risks and whether the company respects human rights.

It turns out, investors really want to know these things. You don't need to be a financial wizard to realize that whether a company invests in its workers or is vulnerable to climate risks might be relevant to the company's long-term prospects and the potential returns on your investment.

But the Trump administration put blinders on investors when, in 2020, it finalized a rule limiting that and made it harder for retirees to invest with ESG considerations in mind. In 2022, the Biden administration Department of Labor rightfully removed these roadblocks and affirmed that retirement fiduciaries have the option to consider ESG factors when making investments on behalf of retirees.

Let's be very clear about what this rule does not do. It does not mandate anything. It does not require that fiduciaries invest or not invest in certain funds. It does not tell fiduciaries to consider or not to consider certain factors. There is nothing new here and certainly nothing extreme.

Let's be clear. By overturning the Department of Labor's rule, Republicans want to tie investors' hands and override the free market. This fight isn't about protecting and strengthening Americans' retirement security. It is not about ensuring that retirement plan fiduciaries are making sound financial investments. And it sure as heck is not about capitalism. It is politics, plain and simple.

How do I know that? Well, Republicans clearly believe that investment decisions should be made with consideration of ESG factors so long as they are ESG factors that the Republicans support. My colleague Senator RUBIO has championed legislation that would prevent Federal Government employees' retirement assets from being invested in Chinese and Russian companies.

At the same time, Republicans also seem to believe that government shouldn't restrict investors' ability to put their money wherever they want. In response to the Department of Labor's very sensible guidance warning about the financial risks of investing in crypto scams, my colleague Senator TUBERVILLE introduced a bill that would prohibit any guidance that would limit the type of investments that workers can make. He said:

> The government has no business standing in the way of retirement savers who want to make their own investment choices.

So add up what the Republicans have already told us with the legislation they are sponsoring. Retirees should have the freedom to invest their hard-earned money in crypto scams, but they should not even be allowed to consider whether a company relies on child labor or is polluting the planet or is underpaying its workers when deciding whether or not an investment is sustainable. It just doesn't make any sense, and it is not supposed to.

There is a bigger picture here that Americans need to understand. Republicans know that President Biden will veto this resolution the minute it hits his desk. They know it won't succeed in nullifying the Department of Labor's rule. So what is the point of doing this?

Well, Republicans have been explicit that the goal of this exercise is to help their buddies in the courts. President Trump appointed judges across the country who are now engaged in a disturbing assault on the regulatory state and are hell-bent on kneecapping any effort to make markets fairer, to make workers safer, and to make the environment cleaner. This resolution is just one more attempt by Republicans to give an assist to these extremist judges and make it easier for the courts to overturn the rule and undermine the law.

Let's call this attack on the Department of Labor's rule what it really is—a wholly invented grievance to advance corporate special interests, not the interests of retirees.

Democrats need to stick together on this and reject these cynical efforts to undermine investor protection and empower extremist Republican courts.

I yield the floor.

The PRESIDING OFFICER. The junior Senator from Minnesota.

Ms. SMITH. Madam President, I appreciate my colleagues' remarks today. You know, the issue that we are debating is whether or not retirement plans should be allowed to consider a company's environmental, social, and governance goals when they make investments. That is ESG, and it is pretty simple.

My colleagues and I say that people who make investments for retirement accounts and pensions plans may—they don't have to; they may—consider ESG in their decisions about what stocks to buy so long, of course, as they adhere to their principal fiduciary responsibility, which is to put the financial best interests of their clients first.

Now, on the other hand, our Republican colleagues are saying: No, retirement plans can't consider ESG goals. They are somehow claiming that this rule will undermine free and fair markets—undermine the free market and promote ''woke'' capitalism. And, if you can tell me what that means, then I will look forward to your explanation.

So let's figure out what this is really about.

People invest their life savings for a safe, secure retirement, and a lot of people want those investments in companies that reflect their values, companies that protect the safety of their workers, that have excellent ethics rules in place, guarding against conflicts of interest; companies that are committed to protecting the environment and managing the risks of climate change. In fact, companies with these kinds of positive environmental, social, and governance policies are often good financial investments as well. The two go hand in hand.

The foundation of a free market is that people can decide for themselves where to invest their money, and they should have good, trustworthy information in order to make those decisions so that the market is fair and they don't get taken advantage of.

That is all this ESG rule that we are defending today does. It asserts that investors should have the option, if they choose, to make ESG investments. It is not a mandate. It does not elevate one type of investment over another. All this rule does is allow workplace retirement plans to offer ESG investments as an option to people who want them, provided, of course, that those investments are prudent and provide a safe and secure retirement.

So I can tell you that out in the real world of Minnesota, this is no big deal. For decades, great Minnesota companies have been looking for excellent returns on their investments. That is their job. But they have also been trying to improve how their companies help their community, help their employees, and help the environment. A lot of people would say that is good business.

In fact, ESG investing has been growing in this country for decades. People like it. They want to invest in companies that reflect their values. More than $18 trillion are held in investment funds that follow the ESG investment principle. So this isn't some sort of weird fly-by-night new idea. ESG investing has been routine for years.

But what is new—what is new—is the way in which these extreme Republican politicians whom we see today are trying to turn ESG into their latest tool to rip us apart and to expand their own political power, and that is so hypocritical.

You know, Republicans claim to be believers in a free market and freedom of choice, but, today, with this vote, they are saying you can't even think about basic concerns like protecting the environment and fighting climate change or protecting workers or strong company ethics. You can't even think about those things as you make investments for your retirement. So instead of allowing people to make their own choices about how to invest in their retirement savings, these Republican politicians want to put their political values and the interests of their donors in the middle of your investment decisions.

That is just wrong. It is out of touch, and I don't think it flies—not in Minnesota and not in most places in this country.

So I hope we can reject this extreme agenda and vote no. This issue is just too important. It is about letting people decide how to secure their own retirement and allowing them to choose investment options that match their values.

To be clear, there are good reasons that people would want to take ESG factors into consideration. It is reasonable to ask whether your retirement is invested in companies that operate sustainably and practice good governance. It is reasonable to say that you don't want to invest in a company with a record of discrimination or mistreating workers.

You know, I have been in business, and I can tell you that these values aren't just good for marketing or investor relations. They are the markers of a healthy, sustainable business—businesses with the capacity to confront risk, to innovate, to diversify, and to meet the needs and challenges of an evolving world for long-term resilience and viability. Businesses that consider these factors do better. It is good business. They make more money.

So, colleagues, I ask for a ''no'' vote, which is a ''yes'' vote for allowing people the freedom to invest their retirement in ways that reflect their values and make money. I also ask my colleagues to join me in my legislation, the Freedom to Invest in a Sustainable Future Act, which would put into law this commonsense rule that we are voting on today.

I commend the Department of Labor for their commonsense rule that we have been talking about, which doesn't force choices. It creates choices.

Let's defeat this resolution and allow people to choose how they want to plan for the future for themselves.

I yield the floor.

The PRESIDING OFFICER. The senior Senator from Delaware.

Mr. CARPER. Before the Senator from Minnesota leaves the floor, I want to say I could not agree with you more.

My dad used to talk to my sister and me about common sense. He would say: Just use some common sense.

Thank you for appealing to our better judgment and common sense. Thanks a lot.

Madam President, I rise today to talk for a few minutes about three letters—ESG—and, as Aretha Franklin might say, to find out what it means to me.

Now, as my staff knows, I am not a fan of acronyms or jargon. ESG is a shorthand description for a form of investing that takes into account environmental, social, and governance factors. It means very little to the average American worker. So let me try to make this simple and real for them.

Millions of American workers are saving for retirement or are already withdrawing from a retirement plan, thanks to their employer-sponsored retirement plan, like a 401(k). Each paycheck, hard-working Americans do their best, even when times are tight, to put money away for their future and the future of their children and grandchildren with the hope that, down the road, those weekly or monthly contributions will grow over time and help folks retire with dignity well into their golden years. And with some good fortune and a prudent investment strategy, retirement accounts can also provide certainty and security so that Americans can enjoy their retirement—to take the vacation that you and your spouse always wanted, to make a charitable donation, or maybe to send their grandchild to college.

Those retirement savings often grow thanks to something called a fiduciary, who manages American workers' retirement money. There is a Federal law

called the Employee Retirement Income Security Act, or ERISA, that first passed in 1974 but has been amended many times to ensure that fiduciaries are doing right by American workers.

When decisions are made on behalf of an individual investor, I don't think it is controversial to say that every American wants their money to grow as much as is reasonably possible. In order to make the best decision for Americans' hard-earned retirement savings, I also don't think it is controversial to say that the Federal Government shouldn't be dictating investment decisions. It shouldn't.

While the previous administration actually blocked fiduciaries from considering economic factors such as climate risk, I believe that is the wrong approach. The Trump administration's unpredictable and uneven rulemaking led to confusion in the business community and uncertainty for investors.

Now, let's be clear. A range of economic factors, including climate change, can impact investment returns and thus fiduciaries' investment decisions. The reality is that concerns about our environment—that is the ''E''—and about the social impact of corporate activities—that is the ''S''—and the corporate governance structure of companies are all highly relevant factors in assessing returns on investments in these companies. That is the ''G.''

So I am pleased. I am pleased that the Biden administration has embraced more of a free market approach, as my friend from New York, the majority leader, outlined, I think, in today's Wall Street Journal.

Further, this rule reflects what successful marketplace investors already know: There is an extensive body of evidence that ESG factors could impact markets, could impact industries and companies.

I know that many of our colleagues are concerned about the ''E'' in ESG. I am too. As chairman of the Senate Committee on Environment and Public Works, I know we can't ignore the ''E'' in ESG. The economic risks from climate change are real and they are significant, and fiduciaries must be allowed—allowed—to consider whether those costs may well lower their returns of an investment or not. Unfortunately, our colleagues' efforts to nullify the current Department of Labor's ESG rule threatens the principles-based process that has worked well for nearly 50 years.

We should be making it easier—not harder, easier—for investors to evaluate the sustainability commitment from our corporations who want to do what is good for business and for our planet, this planet we call home.

With that, I call on our colleagues to join me and many others in opposing the CRA before us today.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. MURRAY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mrs. MURRAY. Madam President, I will be honest. Based on the arguments I have been hearing, I am not sure everyone who is opposing the Biden administration's ESG rule has actually read the policy. Some of the arguments for the resolution overturning this rule simply don't add up. In fact, they are a contradiction. ESG investing is simply the practice of taking into account the environmental, social, and governance practices of companies that you invest in.

For instance, just as a hypothetical, if you are against investing in so-called ''woke'' causes, you are actually laying out your own ESG criteria. Here is the thing: The Biden administration rule would allow that. They would allow that because—and this is an important point, I think, folks are missing—the Biden rule is fundamentally neutral on how ESG factors are taken into consideration, so long as the investment fund is meeting its fiduciary obligations to its beneficiaries.

I am not sure anyone gets that because the fact of the matter is that some of the same people who are railing against this rule and against ESG investing have advocated for positions that essentially are ESG investing.

When Republicans push for legislation to protect local and State governments that divest from companies based on their policies toward Israel, that is a form of ESG investing. It is also worth noting, if you manage a retirement plan for a faith-based organization and you want to make sure you are investing in accordance with your client's faith, that, too, would be ESG investing. When we call for divesting from foreign adversaries due to human rights and national security concerns, again, we are actually talking about ESG investing.

If anyone wants to argue that that is different, that it is a matter of national security, I will note there is no question that climate change is also a really serious national security issue, but that is, honesty, beside the point here.

Let me say it again: The rule we are talking about is neutral—neutral—on whether a fiduciary is considering these factors from a particular perspective. This rule is not about saying the left's or the right's taking on a given environmental, social, or governance issue is correct. It is about acknowledging that these factors are reasonable for asset managers to consider. It is about risk mitigation to safeguard retirement plan savers' nest eggs. It is about letting asset managers do their jobs without the government getting in the way. That shouldn't be controversial. It, actually, should be common sense.

I mean, think about it. When it comes to environmental factors, shouldn't financial advisers have the freedom to consider environmental practices when climate disasters cost trillions of dollars a year?

Shouldn't they have the freedom to take into account whether a company is adopting sustainable practices that reduce its costs and consumption or if it is moving to clean energy so that it makes it less reliant on foreign oil?

When it comes to social factors, we live in a diverse nation. That is part of what makes our country so vibrant and so strong. Shouldn't financial advisers have the freedom to consider whether companies are doing the most to tap into that strength?

Shouldn't they have the freedom to account for whether companies are well situated to serve and speak to the broadest range of people or to grow by reaching communities that are currently underrepresented in their customer base?

When it comes to how companies are governed, we are facing workforce shortages today. Companies are having huge challenges in finding and retaining workers. So shouldn't financial advisers have the freedom to consider how well companies are paying their workers or how seriously they take safety and issues like workplace harassment or what sort of benefits they might provide to retain workers, like childcare, paid leave, or more?

These are concrete factors that have huge implications for companies' bottom lines. So why wouldn't we give advisers the freedom to consider them?

Why do Republicans want to tie their hands and meddle in the free market by reversing this balanced, neutral rule?

Despite the misunderstandings and misrepresentations and despite how badly some of my colleagues seem to be missing the point, at the end of the day, this is actually pretty simple. Financial security is about planning for the future, and you can't plan for the future if you aren't allowed to consider the environmental or social or governance factors that are shaping it.

So I urge my colleagues, today, to join me in voting against this resolution.

I yield the floor.

The PRESIDING OFFICER. The junior Senator from Rhode Island.

Mr. WHITEHOUSE. Madam President, I was delayed in joining my colleagues here to talk about this so-called anti-woke capitalism, or anti-ESG scheme, that has been propagated.

I think the important thing to begin with is to understand what is happening out there, why this has happened. The Republicans would like us to believe that some bizarre, viral epidemic of wokeism has spread into America's great financial companies, into the investment advisers, into the banks, into all kinds of fiduciaries, and that that needs to be somehow excised. That is not what has happened. That is preposterous, magical thinking.

What has happened is that the long forecasted dangers of climate change that scientists have been telling us about for years have now gotten so real and are so immediate that they have hit the due diligence horizon for big banks, big investment companies, corporate boards, and other fiduciaries. When you owe somebody else a fiduciary duty, like your shareholders or your investors or your customers at a bank, then you have to tell them the truth, and you have to tell them the truth about risks. The risks associated with climate change—the risks caused by the fossil fuel industry's relentless emissions—are now so real and so immediate that they can't be denied by big institutions that have no real interest in climate change but are absolutely obliged to tell the truth as fiduciaries.

So that fiduciary threshold—that due diligence horizon—has been crossed, and the fossil fuel industry, which is used to bullying to get its way, is now pushing this completely fake, anti-ESG effort in order to try to undo what the free market and what real life in facts and fiduciary obligations are causing other industries to deal with.

The one telltale clue here is that, when they are done talking about woke capitalism and when they are done talking about anti-ESG stuff, when you actually look at what the objection is—what the specific thing is that they are pushing back against—in the ESG, it is always the ''E.'' It is never the ''S.'' It is never the ''G.'' It is not social stuff. It is not governance stuff. It is environmental stuff. Within that ''E,'' for environmental stuff, it is ''E'' for emissions. That is always the gravamen of the complaint.

So that tells you a lot about who is behind this, and who is pitching it tells you a lot about who is behind this because you have got fossil fuel-funded organizations, like the Republican Attorneys General Association that is cranking up and turning out Republican attorneys general to push this theory. You have got the Republican State treasurers, often funded by the fossil fuel industry, and a group called the State Financial Officers Foundation, which has glommed the State treasurers together to try to push on this. You have got State boards, like the Texas Railroad Commission—again, heavily, heavily, heavily involved with the fossil fuel industry—that are pushing all of this.

When you look at what it is, you can see that its target is always fossil fuel emissions, and you can see that its proponents are always fossil fuel funded. That tells you why we are where we are.

The rule that the fossil fuel industry pushed through during the Trump administration—an administration which did essentially everything the fossil fuel industry wanted it to do—would have restricted the ability of investment professionals to deliver the products that customers actually wanted and prevented them from looking at environmental risks, social issues, or governance. Again, this is really about the environmental piece. The Biden rule just undoes that.

Nobody has to do ESG stuff, as that is dictated by customer demand, but if you want to and if your customers are demanding that and if you want to protect them from climate risk, well, there you go. You have to do it.

Another clue about the mischief here is who some of the propagators of this theory have been. One is the Heritage Foundation. The Heritage Foundation is a notorious climate denial group. It has received millions of dollars from the Koch brothers' political enterprise, from Koch foundations, and has plenty of fossil fuel ties. There is the Texas Public Policy Foundation, which is another group that is a front group for the oil and gas industry. I have already mentioned RAGA, which is heavily fossil fuel funded. It helped produce Scott Pruitt, whom you may remember from EPA disgrace. They had such control over RAGA that they were able to get him, as the attorney general, to write a letter with the identical text from a fossil fuel company, send it in to the EPA under his own letterhead, under his own signature as attorney general, even though the entire text was written by a fossil fuel company.

So that is the kind of relationship it has with RAGA, which, by the way, also helped turn people out for the January 6 insurrection. It is a really, really high-quality operation there.

The last group that I will mention is the Marble Freedom Trust. The Marble Freedom Trust is the 501(c)(4) pop-up operation that magically appeared in Utah to be the recipient of a $1.6 billion slush fund, gifted to it by a far-right billionaire. That put it into the hands of a guy named Leonard Leo, whom I have talked about here on the floor before, who is the orchestrator of the scheme to capture the Supreme Court and put it into special interests' hands. His reward for his success in that project was this $1.6 billion slush fund that he now controls, and he controls it through that Utah 501(c)(4) pop-up called the Marble Freedom Trust.

The guy who delivered that money into the Marble Freedom Trust was also famous for his support for the Heartland Institute, which is really just an epic climate denial crowd, to the point where one of their more notorious acts was to put up a billboard equating climate scientists to the Unabomber. That is the quality of the debate about climate change that the Heartland Institute brought, and the billionaire who has teed up the Marble Freedom Trust was a prime backer of all of that and, indeed, had his CFO go on the board of the Heartland Institute to try to keep the thing afloat so that it could be moderately well managed and continue to do its great work of billboards that compared the climate scientists to the Unabomber.

So that is where we are. These guys are deep into this anti-ESG push. The dark money operation that I talk about on the floor all the time is behind this ESG thing just the way it is behind the capture of the Court and just the way it is behind the whole climate denial operation that has stymied progress on climate in this building.

A few billion dollars here and there in politics turns out to deliver a lot, and the fossil fuel industry desperately wants to stop people who have fiduciary obligations from telling the truth about climate risks to their clients—to the people whom they have that fiduciary risk to—and this is the pitch to do that so that there is a legal hook to stop people from meeting their fiduciary obligations by disclosing real-life, actual climate risk now that it is so clear and so immediate that it is now obliged to be disclosed for due diligence.

Let us vote no on H.J. Res. 30, and let's do more than that. Let's call this out as a phony op. This is a scheme, run by the fossil fuel industry, to try to solve the problem it has—that its emissions problems are now so real that fiduciaries have to address it. That is the problem. A fake operation funded by billions of dollars of dark money through all of these slimy corporations and entities that doesn't disclose who their real donors are and through all of these political operatives that get their funding from the fossil fuel industry—that is not something we want to encourage in this country. We have had enough of the public not being listened to. In this case, actual customers, actual clients, are not being listened to because of this pressure.

Let's call this out. Let's put an end to it. This is not healthy. There is something rotten in Denmark.

With that, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. WARNER. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. WARNER. Madam President, I rise today in joining my other colleagues, organized by my friend the Senator from Hawaii, to ask my colleagues to vote against the resolution, which I think we will be taking up literally in the next 10 minutes, which would strip away a commonsense Department of Labor rule that simply provides fiduciaries—remember who we are talking about: fiduciaries, people who are responsible, under ERISA plans, to think about their beneficiaries over the long term. We are trying to make sure that those fiduciaries who are charged with maintaining retirement plans have the ability to adequately account for environmental, social, and governance factors.

I know some of my colleagues have come on the floor and said this is an

attempt by the Department of Labor to somehow mandate the retirement investments of hard-working Americans. Nothing could be further from the truth. The truth is, we look at profit and loss, we look at cash reserves, and we look at financial accounting. But the idea that environmental, social, and governance factors can't even be looked at is an interference in the business cycle that really kind of goes beyond the pale.

I am often regarded—I have to acknowledge this—in my caucus as sometimes being a Member who has the most experience with capitalism, the most experience with business. I absolutely believe in our system. There is nothing better. But the idea that today—and I don't want to copy some of the comments that have been made, but the idea that today, a lot of folks who have never been able to read a balance sheet are going to come in and tell paid fiduciaries what they can consider or what they can't consider in terms of the long-term economic returns for their beneficiaries—I wonder if things have gotten a little topsy-turvy here.

I can imagine if some people were saying ''Well, we need to make sure we have this rule in place'' or ''Overrule this rule'' or ''Put this binding in place'' if you are talking about day traders or if you are talking about a hedge fund that only looks at the next quarter's results—the kind of short-term capitalism that too often, I think, is eating at the core of our great system. But if we are going to look at long-term returns, we ought to take and have to take into consideration factors—in many cases, factors that may not have been as relevant 30, 50, 70 years ago. Some are going to say we can't look at those.

Unfortunately, my colleagues across the aisle have decided to take away a useful term, a useful set of analyses, something that has been asked for by these pension funds, by these beneficiaries, and instead try to turn it into a political issue.

Let me recall back 75 years ago. If you look at the Fortune 500 and the companies that were involved in that Fortune 500, about roughly 75 to 80 percent of those companies' assets were tangible assets. What does that mean? It means it was their plant. It was their equipment. It was their machinery.

Fast-forward—and a lot of this is due to great innovation in the technology field—and those same Fortune 500 companies are dramatically different than the companies named 60, 70 years ago. If you look at their balance sheets today, 75, 80 percent of their assets are intangible assets. What are intangible assets? Intangible assets are things like intellectual property, and that is coming about from a healthy workforce. But more than anything else, it is the men and women who work at these firms. Virtually every CEO I have heard from in the last 10 years has said: My biggest asset is my workforce.

The idea that somehow—because ESG is not just E; it is also S, and that falls into workforce—the idea that somehow a pension fund can't look at workforce retention, workforce quality, workforce characteristics as a measure of what they want to invest in, to me, is a little whacky.

Let me actually call on a reference sort person, whom I hope my colleagues on the other side of the aisle will acknowledge, and that was President Trump's Chairman of the SEC, the Securities and Exchange Commission, Jay Clayton, whom I had a very good working relationship with. He said that human capital disclosures can and should inform investment decisions.

Chair Clayton said:

> Our current disclosure requirements date back to a time when companies relied significantly on plant, property, and equipment to drive value. Today, human capital represents an essential driver of performance for many companies albeit in different ways.

So under Mr. Trump's SEC, there was a rulemaking process that started to make sure that human capital components can be an appropriate focus of reviews, particularly for companies and entities that want to invest for the long term.

I am concerned that this approach we are taking today might indirectly preclude those fiduciaries who represent pension funds, long-term investors—they are no longer going to be able to actually look at this critical criteria around human capital.

The other thing is, the Department of Labor rule—and I know a lot of my colleagues have spoken to this and talk about: Well, what about the environment? I think we all would recognize or most of us would recognize the fact that climate change is real and poses a rapidly growing threat to the long-term feasibility of investments made on behalf of hard-working Americans.

While this Department of Labor rule won't direct our Armed Forces, I think it is really important to understand that the FFRDCs, the federally funded research and development corporations—the RANDs, the MITREs, the CNA, which does naval work analysis, federally funded—if we are going to apply these same kinds of Department of Labor prohibitions on our Armed Forces, we couldn't allow the CNA to look at the long-term effects on the Navy—and I don't want to give away a secret here, but they have been looking at this issue for over 20 years—that they couldn't make those kinds of predictions about what effect sea level rise would have on our Navy.

I tell you, we are blessed in the Commonwealth of Virginia to have the world's largest Navy base, in Norfolk, and I can assure you, virtually every year or every other year, we have to raise the piers, literally spend hundreds of millions of dollars to raise the piers to make sure that Navy base can still be utilized.

So if it is a smart enough, good enough requirement that the Navy and our Armed Forces are looking at the E of ESG, why would we preclude the private sector from doing that?

I think the Department of Labor's rule on ESG is both practical and necessary. I think those funds that chose not to abide by it, that is their right. That is what capitalism is all about—making choices. But the notion that we are going to somehow come in and impose requirements on the market and take away long-term investors' ability to consider human capital, to consider the effects of climate change, and I have not even touched—I know we are going to have to go to a vote—on issues around corporate governance, all which can lead to, longer term, better returns. If this was a rule about day traders and quarter-to-quarter hedge fund folks, I might get it. But in terms of protecting the long-term value creation in long-term sustainable capitalism, I think this effort today sadly misses the mark and will do a great deal of damage.

I urge my colleagues, when the vote comes, to vote against the CRA.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MURPHY). Without objection, it is so ordered.

H.J. RES. 30

Mr. SCHUMER. Mr. President, I have to admit I come to the floor sort of confounded. For a long time, my Republican friends prided themselves—prided themselves—for being the party of free markets, the party of small government, the party opposed to injecting political ideology into the decisions of private investors and managers and companies. But apparently all that was talk because, today, our Republican friends are making an effort to limit free market choice and inject hard-right ideology into private sector decision making. Republicans are attempting to force corporations and managers, against their will, to turn back the clock 50 years, even if it means getting a lower return on investment—even if it means getting a lower return on investment.

Now, the facts here are not difficult. The Department of Labor recently introduced a rule recognizing that retirement fiduciaries may consider ESG factors when making investment decisions. The Republican proposal, meanwhile, wants to undo that rule, and, across the country, Republican State legislators are trying to punish managers who dare consider, on their own volition, ESG.

Note, Mr. President, that I said ''may''—not ''must''—when describing the rule because the rule that the DOL has put in effect is completely optional. Let me repeat that. The DOL

rule is completely optional while the Republican measure is a mandate. In fact, the current rule goes out of its way to make sure that decision making remains solely in the hands of the fiduciary. Nothing changes the fact that investment decisions must be shown to be prudent above all else.

Now, the hard right has made a lot of noise trying to make ESG their dirty little acronym. They say this is about wokeness, that this is a cult, that it is some grave intrusion into finance. It is the same predictable, uncreative, unproductive attacks they use for anything they don't like.

But this isn't about ideological preference. ESG is about looking at the biggest picture possible so the investors can make decisions that decrease risk while increasing returns. In fact, more than 90 percent of S&P companies already publish ESG reports today. So none of this is new. It has been a long-established practice, one that Republicans suddenly say they don't like and want to forbid.

But why shouldn't managers evaluate the risks posed by an increasingly volatile climate if they deem it helps them get a return on their investment? Why shouldn't they consider the consequences of an aging population or other trends that could impact their portfolio? And even a better question is this: Why are Republicans going out of their way to prohibit investors from making the best possible choices as they manage their funds? Why are Republicans trying to forbid investors from considering climate and other factors if they believe it would help them get a better return?

The bottom line is this: The present rule gives investment managers an option. The Republican rule, on the other hand, ties investors' hands. Republicans talk about their love of the free market, small government, letting the private sector do its work, but their obsession with eliminating ESG would do the opposite, forcing their own views down the throats of every company and investor. The Republican amendment, again, would force their own views down the throats of every company and investor.

You know what we say on this side? Let the market work. If that naturally leads to consideration of ESG factors, then Republicans should practice what they have long preached and get out of the way.

I thank my Democratic colleagues who are joining us in opposition to this measure.

I yield the floor and call the question.

The PRESIDING OFFICER. The clerk will read the title of the joint resolution for a third time.

The joint resolution was ordered to a third reading and was read the third time.

VOTE ON H.J. RES. 30

The PRESIDING OFFICER. The joint resolution having been read the third time, the question is, Shall the joint resolution pass?

Mr. BRAUN. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. FEINSTEIN), the Senator from Pennsylvania (Mr. FETTERMAN), and the Senator from Oregon, (Mr. MERKLEY) are necessarily absent.

Mr. THUNE. The following Senator is necessarily absent: the Senator from Idaho (Mr. CRAPO).

The result was announced—yeas 50, nays 46, as follows:

[Rollcall Vote No. 35 Leg.]

YEAS—50

Barrasso	Grassley	Ricketts
Blackburn	Hagerty	Risch
Boozman	Hawley	Romney
Braun	Hoeven	Rounds
Britt	Hyde-Smith	Rubio
Budd	Johnson	Schmitt
Capito	Kennedy	Scott (FL)
Cassidy	Lankford	Scott (SC)
Collins	Lee	Sullivan
Cornyn	Lummis	Tester
Cotton	Manchin	Thune
Cramer	Marshall	Tillis
Cruz	McConnell	Tuberville
Daines	Moran	Vance
Ernst	Mullin	Wicker
Fischer	Murkowski	Young
Graham	Paul	

NAYS—46

Baldwin	Hickenlooper	Sanders
Bennet	Hirono	Schatz
Blumenthal	Kaine	Schumer
Booker	Kelly	Shaheen
Brown	King	Sinema
Cantwell	Klobuchar	Smith
Cardin	Luján	Stabenow
Carper	Markey	Van Hollen
Casey	Menendez	Warner
Coons	Murphy	Warnock
Cortez Masto	Murray	Warren
Duckworth	Ossoff	Welch
Durbin	Padilla	Whitehouse
Gillibrand	Peters	Wyden
Hassan	Reed	
Heinrich	Rosen	

NOT VOTING—4

Crapo	Fetterman
Feinstein	Merkley

The joint resolution (H.J. Res. 30) was passed.

EXECUTIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume executive session.

CLOTURE MOTION

The PRESIDING OFFICER. Pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The senior assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Executive Calendar No. 39, James Edward Simmons, Jr., of California, to be United States District Judge for the Southern District of California.

Charles E. Schumer, Richard J. Durbin, Jeff Merkley, Jeanne Shaheen, Elizabeth Warren, Sheldon Whitehouse, Richard Blumenthal, Christopher A. Coons, Jack Reed, Alex Padilla, Gary C. Peters, Angus S. King, Jr., Mazie K. Hirono, Tim Kaine, Brian Schatz, Cory A. Booker.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of James Edward Simmons, Jr., of California, to be United States District Judge for the Southern District of California, shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will call the roll.

The senior assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from California (Mrs. FEINSTEIN), the Senator from Pennsylvania (Mr. FETTERMAN), and the Senator from Oregon (Mr. MERKLEY) are necessarily absent.

Mr. THUNE. The following Senator is necessarily absent: the Senator from Idaho (Mr. CRAPO).

The yeas and nays resulted—yeas 51, nays 45, as follows:

[Rollcall Vote No. 36 Ex.]

YEAS—51

Baldwin	Heinrich	Rosen
Bennet	Hickenlooper	Sanders
Blumenthal	Hirono	Schatz
Booker	Kaine	Schumer
Brown	Kelly	Shaheen
Cantwell	King	Sinema
Cardin	Klobuchar	Smith
Carper	Luján	Stabenow
Casey	Manchin	Tester
Collins	Markey	Tillis
Coons	Menendez	Van Hollen
Cortez Masto	Murphy	Warner
Duckworth	Murray	Warnock
Durbin	Ossoff	Warren
Gillibrand	Padilla	Welch
Graham	Peters	Whitehouse
Hassan	Reed	Wyden

NAYS—45

Barrasso	Grassley	Paul
Blackburn	Hagerty	Ricketts
Boozman	Hawley	Risch
Braun	Hoeven	Romney
Britt	Hyde-Smith	Rounds
Budd	Johnson	Rubio
Capito	Kennedy	Schmitt
Cassidy	Lankford	Scott (FL)
Cornyn	Lee	Scott (SC)
Cotton	Lummis	Sullivan
Cramer	Marshall	Thune
Cruz	McConnell	Tuberville
Daines	Moran	Vance
Ernst	Mullin	Wicker
Fischer	Murkowski	Young

NOT VOTING—4

Crapo	Fetterman
Feinstein	Merkley

The PRESIDING OFFICER (Ms. CORTEZ MASTO). On this vote, the yeas are 51, the nays are 45.

The motion is agreed to.

EXECUTIVE CALENDAR

The PRESIDING OFFICER. The clerk will report the nomination.

The legislative clerk read the nomination of James Edward Simmons, Jr., of California, to be United States District Judge for the Southern District of California.

The PRESIDING OFFICER. The majority whip.

EQUAL RIGHTS AMENDMENT

Mr. DURBIN. Madam President, yesterday was an interesting day for me personally, but it was an interesting day, more importantly, in the history of the United States when it comes to the Equal Rights Amendment.

The Equal Rights Amendment was first introduced in 1923, 100 years ago—100 years ago. It was proposed by a leader named Dr. Alice Paul. At the time, she had just won an important victory. She and her fellow suffragists had just led successfully the campaign to ratify the 19th Amendment to give women the right to vote in the United States—100 years ago.

Despite this monumental achievement, Dr. Paul recognized that just the right to vote was not enough for gender equality, but it was the right starting point. So she devoted the remaining years of her life to enshrining gender equality in every facet of American life and particularly into the Constitution with the Equal Rights Amendment.

Sadly, Dr. Paul and her fellow suffragists passed away long before they could see the ERA become the law of the land, but their legacy lives on today in a new generation of activists, lawmakers, and trailblazers who are propelling the movement for equality forward.

The personal side of this relates to the fact that when I graduated from law school in 1969, I went to work for the Lieutenant Governor of Illinois, Paul Simon, who later served here in the Senate. One of my first assignments in the Illinois State Senate was to work for the passage of the Equal Rights Amendment in the State of Illinois.

The road to ratification has been long and winding. I continue to be amazed by the proposal. Fifty years ago, it really came down to some very basic arguments, and the leading argument against the Equal Rights Amendment was that men and women would have to share public restrooms. When I say that, you think: Wait a minute. You want enshrined in the Constitution the constitutional rights of more than half of the people living in America, and the article came down to a debate over the future of public restrooms? I have to tell you, that had more to do with it than almost anything else. I heard that argument over and over and over again.

The ERA is a rallying cry for Americans young and old for good reason. As the 28th Amendment to the Constitution, it would ensure that our Nation lives up to the promise of real equality, and, frankly, it is a principle that should be enshrined in the Constitution.

Thirty-eight States have ratified the Equal Rights Amendment in the past half century—the most recent, Virginia in 2020. Thirty-eight is the exact number needed to certify an amendment to the Constitution. The only thing standing in the way of an Equal Rights Amendment is an arbitrary deadline that Congress included in the preamble—let me underline those three words, ''in the preamble''—of this amendment as it passed in 1972 clarifying that this was not the controlling but simply in the preamble, is what the current controversy is about.

During yesterday's hearing on the ERA, we heard from several witnesses: my own home State Lieutenant Governor, Juliana Stratton, and a young woman whose name is Thursday Williams, a first-generation American, a board member of the ERA Coalition, and a senior at Trinity College in Connecticut. She spoke on behalf of a lot of young people. She is a college senior. Her compelling testimony was a testament to the value of her voice in the conversation. I am glad she was there.

After graduating college, Ms. WILLIAMS plans to become an attorney. She said:

[I] fell in love with the United States Constitution in high school.''

You don't hear that very often, do you?

She said:

What I love the most about the Constitution is how brilliantly it was designed to adapt to the changing needs of its people.

She argued that today the American people deserve a Constitution that guarantees equality regardless of sex, a Constitution that we can use as a tool to fight discrimination.

She concluded her testimony by asking the members of the committee:

If we continue to hold back more than half of [the] people [in America] from accessing equal opportunities, what does that say about us as a country?

How can we be the beacon of freedom and democracy we claim to be if we don't declare that sex discrimination contradicts the American dream?

This young college student is pretty smart, as far as I am concerned. She knew exactly the right question to ask. Generations of Americans have been waiting for us in Congress to protect their fundamental rights.

Congress approved the ERA 50 years ago, but in doing so, we imposed that arbitrary time limit for ratification. That is why our hearing yesterday was so important. The members of the committee were not merely discussing the importance of the ERA; we were urging our colleagues to join us in passing it.

This joint resolution already has bipartisan support in both Chambers. I want to salute Senator MURKOWSKI of Alaska, with Senator BEN CARDIN, for joining us in cosponsoring this effort. We can't wait any longer.

I listened to the arguments about opposing the Equal Rights Amendment in this year, 2023. Fifty years ago, the argument was, we can't see how we are going to resolve public restrooms. Now the argument raised by one of the witnesses called by the Republicans was, we are worried about the impact that an Equal Rights Amendment would have on the future of field hockey—field hockey. The woman who testified, representing one of the Koch Industries' entities that have been created to do politicking, said she couldn't explain to her daughter or guarantee to her that there wouldn't be some clash as to whether men could play on her field hockey team.

I would say to her with all due respect—and I have been a parent myself; still am—that it is time to sit down and talk to her daughter about the basics, and the basics are the constitutional guarantee of her rights for the rest of her natural life, not the next field hockey game.

There is more at stake here, and it probably relates less to her because of who she is and her family than it does to all the other women whose lives would be improved by the passage of the Equal Rights Amendment. That is where we stand today.

There is no room for uncertainty when it comes to protecting equal rights under the law. That is a lesson that was driven home last year when the Supreme Court overturned Roe v. Wade. For the first time in history—for the first time in the history of the United States of America—the Supreme Court ripped away a constitutional right from the American people. That has never, never happened before.

One of the Supreme Court Justices—by name, Clarence Thomas—made it clear that this was just the beginning. He was going to call into question a lot of fundamental constitutional rights, like the right to privacy, the right to reproductive freedom, the right to family planning.

So now Members of the Senate have to make a decision during our time: What kind of America do we want for our granddaughters and daughters—a country in which the fundamental rights are safe and secure or one in which the Constitution still—still, 100 years after we started—fails to recognize fundamental equality on the basis of sex?

I think the hearing was very clear, and I think the issue is very clear. I know what I want to be able to explain to my little granddaughter. She is only 3½ now, but I hope to live long enough to someday sit down with her and have a serious conversation about this. I want to tell her that during the course of my life, her constitutional rights in America were at issue and that we did the right thing for her and for her daughter and her daughter's daughter and everyone born in America in guaranteeing basic equality.

GUANTANAMO BAY

Madam President, I want to tell you about a young law student whose name is Leila Murphy. She was 3 years old when her father Brian was killed. Her oldest sister, Jessica, was only 5. It is a day Leila was too young to remember, let alone comprehend, but for the Americans who are old enough, it is a day we will never forget—9/11/2001.

Leila grew up in the shadow of the 9/11 attacks. She recently wrote me a

powerful letter about the failure of this country to deliver justice. I quote her:

My father, Brian Murphy, worked on the 105th floor of the World Trade Center. [He] was killed when the first plane struck the North Tower. . . . Twenty-two years and four [Presidents] later, there has been no accountability for his death, nor the deaths of nearly three thousand [other Americans that day].

Leila and 3,000 other families like hers have been waiting for justice for 9/11 for almost 20 years, maybe longer. In those two decades, Leila has grown from a toddler to a law student. But the military commission trial against the five 9/11 codefendants in Guantanamo has never even started, 22 years later. Let me repeat that. More than two decades after the attacks, the 9/11 trial has never even started.

In her words, she said:

The parties are no closer to a trial date than when the hearings began in 2012—

More than a decade ago.

In the meantime, many family members have died, and others have given up hope. [They don't know that this] case will ever end in their lifetime.

Leila has traveled to Guantanamo to watch the military commission proceedings and came away frustrated and, in her words, ''ashamed''—frustrated at the slow pace and makeshift nature of the proceedings and ashamed to learn how the defendants were actually tortured by her own government. Leila recognizes that because of this history, real justice is now unattainable.

By setting up ad hoc military commissions rather than trusting our courts, by torturing detainees rather than securing evidence lawfully, we have made true justice for families like Leila's virtually legally impossible.

If pretrial proceedings are still going on 20 years after the event, how many years do you think the actual trial would take? How many years of appeals would then follow? What are the chances that prosecutors can even convict men who were tortured at our hands for years? And if they did, what are the chances that those convictions would be upheld? How many family members would still be alive to see judgments of guilt, if they ever, ever come?

The reality is that securing guilty pleas in the 9/11 case is at this point the only way to deliver a modicum of justice to the victims and their families. The Biden administration should step up to the plate and deliver the justice that three previous administrations have failed to provide.

In Leila's words:

The military commissions have failed to provide justice for 9/11 families. Plea deals are a way out—

The only way out, maybe—

[but the] thing standing in the way is political will.

Leila says:

It is time for that to change.

She is not alone in recognizing that guilty pleas are realistically the only hope for justice.

On the morning of 9/11, former Bush administration Solicitor General Ted Olson went to his office at the Justice Department, while his wife Barbara headed to Dulles Airport for a flight to Los Angeles. Barbara had planned to leave the day before, but she delayed her departure by a day so she could wake up with Mr. OLSON, her husband, on his birthday.

After the two planes hit the World Trade Center towers, Mr. Olson's thoughts turned to his wife's safety. At first, he was relieved when the assistant told him that she was on the phone, but she was calling from the back of the airplane to tell him that her plane had been hijacked. She asked what she could tell the captain—and, then, silence.

At 9:37 a.m., American Airlines flight 77 crashed into the Pentagon, killing all 64 people aboard and 125 people in the Pentagon. Barbara was one of those victims.

Like Leila, Ted Olson is still awaiting justice, but today he believes that true justice seems unattainable.

By coincidence, I ran into him last night at a reception here on Capitol Hill. I went up and introduced myself to him, and I said I was going to talk about his statement and his wife on the floor. And he thanked me for it. He said: It is time for the American people to hear this straight from those of us who were directly impacted by 9/11.

In a powerful column earlier this month, Mr. Olson wrote:

I now understand that the commissions were doomed from the start.

He said:

We tried to pursue justice expeditiously in a new, untested legal system. It didn't work. The established legal system of the U.S. would have been capable of rendering a verdict in these difficult cases, but we didn't trust America's tried-and-true courts.

He concluded:

Nothing will bring back the thousands whose lives were so cruelly taken that September day. But we must face reality and bring this process to an end. The American legal system must move on by closing the book on the military commissions and securing guilty pleas.

In the fearful days after 9/11, our Nation's leaders made a fateful decision to forsake our most trusted institutions and betray our cherished values. The decision to open Guantanamo in a rush for vengeance and swift justice instead robbed the victims of 9/11 and their loved ones of their right to true justice. It is time to salvage what justice we can by bringing the commission cases to an end. We must also bring an end to the shameful, shameful indefinite detention of detainees who have never been charged with a crime. More than two decades after the incident of 9/11, these detainees have never been charged with any crime.

Eighteen of the thirty-two remaining detainees have never been charged with any crime and have been unanimously cleared for release—18—by our national security and military leadership. Yet they continue to be detained indefinitely—day after day, year after year—for more than two decades.

The administration must redouble its effort to transfer the men who have been cleared for release or served their sentences. The recent transfer of three longtime detainees were steps forward, but the administration needs to pick up the pace. Men who have served their time or been cleared for release should not be sitting in Guantanamo. Ending these abuses is a moral and national security imperative.

Guantanamo Bay continues to serve the interest of America's worst enemies. Terrorist groups point to the history of torture and indefinite detention in their propaganda and recruitment videos. Autocrats point to Guantanamo to justify their own human rights abuses.

Adding insult to injury, this moral stain on our Nation and national security liability continues to be funded by American taxpayers. The cost of Guantanamo is astronomic. We spend more than $540 million each year to keep Guantanamo open for just 32 detainees. Let me repeat that: $540 million a year in taxpayers' money to keep Guantanamo open for 32 detainees. That is nearly $17 million a year for each detainee. It is an outrage. And 18 of those men have been cleared for release for a long period.

We must not forget that Guantanamo was set up to be outside the reach of the law, outside the reach of the Constitution, outside the reach of the concept of habeas corpus, outside the reach of due process, and outside the reach of the Geneva Conventions. That is why it was chosen.

We must not forget that the detainees were held incommunicado and actually tortured at Guantanamo. We must not forget that more than half the men there still continue to be detained indefinitely without any charge or any trial. In America, we must stand for something better than that.

Guantanamo Bay, sadly, is a historic stain on America's long pursuit of the cause of justice. We have a responsibility to release detainees who have never been charged with a crime and have served their time, period, and we have a responsibility to deliver what little justice we still can to the victims of 9/11 and their families.

So let's do what must be done. Let's finally salvage a small measure of justice and dignity for Leila, for Ted Olson, and for everyone else who lost a loved one on that terrible day.

I yield the floor.

The PRESIDING OFFICER (Mr. OSSOFF). The Senator from Rhode Island.

CLIMATE CHANGE

Mr. WHITEHOUSE. Mr. President, here I am again with my trusty, battered chart by my side, this time here to talk about the looming costs and economic risks of climate upheaval.

Almost exactly 5 years ago, I sent around a binder about this thick to all

of my Senate colleagues in which I compiled some of the most compelling warnings about the looming climate economic crisis. I have just recently updated it and shared it with all of the Budget Committee members. It is now more like this thick, as the warnings just keep piling up.

These warnings come from central bankers, economists, asset managers, insurance companies, investment banks, credit rating agencies, and leading management consultants—folks with a lot of credibility when it comes to economics, finance, corporate risk, and their effects on government spending and revenues—folks who often have a fiduciary obligation to get this right.

The Budget Committee has started to dig into these warnings. We have just held the first two of a series of hearings on climate impacts to our Federal budget. Our second hearing, held earlier today, explored warnings of crashes in coastal property values amid rising seas and more powerful storms.

One of our witnesses was Kate Michaud, the town manager of Warren, RI.

And next time we will spell ''Rhode Island'' correctly.

Warren is the smallest town in the smallest county of our smallest State. There, like in many small coastal towns all around the country, in Georgia and elsewhere, the problems are real and they are immediate. She testified that some homes in Warren have seen their value drop by one-third because of flood risk.

And sea level rise is projected to permanently flood some coastal portions of Warren over the next decade. This is mapping that is done by the State of Rhode Island that shows the projected flooding zone of Warren, and all of these are existing buildings and homes that will be inundated.

Warren is not alone. Zillow's real estate database has identified over 4,800 homes in Rhode Island that would be under water with a projected 6 feet of sea level rise, which is projected for Rhode Island. That is nearly $3 billion in home values.

And Rhode Island is not alone. The United States has nearly 13,000 miles of coastline. Forty percent of our population lives along the coast. More than a trillion dollars' worth of residential and commercial real estate is coastal. And for most American households, their greatest wealth is their home.

First Street Foundation, whose CEO testified at this morning's hearing, examines flood risk. It is what they do. Their examination shows significantly increasing risks to residential properties over the next 30 years. And Rhode Island does its own flood projections, and they show similar risks.

Just 2 weeks ago, a study found real estate exposed to flood risks was overvalued—i.e., the flood risk had not yet been taken into account—by up to a staggering $237 billion, with the worst property overvaluations along coasts; and, of course, Florida, with all of its coasts, is the prime liability. The study warns that, as a result, coastal real estate values may plummet and that can cascade into systemic risks for the mortgage market.

Freddie Mac, the mortgage giant, has made very similar warnings about coastal property values. Their former chief economist, who also testified at this morning's hearing, has said:

> The economic losses and social disruption . . . are likely to be greater in total than those experienced in the housing crisis and Great Recession.

Anybody who was here through that 2008 housing crisis and the recession that followed knows how sobering that warning is, and it comes from that collapse in coastal property values triggered by difficulty in getting mortgage and insurance, with its 30-year lead time, collapsing values and then cascading out into the rest of the economy.

Sea levels are rising, and the rate is accelerating. That is a scientific fact. As homes and businesses in coastal communities face more frequent sunny-day flooding and wetter and more violent ocean storms, more homes will be under water, both literally and figuratively. Insurance will become more expensive and harder to find. Mortgages depend on insurance. So lending will suffer. Coastal communities will become harder places to live and work, and real estate values and local tax bases will decline.

Moody's is already looking at local municipal bonds in this light. In emergencies, coastal communities will turn to the Federal Government for financial assistance. Federal flood insurance costs will rise. For home mortgages, banks and insurance companies will look ahead 30 years. So, long before the ocean laps at physical doorsteps, those markets will be hit, and the effect in real estate markets across the country will bring harsh consequences for families and their financial stability.

I used the term ''systemic risk'' earlier. Systemic risk is a bland term used by economists. What it refers to is anything but bland. It refers to the massively destabilizing events that can cascade out and trigger general economic recession. Think of the mortgage crisis in 2008. Twenty percent of household wealth was wiped out in 2 years. Unemployment soared, and government revenues were reduced for a decade.

There is broad concern here about deficits. Well, deficits tripled as a result of that 2008 shock. According to CBO, revenues fell by $4.4 trillion, and projected spending rose by $800 billion to fund the recovery, for a net debt increase total of over $5 trillion from that event.

Well, we should see the writing on the wall when it comes to climate risks. At our first hearing, Dr. Mark Carney, who has been Governor—their phrase for CEO—of the Bank of England and of the Bank of Canada, gave us the scale of the risk.

He testified that ''over the balance of this century, climate change could reduce the level of global GDP per capita by 10 to 20 percent without efforts to limit warming.'' That would be ''the equivalent of a decade of no economic growth.''

Bob Litterman, an economist who spent more than two decades managing risk for Goldman Sachs as its chief risk officer, now chair of the Climate-Related Market Risk Subcommittee at the U.S. Commodity Futures Trading Commission, testified:

> We are on track for somewhere between 2.2 and 3.4 degrees of warming by 2100, which would result in GDP losses of somewhere between 2.6 and 4 percent. That's more than our recent annual growth rate, implying the possibility of long-term negative growth as climate change worsens.

This is not a future problem. Some of these warned-of risks are already upon us. Already, climate-related natural disasters increase Federal spending on disaster assistance, flood insurance, crop insurance, and other programs. Already, extreme heat and drought force western farmers to leave land unplanted and reduce livestock herds. Droughts around the world already hit cotton production, raising costs on production like medical gauze and cloth diapers. Insurance prices are already through the roof—in Florida and Louisiana, hammered by increasingly violent hurricanes, and out West, under siege from more intense and frequent wildfires.

This will certainly get worse—much worse, particularly if warming exceeds 1.5 degrees Celsius. We are on a bad trajectory. Think of coastal cities flooded with water and Southwest cities that can't get water. Think of a Salt Lake that is virtually gone and blowing dust over Salt Lake City. Deloitte—the management consulting firm—predicts that the differential between being responsible and reckless about climate could sum to more than $220 trillion globally between now and 2070.

We use big numbers around here a lot. A $220-trillion swing in the global economy is massive. And Deloitte is not exactly a green outfit.

There is some good news here. By acting now, we can minimize the damage and costs to households, businesses, and our economy—and there are huge economic opportunities from investing in climate action. The Inflation Reduction Act invested $370 billion to create good-paying jobs and new economic opportunities. It will lower energy costs for families and small businesses and accelerate the transition to clean energy.

Looking ahead, a well-designed carbon border adjustment—an idea which has bipartisan support—would significantly curb greenhouse gas emissions in the United States and overseas and boost American heavy industry against our Chinese competitors and reshore American manufacturing jobs lost in past decades.

Let me close on tipping points. Tipping points are thresholds that change

the trajectory of harm, potentially dramatically. One example is the tipping point where warming will cause the Greenland ice sheet to collapse and melt. We don't know exactly where that threshold lies. That is one of the dangers of our climate experiment. But science suggests it is between 1.5 and 2 degrees Celsius of warming.

Well, folks, we have already warmed 1.1 degrees. So the distance to 1.5 or 2 degrees is pretty short.

If we lose the Greenland ice sheet, it is 22 feet of sea level rise. So we would do well to avoid these tipping points, to avoid the systemic economic risks, to behave prudently and responsibly, and to take advantage of a stronger and more stable clean energy economy that beckons. It is long past time to wake up.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

LIEUTENANT RIDGE ALKONIS

Mr. LEE. Mr. President, on February 2, I called on Japanese Prime Minister Kishida to transfer U.S. Navy Lt. Ridge Alkonis back to U.S. custody no later than midnight on February 28. I was explicit that a very public discussion about the U.S.-Japan relationship—and, in particular, the U.S.-Japan Status of Forces Agreement—would ensue if Lieutenant Alkonis were not back in U.S. custody by that date.

It is now March 1, 2023, and it is about 6:20 p.m. And Ridge Alkonis is not only not back in U.S. custody, he is not only not on U.S. soil, he is still languishing in a Japanese prison.

So let's have a frank discussion about our Status of Forces Agreement with Japan because we have waited long enough. Ridge Alkonis has waited long enough. And his wife Brittney Alkonis has waited long enough. Their children have waited long enough, all three of them. We are done waiting.

The Japanese Government has unjustly incarcerated Lieutenant Alkonis for too long. I traveled to Tokyo in August to meet with Japanese Foreign Minister Hayashi, where he made an unequivocal commitment to expedite the Council of Europe prisoner transfer once the U.S. paperwork was completed. And it was understood at the time that that would be in a matter of days or weeks, not months or years.

Lieutenant Alkonis felt comfortable signing off on the transfer paperwork because of Foreign Minister Hayashi's commitment. With this understanding, the U.S. Department of Justice completed the necessary paperwork in less than 2 weeks. Japan has been sitting on that request ever since then, for months and months and months.

However, the Japanese Government tried to renege on its promise by having a junior member of the Japanese Embassy staff in Washington reach out to a member of my staff to deny that Foreign Minister Hayashi had ever made such a commitment. Allow me, not a member of my staff, to correct the record. Foreign Minister Hayashi, you did make that commitment to me. I have not forgotten it, and I know you haven't either.

This isn't too much to ask of any country, let alone one on which we spend billions of dollars—billions of dollars—a year to defend. A Council of Europe transfer is not an extraordinary request. On the contrary, these kinds of requests are routine. Situations like this one are the very reason why we have a prisoner of transfer process in the first place. The stated purpose for the Council of Europe Treaty is to facilitate the rehabilitation of the transferred offenders and to relieve some of the administration and diplomatic issues that arise with the incarceration of foreign nationals.

Now, look, to be very clear, we are not even asking for Ridge to be released from custody, for him to just be told that his sentence is no longer intact. We are simply asking that he be transferred to U.S. custody to serve out the remainder of his sentence.

These transfers happen all the time. It makes little sense that we would allow those tasked with defending the Constitution and its enshrined principles to be treated so poorly by an allied nation, to be subjected to laws so draconian that they are unrecognizable to the principles of justice our servicemembers swear to defend.

When we swear to defend the Constitution of the United States, it represents an enduring commitment to individual liberty—a spirit that says no matter who we are or where we came from or what religion, if any, we practice, we enjoy liberty that is self-evident because it is God-given.

Our Armed Forces stand ready to protect not only the safety and sovereignty of the United States but the safety and sovereignty of our friends, like Japan, which enjoyed over $20 billion in U.S. military aid over the last 5 years. And yet, they can't keep their promise to facilitate a routine prisoner transfer? I cannot and will not accept that—not now, not ever.

I don't think the American people can accept that either. In fact, I know they can't, nor should they. I don't think they would be OK knowing that we spend billions of dollars to defend a country when our Status of Forces Agreement with that country is so unfavorable to our troops. I don't think they would be OK sending 55,000 of their sons and daughters to support an allied country where they won't have the most basic legal right.

I am certainly not. Japan isn't either.

To illustrate, under the terms of the Japan-Djibouti Status of Forces Agreement—Djibouti, by the way, is the only country in which Japan has a foreign base—Japanese servicemembers are immune from criminal prosecution. They are completely immune. Why should Japan be allowed to treat U.S. forces any less favorably than Japanese forces are treated by Djibouti?

Look, I want to be very clear here. Japan has a good thing going. It doesn't get much better than the deal they have got going. I don't know why they would want to jeopardize that.

But patience in Washington has grown thin. And the Japanese Government has vastly underestimated the intensity of bipartisan support for Lieutenant Alkonis in Congress at every level of government, including a commitment from President Biden—a recent commitment from President Biden himself—to Brittney Alkonis, saying: ''I promise you, we're not giving up, OK?''

President Biden is right. He said that with good reason. And he said that not only as President of the United States but also as a red-blooded American who cares about this country—himself a father of a decorated, respected U.S. military officer. We are not giving up. This isn't going away. We are not just going to keep quiet. And the longer Ridge remains in Japanese custody, the louder we will get.

If the Japanese Government can't respect our servicemembers, and we can't trust them to uphold their commitments, then we are long overdue for a renegotiation of the Status of Forces Agreement between our two nations. We must do so to protect our servicemembers, especially if they are stationed in a country with a justice system as draconian as Japan's.

In Japanese criminal justice, interrogation is the primary means police and prosecutors use to obtain confessions. These are no ordinary interrogations—not by our standards, not by a long shot. In a typical criminal case, the average Japanese interrogation lasts more than 20 hours. In bribery interrogations, they average 130 hours.

The night that Lieutenant Alkonis was involved in that tragic accident, rather than being taken to a hospital, he was placed in solitary confinement for 26 days. During that time, he was denied access to legal counsel, denied access to an adequate translator, denied proper medical care—despite the fact he had just been in a serious accident—and was subjected to intense interrogation tactics at all hours of the night. He was subjected to bright lights, causing sleep deprivation, and coerced into signing complex legal documents written in Japanese, with no interpreter available, just to have a chance at getting bail.

It was later discovered that Japanese authorities manipulated Lieutenant Alkonis's forced statement. It is not uncommon in Japan where 26 percent of prosecutors there have admitted in an anonymous survey to falsifying suspects' statements. He was told not to contest the falsified documents as the Japanese court would perceive this as a lack of remorse. Given the unfair treatment of one of our best and brightest, we as a Congress should take every precaution to ensure that our servicemembers are never ever treated this way again.

I am not exaggerating. The U.N. Human Rights Council and other legal

and human rights organizations have long criticized Japan's justice system for unnecessarily long pre-indictment detention periods, denial of lawyers during interrogations, and questionable interrogation tactics, to put it mildly. Often, these practices lead to false confessions and have resulted in Japan's legal system being known as ''hostage justice''—appropriately so.

Don't believe me? The criminal conviction rate in Japan is 99 percent.

We have status of forces agreements to establish frameworks under which U.S. military personnel operate in foreign countries and how domestic laws of foreign jurisdictions apply to U.S. military personnel in those countries. At a minimum, any agreement between the United States and a foreign country should provide adequate legal protections for American servicemembers. This means access to legal counsel, and it means access to a competent interpreter, and it means access to medical treatment throughout the legal process. These are basic rights afforded in modern and fair justice systems, but not in Japan.

It is not too much to ask for a renegotiation of our SOFA with Japan. Many similar concerns once existed in the Republic of Korea. However, we successfully implemented much needed improvements to the U.S.-Korea SOFA to include a U.S. Government representative to be present during any interview or interrogation; a lawyer to be present at any time at the request if a servicemember so requires it, or a dependent, including during the interviews and interrogations, as well as, of course, a competent interpreter. We need these same changes to be made in the U.S.-Japan SOFA.

Look, I am sure—in fact, I am certain—there are many who wish I weren't giving this speech. I have been told that it just isn't worth risking the relationship we have with the strategic partner over a single American. They are wrong. The Latin term ''Unus pro omnibus, omnes pro uno'' means ''one for all, all for one.'' The concept is depicted multiple times in the Bible. It can be found in the works of Shakespeare and was made popular by Alexander Dumas in his 1844 novel ''The Three Musketeers.''

Our military personnel and their families sacrifice their blood, sweat, and treasure so that all of us might enjoy the blessings of liberty that generations of Americans fought and died to protect. They truly embody ''all for one and one for all.'' But what does it say about us if we are collectively unwilling to stand up for the rights of the one? We cannot expect people to stand up for their country if their country does not stand up for them.

The PRESIDING OFFICER. The Senator from Ohio.

RAIL SAFETY ACT OF 2023

Mr. BROWN. Mr. President, it shouldn't take a train derailment for elected officials to put partisanship aside and work together for the people whom we serve—not work for corporations like Norfolk Southern.

That is why, this morning, I introduced bipartisan legislation with Senator VANCE, my new Republican colleague, who has been here only about 2 months, and our colleagues Senator RUBIO, Republican from Florida; Senator CASEY, a longtime friend and Democrat from Pennsylvania; Senator FETTERMAN, also a freshman who has been here a couple of months, from Pennsylvania; and Senator HAWLEY from Missouri, to make trains safer as they go through places like East Palestine, OH.

Railroad company lobbyists spent years fighting every effort that we could make to make our trains and our rail lines safer. Now Ohioans have seen it, and Georgia has seen it, and the Presiding Officer, the senior Senator from Georgia, has seen it in his State. Ohioans have seen these rail crashes, these derailments, just in the last 4 months. The one in East Palestine is the best known because the damage was the greatest. But there was also one in Sandusky, on Lake Erie, the greatest body of fresh water in the world, in the Great Lakes; and also in Steubenville, on the Ohio River. Those are the two greatest natural resources that our State has, the Ohio River and Lake Erie. It affects drinking water and all kinds of things—recreation for so many people. We have seen that all three of these communities are paying a price.

Over the past month, I have been in East Palestine multiple times, talking with residents, the mayor, the fire chief, business owners, parents. I have heard their fears for what this means for their town, for their futures.

I met with Melissa Smith, who runs a company, a candle-making company. I learned something from her and from my wife—that the best candles now are made from soy, not wax. They smell better and burn cleaner. Thank you for acknowledging that. Perhaps, it is better for the environment. But she owns this candle company that she and her daughter run.

She and her husband, about 4 miles away, have a small farm. They have 25 beef cattle. I think she said 25. She has regular customers. This isn't some huge stockyard. She has regular customers, and these customers, whom she sells to every year, buy a side of beef or a full beef and she tells me she is getting calls from these customers saying: I don't know if I am going to buy this year. Is your beef safe?

She can't promise that, and they don't know.

We agree we need to do everything in our power to make sure an accident like this never happens again and make sure these residents—the 4,500 residents of East Palestine and the township, Unity Township, around it; and east of Unity Township, the township east is in western PA, Darlington Township—to make sure people's lives return to normal.

Our bill would do a few key things. It includes new safety requirements for trains that carry hazardous materials. Governor DeWine, who served in the Senate before he was Governor, is particularly upset that these trains—these tanker train cars—can come in that are carrying hazardous material and not tell the State or local governments or, more importantly, not tell firefighters and people who are not trained to fight hazmat kinds of fires.

The bill would also mean new rules to prevent wheel bearing failures like we saw in this crash. We know wheel bearing failures are the No. 1 mechanical cause of derailments.

It would require two-person crews on every train.

Think about this. This train was more than 150-cars long, more than a mile. It has one locomotive at the front, then a locomotive about two-thirds of the way or halfway back to help pull the train. There were only two employees. There were three this time: two employees and a trainee. But the railroads want there to only be one human being riding these trains—one human being on a train a mile long, 150 cars.

We require a minimum two-person work crew on every train. It is a good first step toward making train and rail lines safer and protecting rail workers.

It means real accountability when accidents happen.

It raises the fines that, right now, are so low that they don't even make a dent in the profits of these big companies; it is just the cost of doing business.

We have seen what happens: dangerous derailments over and over. There were three in Ohio just in the last few months.

As Norfolk Southern's profits have gone up, accidents have gone up. That is not exactly shocking. They don't care about these communities and the damage they do, as long as they still bring in enough to do billions in stock buybacks to reward their executives. Last year, they did $3 billion in stock buybacks. This year, they were planning to do several billion more. They backed off after the train derailment, of course.

In the last 10 years, Norfolk Southern laid off one-third of their workforce. You know what that means? It means track inspections by Norfolk Southern employees are more cursory, not as thorough, not as safe, not done as well. They can't be because these workers are so harried and have so much work to do.

The rail companies cut costs by cutting corners and, as I said, cutting workers, leaving crews overworked and unsafe. It happens quarter after quarter.

They report every quarter back to their Wall Street analysts all the ways they have cut costs, cut costs, cut costs. Communities like East Palestine be damned. These are the places that are so often exploited by corporate America.

When I talk about the dignity of work, I understand that my job is to fight for those workers and fight to make sure this never happens again. I will work with anyone to do this.

I am thrilled that Senator VANCE, my freshman colleague in his second month in the Senate, a Republican—we don't agree on the big issues, but we have listened to the same people and sure as heck agree that we need to do this.

I will work to get these reforms passed that hold Norfolk Southern accountable to make sure they pay for every cent of the cleanup.

As I said, Senator VANCE and I come from different parties, but we come together for the people in our State, as I did with Senator Portman. Again, we have major differences on the big issues, but we are working together for Ohio. We pressed Federal officials to take legal action. We pressed for monitoring of potential long-term health effects.

That is how you get things done. You listen to the people whom you serve and you find common ground with the elected officials, who should be your partners, regardless of party.

As I said, it is what we did with Senator Portman again and again. We found agreement wherever we could and got things accomplished.

Right after Senator Portman left office—he was maybe out of office for 2 days in January—he and I and Senator MCCONNELL, who sits at this chair and is the Republican leader, with Governor DeWine, a Republican, and the Governor of Kentucky, a Democrat, and the President of the United States stood at the Brent Spence Bridge, a project we have been working on for 10 years. Three percent of GDP crosses over that bridge, connecting Senator MCCONNELL's State and Cincinnati in my State.

Senator Portman and I worked together to come up with the strongest ''Buy American'' laws ever; to strengthen our trade enforcement laws to protect Ohio workers and Ohio businesses, like Whirlpool; expanding access for opioid addiction; the PACT Act, taking care of veterans exposed to those football field-sized burn pits and, maybe 2, 3, 5, 10 years later, develop a cancer or bronchial illness. They need treatment and they show up at the VA, and because of the PACT Act that Senator TESTER, my colleague and the principal writer, and I, who also helped write—which is named after an Ohioan—the PACT Act will save lives.

I am hopeful that we continue that bipartisan Ohio tradition with Senator VANCE, starting with these commonsense reforms to prevent other Ohio communities from facing another disaster.

As I told the residents of East Palestine, I am here for the long haul. The last time I was there, I said to the mayor: I am going to keep calling you on the phone. I am going to keep calling the fire chief. I am going to keep calling Melissa Smith, who owns that candle company. I am going to show up. I am not going away until this is fixed, until people's lives are back to normal, and until Norfolk Southern is held accountable. When people who don't live in Ohio pack up in a week or two, we are still going to be there for months, for the next year—for the next 10 years, if that is what it takes to make this right.

I hope my colleagues of both parties will show that same commitment that Senator VANCE is saying and Senator RUBIO and Senator CASEY and Senator FETTERMAN and Senator HAWLEY. Join us to get something real done for the people whom we serve.

The PRESIDING OFFICER. The Senator from Ohio.

LEGISLATIVE SESSION

MORNING BUSINESS

Mr. BROWN. Mr. President, I ask unanimous consent that the Senate proceed to legislative session for a period of morning business, with Senators permitted to speak therein for up to 10 minutes each.

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

CONFIRMATION OF ARACELI MARTINEZ-OLGUIN

Mr. DURBIN. Madam President, this week, the Senate confirmed Araceli Martinez-Olguin to the U.S. District Court for the Northern District of California.

A first-generation American, Ms. Martinez-Olguin graduated from Princeton University and the University of California, Berkeley School of Law, before clerking for Judge David Briones on the U.S. District Court for the Western District of Texas. From there, she embarked on a legal career defined by her commitment to protecting the rights of immigrants, workers, students, and women—from the ACLU Women's Rights Project to Legal Aid at Work, to the Department of Education's Office of Civil Rights, and the National Immigration Law Center. In addition to her experience assisting with legal briefs for cases being considered by the Supreme Court, Ms. Martinez-Olguin has focused on dozens of immigration and employment matters, many of which implicated complex statutory schemes.

The American Bar Association rated Ms. Martinez-Olguin as ''qualified,'' and her nomination was strongly supported by her home State Senators, Mrs. FEINSTEIN and Mr. PADILLA.

With a career-long commitment to defending equal justice for all, and a professional background that is historically underrepresented on the bench, Ms. Martinez-Olguin will serve the Northern District of California with distinction. I was proud to support her nomination.

CONFIRMATION OF JAMAL N. WHITEHEAD

Mr. DURBIN. Madam President, yesterday, the Senate voted to confirm Jamal Whitehead to the U.S. District Court for the Western District of Washington.

Mr. Whitehead's significant trial experience in both government and private practice and his commitment to equal justice under law make him an outstanding nominee to the district court. After graduating from the University of Washington and the Seattle University School of Law, he joined the U.S. Equal Employment Opportunity Commission's—EEOC—Seattle field office as a trial attorney. While at the EEOC, Mr. Whitehead was responsible for enforcing Federal employment discrimination laws, including title VII of the Civil Rights Act and the Americans with Disabilities Act.

Mr. Whitehead then served as an Assistant U.S. Attorney in the civil division of the U.S. Attorney's Office for the Western District of Washington, where he handled both employment and tort matters. He returned to private practice in 2016 and has continued to focus on civil rights, including representing individuals who have brought claims against their employers for harassment, discrimination, or retaliation.

Mr. Whitehead is President Biden's first judicial nominee living with a known physical disability, and he will be one of few Federal judges who understands this experience. He will bring a valuable perspective to the district court bench. In addition, the American Bar Association unanimously rated Mr. Whitehead ''well qualified,'' and he has the strong support of his home-state Senators, Mrs. MURRAY and Ms. CANTWELL.

I supported his nomination and was glad to see him confirmed.

ARMS SALES NOTIFICATION

Mr. MENENDEZ. Madam President, section 36(b) of the Arms Export Control Act requires that Congress receive prior notification of certain proposed arms sales as defined by that statute. Upon such notification, the Congress has 30 calendar days during which the sale may be reviewed. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Senate Foreign Relations Committee.

In keeping with the committee's intention to see that relevant information is available to the full Senate, I ask unanimous consent to have printed in the RECORD the notifications which have been received. If the cover letter references a classified annex, then such annex is available to all Senators in the office of the Foreign Relations Committee, room SD–423.

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

DEFENSE SECURITY COOPERATION AGENCY,
Washington, DC.

Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 23–0B. This notification relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 19–65 of October 29, 2019.

Sincerely,

JAMES A. HURSCH,
Director.

Enclosures.

TRANSMITTAL NO. 23–0B

Report of Enhancement or Upgrade of Sensitivity of Technology or Capability (Sec. 36(b)(5)(C), AECA)

(i) Purchaser: Government of Japan.

(ii) Sec. 36(b)(1), AECA Transmittal No.: 19–65; Date: October 29, 2019; Implementing Agency: Air Force.

(iii) Description: On October 29, 2019, Congress was notified by Congressional certification transmittal number 19–65 of the possible sale, under Section 36(b)(1) of the Arms Export Control Act, of the upgrade of up to ninety-eight (98) F–15J aircraft to a Japanese Super Interceptor (JSI) configuration consisting of up to one hundred three (103) APG–82(v)1 Active Electronically Scanned Array (AESA) Radar (includes 5 spares); one hundred sixteen (116) Advanced Display Core Processor II (ADCP II) Mission System Computer (includes 19 spares); and one hundred one (101) ALQ–239 Digital Electronic Warfare System (DEWS) (includes 3 spares). Also included were Joint Mission Planning System (JMPS) with software, training and support; Selective Availability Anti-spoofing Module (SASSM); ARC–210 radio, aircraft and munition integration and test support; ground training devices (including flight and maintenance simulators); support and test equipment; software delivery and support; spare and repair parts; communications equipment; facilities and construction support; publications and technical documentation; personnel training and training equipment; U.S. Government and contractor engineering; technical and logistics support services; studies and surveys; and other related elements of logistical and program support. The estimated total program cost was $4.5 billion. Major Defense Equipment (MDE) constituted $2.4 billion of this total.

On July 26, 2022, Congress was notified by Congressional certification transmittal number 22–0K of the possible sale, under Section 36(b)(5)(C) of the Arms Export Control Act, of one hundred three (103) AN/ALQ–250 Eagle Passive Active Warning Survivability System (EPAWSS) electronic warfare suites. The total cost of new MDE articles was $956 million. This did not increase the total net cost of MDE, which remained $2.4 billion. The total case value did not increase, remaining $4.5 billion.

This transmittal notifies the addition of the following MDE items: up to one (1) Instrumented Test Vehicle; two (2) JASSM AGM–158 Separation Test Vehicles; two (2) JASSM AGM–158 Jettison Test Vehicles; two (2) ASSM AGM–158 Captive Carry Flight Test Vehicles; two (2) AGM–158 Inert JASSMs; and one hundred three (103) Embedded Global Positioning System/Inertial Navigation System (GPS/INS) (EGI) devices with M–code technology. The total cost of new MDE articles is $41 million. The total net cost of MDE remains $2.4 billion. The total net cost of non-MDE remains $2.1 billion. The total case value remains $4.5 billion.

(iv) Significance: The inclusion of this MDE represents an increase in capability over what was previously notified. The proposed articles and services will assist Japan in developing and maintaining a strong and effective self-defense capability.

(v) Justification: This proposed sale will support the foreign policy goals and national security objectives of the United States by improving the security of a major ally that is a force for political stability and economic progress in the Asia-Pacific region.

(vi) Sensitivity of Technology:

The AGM–158B/B–2 Joint Air-to-Surface Standoff Missile with Extended Range (JASSM–ER) is a low-observable, highly-survivable, subsonic cruise missile designed to penetrate next-generation air defense systems en route to target. The JASSM–ER is designed to kill hard, medium-hardened, soft and area-type targets. A turbo-fan engine and reconfigured fuel tanks provide added capacity. This potential sale will only include testing and training munitions.

a. The AGM–158/B–2 system capabilities include all the capabilities of the AGM–158/B. The AGM–158/B–2 configuration has different internal components to address multiple obsolescence issues as well as subcomponent updates to position for GPS M–Code and other potential upgrades.

b. The AGM–158 Instrumented Test Vehicle (ITV) is a flight certification vehicle equipped with an intelligent Test Instrumentation Kit (iTIK). The ITV collects airworthiness data to ensure safe separation of the munition from the aircraft.

c. The JASSM AGM–158 Separation Test Vehicle (STV), equipped with iTIK, collects separation data during airworthiness/flight certification.

d. The JASSM Jettison Test Vehicle (JTV) is used during the airworthiness data collection process to ensure safe jettison of the munition from the aircraft. It provides pilot captive-carry training with recording capability for post-release data analysis.

e. The JASSM AGM–158 Captive Carry Flight Test Vehicle, equipped with iTIK, has an inert warhead and fuze and an anti-jam GPS receiver. It is used solely for captive carry testing, conducted in the U.S.

f. The AGM–158 Inert JASSM, equipped with iTIK, has an inert warhead and fuze and an anti-jam GPS receiver. It is used for live launch testing, conducted in the U.S.

The M–Code capable Embedded Global Positioning System/Inertial Navigation System (GPS/INS) (EGI), with an embedded GPS Precise Positioning Service (PPS) Receiver Application Module-Standard Electronic Module (GRAM–S/M), is a self-contained navigation system that provides acceleration, velocity, position, attitude, platform azimuth, magnetic and true heading, altitude, body angular rates, time tags, and coordinated universal time (UTC) synchronized time. The embedded GRAM–S/M enables access to both the encrypted P(Y) and M–Code signals, providing protection against active spoofing attacks, enhanced military exclusivity, integrity, and anti-jam.

The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

(vii) Date Report Delivered to Congress: February 28, 2023.

ARMS SALES NOTIFICATION

Mr. MENENDEZ. Madam President, section 36(b) of the Arms Export Control Act requires that Congress receive prior notification of certain proposed arms sales as defined by that statute. Upon such notification, the Congress has 30 calendar days during which the sale may be reviewed. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Senate Foreign Relations Committee.

In keeping with the committee's intention to see that relevant information is available to the full Senate, I ask unanimous consent to have printed in the RECORD the notifications which have been received. If the cover letter references a classified annex, then such annex is available to all Senators in the office of the Foreign Relations Committee, room SD–423.

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

DEFENSE SECURITY COOPERATION AGENCY,
Washington, DC.

Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 23–09, concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Taipei Economic and Cultural Representative Office in the United States (TECRO) for defense articles and services estimated to cost $619 million. We will issue a news release to notify the public of this proposed sale upon delivery of this letter to your office.

Sincerely.

JAMES A. HURSCH,
Director.

Enclosures.

TRANSMITTAL NO. 23–09

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) Prospective Purchaser: Taipei Economic and Cultural Representative Office in the United States (TECRO).

(ii) Total Estimated Value:

Major Defense Equipment* $557 million.

Other $62 million.

Total $619 million.

Funding Source: National Funds.

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:

Major Defense Equipment (MDE):

One hundred (100) AGM–88B High-Speed Anti-Radiation Missiles (HARM).

Twenty-three (23) HARM Training Missiles.

Two hundred (200) AIM–I20C–8 Advanced Medium Range Air-to-Air Missiles (AMRAAM).

Four (4) AIM–I20C–8 AMRAAM Guidance Sections.

Twenty-six (26) LAU–129 Multi-Purpose Launchers.

Non-MDE: Also included are LAU–118A missile launchers with Aircraft Launcher Interface Computer (ALIC); HARM missile containers; AIM–120 control sections and containers; AIM–120C Captive Air Training Missiles (CATM); dummy air training missiles (DATM), integration and test support and equipment; munitions support and support equipment; spare parts, consumables and accessories and repair and return support; classified software; maintenance and maintenance support; classified publications and technical documentation; U.S. Government and contractor engineering, technical and logistics support services, studies and surveys; and other related elements of logistical and program support.

(iv) Military Department: Air Force (TW–D–YAC).

(v) Prior Related Cases, if any: TW–D–QBZ, TW–D–SAD, TW–D–YPH.

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None known at this time.

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Attached Annex.

(viii) Date Report Delivered to Congress: March 1, 2023.

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office in the United States—F–16 Munitions

The Taipei Economic and Cultural Representative Office in the United States (TECRO) has requested to buy one hundred (100) AGM–88B High-Speed Anti-Radiation Missiles (HARM); twenty-three (23) HARM training missiles; two hundred (200) AIM–120C–8 Advanced Medium Range Air-to-Air Missiles (AMRAAM); four (4) AIM–120C–8 AMRAAM Guidance Sections; and twenty-six (26) LAU–129 multi-purpose launchers. Also included are LAU–118A missile launchers with Aircraft Launcher Interface Computer (ALIC); HARM missile containers; AIM–120 control sections and containers; AIM–120C Captive Air Training Missiles (CATM); dummy air training missiles (DATM), integration and test support and equipment; munitions support and support equipment; spare parts, consumables and accessories and repair and return support; classified software; maintenance and maintenance support; classified publications and technical documentation; U.S. Government and contractor engineering, technical and logistics support services, studies and surveys; and other related elements of logistical and program support. The estimated total cost is $619 million.

This proposed sale is consistent with U.S. law and policy as expressed in Public Law 96–8.

This proposed sale serves U.S. national, economic, and security interests by supporting the recipient's continuing efforts to modernize its armed forces and to maintain a credible defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, and economic progress in the region.

The proposed sale will contribute to the recipient's capability to provide for the defense of its airspace, regional security, and interoperability with the United States. The recipient will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be Raytheon Missiles and Defense, Tucson, AZ; and Lockheed Martin Corporation, Bethesda, MD. The purchaser typically requests offsets. Any offset agreement would be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to recipient.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

TRANSMITTAL NO. 23–09

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) Sensitivity of Technology:

1. The AGM–88 High-speed Anti-Radiation Missile (HARM) is a tactical, supersonic air-to-surface missile designed to suppress or destroy enemy radar-equipped, surface-to-air missile radars, early warning radars, and radar-directed air defense artillery systems. This potential sale will include HARM training missiles.

2. The LAU–118 launcher provides the mechanical and electrical interface between the HARM missile and aircraft.

3. The AIM–120C–8 Advanced Medium Range Air-to-Air Missile (AMRAAM) is a supersonic, air-launched, aerial intercept, guided missile featuring digital technology and micro-miniature solid-state electronics. AMRAAM capabilities include look-down/shoot-down, multiple launches against multiple targets, resistance to electronic countermeasures, and interception of high- and low-flying and maneuvering targets. This potential sale will include Captive Air Training Missiles (CATM), as well as AMRAAM guidance section and control section spares.

4. The LAU–129 Guided Missile Launcher provides mechanical and electrical interface between the AIM–9 Sidewinder or AIM–120 AMRAAM missile and aircraft.

5. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

7. A determination has been made that the recipient can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

8. All defense articles and services listed in this transmittal have been authorized for release and export to the recipient.

ARMS SALES NOTIFICATION

Mr. MENENDEZ. Madam President, section 36(b) of the Arms Export Control Act requires that Congress receive prior notification of certain proposed arms sales as defined by that statute. Upon such notification, the Congress has 30 calendar days during which the sale may be reviewed. The provision stipulates that, in the Senate, the notification of proposed sales shall be sent to the chairman of the Senate Foreign Relations Committee.

In keeping with the committee's intention to see that relevant information is available to the full Senate, I ask unanimous consent to have printed in the RECORD the notifications which have been received. If the cover letter references a classified annex, then such annex is available to all Senators in the office of the Foreign Relations Committee, room SD–423.

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

DEFENSE SECURITY COOPERATION AGENCY,
Washington, DC.

Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 23–17, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of the United Kingdom for defense articles and services estimated to cost $125.13 million. We will issue a news release to notify the public of this proposed sale upon delivery of this letter to your office.

Sincerely,

JAMES A. HURSCH,
Director.

Enclosures.

TRANSMITTAL NO. 23–17

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) Prospective Purchaser: Government of the United Kingdom.

(ii) Total Estimated Value:

Major Defense Equipment* $125.00 million.

Other $.13 million.

Total $125.13 million.

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:

Major Defense Equipment (MDE): Up to six hundred (600) Javelin FGM–148F Missiles (includes twelve (12) Fly-to-Buy Missiles).

Non-MDE: Also included is U.S. Government technical assistance and other related elements of logistics and program support.

(iv) Military Department: Army (UK–B–WVJ).

(v) Prior Related Cases, if any: UK–B–WVA.

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None.

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Attached Annex.

(viii) Date Report Delivered to Congress: February 28, 2023.

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Kingdom—Javelin Missiles

The Government of the United Kingdom has requested to buy up to six hundred (600) Javelin FGM–148F missiles (includes twelve (12) fly-to-buy missiles). Also included is U.S. Government technical assistance and other related elements of logistics and program support. The total estimated cost is $125.13 million.

This proposed sale will support the foreign policy goals and national security objectives of the United States by improving the security of a NATO Ally that is a force for political stability and economic progress in Europe.

The proposed sale will improve the United Kingdom's capability to meet current and future threats. The United Kingdom will use the enhanced capability to build its long-term defense capacity to meet its national defense requirements. The United Kingdom will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Raytheon/Lockheed Martin Javelin Joint Venture, Orlando, FL and Tucson, AZ. There are no known offset agreements in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of U.S. Government or contractor representatives to the United Kingdom.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

TRANSMITTAL NO. 23–17

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) Sensitivity of Technology:

1. The Javelin Weapon System is a medium-range, man portable, shoulder-launched, fire and forget, anti-tank system for infantry, scouts, and combat engineers. It may also be mounted on a variety of platforms including vehicles, aircraft and watercraft. The system weighs 49.5 pounds and has a maximum range in excess of 2,500 meters. They system is highly lethal against tanks and other systems with conventional and reactive armors. The system possesses a secondary capability against bunkers.

2. Javelin's key technical feature is the use of fire-and-forget technology which allows the gunner to fire and immediately relocate or take cover. Additional special features are the top attack and/or direct fire modes, an advanced tandem warhead and imaging infrared seeker, target lock-on before launch, and soft launch from enclosures or covered fighting positions. The Javelin missile also has a minimum smoke motor thus decreasing its detection on the battlefield.

3. The Javelin Weapon System is comprised of two major tactical components, which are a reusable Light Weight Command Launch Unit (LWCLU) and a round contained in a disposable launch tube assembly. The LWCLU has been identified as Major Defense Equipment (MDE). The LWCLU incorporates an integrated day-night sight that provides a target engagement capability in adverse weather and countermeasure environments. The LWCLU may also be used in a stand-alone mode for battlefield surveillance and target detection. The LWCLU's thermal sight is a 3rd generation Forward Looking Infrared (FLIR) sensor. To facilitate initial loading and subsequent updating of software, all on-board missile software is uploaded via the LWCLU after mating and prior to launch.

4. The missile is autonomously guided to the target using an imaging infrared seeker and adaptive correlation tracking algorithms. This allows the gunner to take cover or reload and engage another target after firing a missile. The missile has an advanced tandem warhead and can be used in either the top attack or direct fire modes (for target undercover). An onboard flight computer guides the missile to the selected target.

5. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

6. If a technologically advanced adversary obtains knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

7. A determination has been made that the United Kingdom can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This proposed sale is necessary to further the U.S. foreign policy and national security objectives outlined in the Policy Justification.

8. All defense articles and services listed on this transmittal are authorized for release and export to the Government of the United Kingdom.

TRIBUTE TO CHAD KIDD

Mr. RISCH. Madam President, I rise today to honor a great Idahoan and the new Federal Engineer of the Year, Chad Kidd.

Over the past decade, Mr. Kidd has served as an electrical engineer for the Bureau of Reclamation. Throughout his time he has displayed a consistent record of outstanding design, installation, commissioning, and professional engineering support for Reclamation's hydro generation program. Mr. Kidd is also a stalwart leader in electrical safety for power plants in the Columbia-Pacific Northwest Region. Most notably, Mr. Kidd developed and delivered electrical awareness and safety training across the region years before a formal Reclamation electrical training program even existed. Mr. Kidd has won numerous awards and accolades to commemorate his phenomenal work and is a six-time recipient of the STAR Award.

In addition to his many engineering accomplishments, Mr. Kidd has also displayed himself as a great community leader. He has spent hundreds of hours volunteering for the Boy Scouts of America, Meals on Wheels, Declo High School, and other organizations providing his labor and expertise to help those around him.

Idahoans like Mr. Kidd make our State proud. I am thankful for his work in our great State and congratulate him on this high achievement.

ADDITIONAL STATEMENTS

TRIBUTE TO DAN RATH

● Ms. HASSAN. Madam President, I am honored to recognize Dan Rath of Spofford as February's Granite Stater of the Month. For the past 22 years, Dan has led a team—the Frozen Sections—in Special Olympics New Hampshire's Penguin Plunge at Hampton Beach.

Special Olympics New Hampshire works to foster inclusion for people of all ages with intellectual disabilities by enabling them to participate in sports. The yearly Penguin Plunge, where participants raise money and plunge in frigid Hampton Beach waters in early February, serves as a way to fundraise for Special Olympics New Hampshire's various programs. When Dan's wife showed him an ad to participate in the Penguin Plunge in 2001, he knew he had to sign up. Not only had Dan been a special education teacher for 4 years earlier in his career, but he also loved being in any type of body of water.

After fundraising and plunging the first winter on his own, Dan began recruiting friends and people who he met through his job at Cheshire Medical Center. The recovery room nurses came up with a saying—''If you ain't plunging, you're pledging''—since if Dan couldn't convince someone to sign up for the Penguin Plunge with him, he usually could persuade them to at least donate instead.

At 70 years old, Dan continues to lead an impressive group each year in taking the Penguin Plunge. This year, the 17 members of the Frozen Sections raised over $31,000 for Special Olympics NH. The highest fundraiser of the group was Becky May, who has been a Special Olympics athlete herself since the age of 5 and who raised more than $13,000 by driving across the State and knocking on doors to raise money.

The other members of this year's Frozen Sections were: Cindy Bunszel, Patrick Moynihan, Aaron St. Peter, Trevor Hunt, Trent Hunt, Stacy Taylor, Kelly Erunski, Downey Page, Sean Craig, Taylor Woodward, Steve Hart, Cherie Rowe, Michelle Leavitt, Priscilla Jones, and Larry Welkowitz.

I commend Dan, the Frozen Sections, and all Penguin Plunge participants in our State for submerging themselves in the frigid winter waters of Hampton Beach year after year in order to raise money for Special Olympics New Hampshire. Their hard work helps Granite State children and adults with intellectual disabilities to experience the joy and empowerment that comes with participating in a sport. Their commitment to making an impact in their communities is inspiring and a hallmark of the Granite State spirit, and I thank them for making New Hampshire a more inclusive place.●

REMEMBERING CLARENE LAW

● Ms. LUMMIS. Madam President, it is with a heavy heart that I rise today to share with you that Wyoming lost one of its finest residents on September 21. At the age of 89, God called up one of his most faithful servants, Clarene Law, up to heaven. I join with the rest of Wyoming in mourning this tremendous loss.

While she was born in neighboring Idaho, Clarene's journey to Wyoming began in 1959 when her husband at the time was hired to be a guidance counselor at Jackson/Wilson High School, which brought the family to Jackson, WY. In the early 1960s, Jackson presumably looked a whole lot different than it looks today. Of course, Grand Teton National Park and Yellowstone were a short drive away, and the entire area is surrounded by so much natural beauty, but it was not the major tourist destination that it is today.

Once settled in Jackson, Clarene took what may be considered her first step in the hospitality business by working as a bookkeeper and auditor at the Wort Hotel in Jackson. In 1962, while working at the Wort, she overheard a conversation about the owner of the Antler Motel telling another person they wanted to sell it. After hearing this conversation, Clarene chimed in to say that she was interested. Clarene and her husband got together, scrounged up their money, were able to receive assistance from both sets of parents to make the necessary down payment to become owners of the Antler Motel.

The work at the Antler was tough, but it also gave her the chance to be a

working mother and watch her kids while doing all the remaining tasks necessary for running a hotel. She worked the front desk, cleaned the sheets, made the beds, did the books, and eventually even pumped gas at the station they later added. Business was certainly picking up, and it allowed them to start expanding the Antler. They were able to purchase several nearby properties which were rolled into the Antler itself and a location that once was a series of different restaurants to what is known today as the Pearl Street Market.

In 1973, Clarene remarried Creed Law who was a hard-working man who could do just about anything with his hands. Creed was also instrumental in the upkeep and expansion of the hotel operations. There were few things he couldn't fix and coincidentally put together. Case in point, they actually purchased what was the Settlers Best Western in Worland and took it apart only to put it back together in Jackson, some 250 miles away.

Clarene certainly knew what she was doing, and she was doing it extremely well. Over the years, they continued to expand, purchase new properties, update some of the old ones, and at the time of her passing, Clarene and Creed owned 6 lodges with 477 hotel units and employed numerous people to help manage and maintain them. One of the true special parts about that is that, over the nearly 60 years that Clarene was responsible for the hotels, you could regularly still find her sitting behind the front desk at the Antler, greeting people, and getting them situation and settled into their rooms.

For anyone to have worked nearly 60 years setting up a major family business and helping to transform Jackson into the destination that it is today would be remarkable enough and incredibly noteworthy, it still does not even tell the full story of how Clarene impacted Wyoming.

Having been recognized by so many in the community for her hard work and dedication to Jackson and seeing the town grow and develop, she was frequently asked to serve in numerous civic organizations. She was able to make time to serve as a board member for the Jackson Hole Chamber of Commerce and the Jackson Planning Commission. The list goes on. She was a founder and president of the Jackson Hole Resort Association, president of the Wyoming Lodging and Restaurant Association, director of the Jackson State Bank, a member of the school board, and still found a way to teach Sunday school. Much of this work led to her receiving the Big WYO award in 1987, which is an incredible honor put forth by the Wyoming Hospitality and Travel Coalition.

The desire to work with her community and to find solutions to improve and make things better led to her decision to run for the Wyoming House of Representatives. Her neighbors agreed and voted her to be their State representative in house district 23, where she served the people of Teton County for seven 2-year terms from 1991–2005.

During her time in the legislature, she became the chair of the house minerals, business, and economic development committee, which is quite fitting since she was responsible for so much growth in the tourism industry in Teton County. She was a strong supporter of the Cultural Trust, supported learning centers and access to healthcare, especially working for a Medicaid match for traumatic brain injuries for adults. She was also one that had a way about her that seemed to ease the tension in the room. Her collegial way amongst her fellow representatives was such that she was able to bring people together and find something that they can agree on. Having served in the State legislature with former Senator Mike Enzi, maybe she was familiar with his 80/20 tool, which emphasizes focusing on 80 percent of an issue people can agree on and leaving out or finding another way to work on the 20 percent which typically is the part which many tend to disagree on. Regardless, she had a very successful second career for herself and influenced so many by serving Wyoming in the State house.

Before her passing, Clarene wrote a memoir about her life. It is titled, ''And I Had Fun! The Life and Legacy of Clarene Law.'' That is a perfectly fitting title as that is how she ended many of her letters. After having known her for as long as I have, I am sure that, yes, she had fun.

Clarene was a legend, truly one of a kind. She was the best of the best. She was kind, but firm, smart and generous, and devoted to serving her Teton County community. Her family and husband Creed were her greatest joy. Above all else, she was a woman of great faith. Clarene was the type of leader and person we should all aspire to be. She was a dear friend and a woman I admired greatly. I will miss everything about her, but her legacy lives across her beloved State of Wyoming.●

TRIBUTE TO CELIA GOULD

● Mr. RISCH. Madam President, Senator CRAPO and I rise today to honor the service of the retiring director of the Idaho Department of Agriculture, Mrs. Celia Gould.

Celia was appointed the director of the Idaho State Department of Agriculture in January 2007 as the first woman to ever serve in the position. She provided unmatched leadership and integrity throughout her tenure and exemplified what it is to be a public servant. As a third-generation rancher herself, she utilized firsthand knowledge and made thoughtful decisions, which further solidified the incredible success of Idaho agriculture. Before spending 16 years as Idaho's director of agriculture, Celia served 16 years in the Idaho House of Representatives. There is truly no one else who knows the State quite like she does, and we will miss her dearly.

Senator CRAPO and I are happy to join the rest of the State in wishing her the very best in her well-deserved retirement.●

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Ms. Kelly, one of his secretaries.

PRESIDENTIAL MESSAGES

REPORT OF THE CONTINUATION OF THE NATIONAL EMERGENCY THAT WAS ORIGINALLY DECLARED IN EXECUTIVE ORDER 13288 OF MARCH 6, 2003, WITH RESPECT TO THE ACTIONS AND POLICIES OF CERTAIN MEMBERS OF THE GOVERNMENT OF ZIMBABWE AND OTHER PERSONS TO UNDERMINE ZIMBABWE'S DEMOCRATIC PROCESSES OR INSTITUTIONS—PM 2

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs:

To the Congress of the United States:

Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)) provides for the automatic termination of a national emergency unless, within 90 days prior to the anniversary date of its declaration, the President publishes in the *Federal Register* and transmits to the Congress a notice stating that the emergency is to continue in effect beyond the anniversary date. In accordance with this provision, I have sent to the *Federal Register* for publication the enclosed notice stating that the national emergency declared in Executive Order 13288 of March 6, 2003, with respect to the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions is to continue in effect beyond March 6, 2023.

President Emmerson Mnangagwa has not made the necessary political and economic reforms that would warrant terminating the existing targeted sanctions program. Throughout the last year, government security services routinely intimidated and violently repressed citizens, including members of opposition political parties, union members, and journalists. The absence of progress on the most fundamental reforms needed to ensure the rule of law, democratic governance, and the protection of human rights leaves Zimbabweans vulnerable to ongoing repression and presents a continuing threat to the peace and security in the region.

The actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions continue to pose an unusual and extraordinary threat to the foreign policy of the United States.

Therefore, I have determined that it is necessary to continue the national emergency declared in Executive Order 13288, as amended, with respect to Zimbabwe and to maintain in force the sanctions to respond to this threat.

JOSEPH R. BIDEN, Jr.
THE WHITE HOUSE, *March 1, 2023*.

REPORT OF THE CONTINUATION OF THE NATIONAL EMERGENCY THAT WAS ORIGINALLY DECLARED IN EXECUTIVE ORDER 13660 OF MARCH 6, 2014, WITH RESPECT TO UKRAINE—PM 3

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs:

To the Congress of the United States:

Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)) provides for the automatic termination of a national emergency unless, within 90 days prior to the anniversary date of its declaration, the President publishes in the *Federal Register* and transmits to the Congress a notice stating that the emergency is to continue in effect beyond the anniversary date. In accordance with this provision, I have sent to the *Federal Register* for publication the enclosed notice stating that the national emergency declared in Executive Order 13660 of March 6, 2014, which was expanded in scope in Executive Order 13661, Executive Order 13662, and Executive Order 14065, and under which additional steps were taken in Executive Order 13685 and Executive Order 13849, is to continue in effect beyond March 6, 2023.

The actions and policies of persons that undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, as well as the actions and policies of the Government of the Russian Federation, including its purported annexation of Crimea and its use of force in Ukraine, continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States.

Therefore, I have determined that it is necessary to continue the national emergency declared in Executive Order 13660 with respect to Ukraine.

JOSEPH R. BIDEN, Jr.
THE WHITE HOUSE, *March 1, 2023*.

REPORT OF THE CONTINUATION OF THE NATIONAL EMERGENCY THAT WAS ORIGINALLY DECLARED IN EXECUTIVE ORDER 13692 OF MARCH 8, 2015, WITH RESPECT TO THE SITUATION IN VENEZUELA—PM 4

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs:

To the Congress of the United States:

Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)) provides for the automatic termination of a national emergency unless, within 90 days prior to the anniversary date of its declaration, the President publishes in the *Federal Register* and transmits to the Congress a notice stating that the emergency is to continue in effect beyond the anniversary date. In accordance with this provision, I have sent to the *Federal Register* for publication the enclosed notice stating that the national emergency declared in Executive Order 13692 of March 8, 2015, with respect to the situation in Venezuela is to continue in effect beyond March 8, 2023.

The situation in Venezuela continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, I have determined that it is necessary to continue the national emergency declared in Executive Order 13692 with respect to the situation in Venezuela.

JOSEPH R. BIDEN, Jr.
THE WHITE HOUSE, *March 1, 2023*.

MESSAGE FROM THE HOUSE

At 12:05 p.m., a message from the House of Representatives, delivered by Mrs. Cole, one of its reading clerks, announced that the House has passed the following joint resolution, in which it requests the concurrence of the Senate:

H.J. Res. 30. Joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Labor relating to ''Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights''.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. PETERS, from the Committee on Homeland Security and Governmental Affairs:

Special Report entitled ''Activities of the Committee on Homeland Security and Governmental Affairs during the 117th Congress'' (Rept. No. 118–1).

By Mr. DURBIN, from the Committee on the Judiciary, without amendment:

S. 79. A bill to amend title 35, United States Code, to establish an interagency task force between the United States Patent and Trademark Office and the Food and Drug Administration for purposes of sharing information and providing technical assistance with respect to patents, and for other purposes.

By Mr. DURBIN, from the Committee on the Judiciary, with an amendment in the nature of a substitute:

S. 113. A bill to require the Federal Trade Commission to study the role of intermediaries in the pharmaceutical supply chain and provide Congress with appropriate policy recommendations, and for other purposes.

S. 142. A bill to prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market, and to prohibit biological product manufacturers from compensating biosimilar and interchangeable companies to delay the entry of biosimilar biological products and interchangeable biological products.

S. 148. A bill to enable to Federal Trade Commission to deter filing of sham citizen petitions to cover an attempt to interfere with approval of a competing generic drug or biosimilar, to foster competition, and facilitate the efficient review of petitions filed in good faith to raise legitimate public health concerns, and for other purposes.

By Mr. DURBIN, from the Committee on the Judiciary, without amendment:

S. 150. A bill to amend the Federal Trade Commission Act to prohibit product hopping, and for other purposes.

EXECUTIVE REPORT OF COMMITTEE

The following executive report of a nomination was submitted:

By Ms. STABENOW for the Committee on Agriculture, Nutrition, and Forestry.

*Margo Schlanger, of Michigan, to be an Assistant Secretary of Agriculture.

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

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

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

By Ms. HASSAN (for herself and Mr. BRAUN):

S. 574. A bill to amend the Federal Food, Drug, and Cosmetic Act to prevent the use of patents, trade secrets, or other intellectual property to inhibit competition; to the Committee on Health, Education, Labor, and Pensions.

By Mr. BRAUN (for himself, Mr. CRUZ, Mrs. BLACKBURN, and Mr. SCOTT of Florida):

S. 575. A bill to require balanced budgets in concurrent resolutions on the budget, to establish limits on the waiver of budget points of order, and to prevent appropriations in excess of the amount authorized to be appropriated; to the Committee on the Budget.

By Mr. BROWN (for himself, Mr. VANCE, Mr. CASEY, Mr. RUBIO, Mr. FETTERMAN, and Mr. HAWLEY):

S. 576. A bill to enhance safety requirements for trains transporting hazardous materials, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. RUBIO (for himself and Mr. WARNOCK):

S. 577. A bill to require the Department of Housing and Urban Development to conduct an annual risk assessment of properties receiving tenant-based or project-based rental assistance for lead-based hazards, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. RUBIO:

S. 578. A bill to reform requirements regarding the safety and security of families living in public and federally assisted housing in high-crime areas; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. RUBIO:

S. 579. A bill to provide for a comfortable and safe temperature level in dwelling units receiving certain Federal housing assistance, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. RUBIO (for himself, Mr. CRAMER, Mr. TUBERVILLE, and Mr. SCOTT of Florida):

S. 580. A bill to provide greater scrutiny of visas for Chinese Communist Party members; to the Committee on the Judiciary.

By Mr. RUBIO:

S. 581. A bill to provide standards for physical condition and management of housing receiving assistance payments under section 8 of the United States Housing Act of 1937; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. RUBIO (for himself, Mr. LANKFORD, Mr. PADILLA, Mr. TUBERVILLE, Mr. MARKEY, Mr. HAGERTY, Ms. SMITH, Mr. SCOTT of Florida, Mrs. HYDE-SMITH, Mr. PAUL, Mr. WYDEN, and Mr. HEINRICH):

S. 582. A bill to make daylight saving time permanent, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. RUBIO (for himself, Mr. CRUZ, Mr. CRAMER, Mr. COTTON, Mrs. BLACKBURN, and Mr. SCOTT of Florida):

S. 583. A bill to amend the Federal Deposit Insurance Act to permit the Federal Deposit Insurance Corporation to terminate the insured status of a depository institution that refuses to provide services to certain Federal contractors, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. RUBIO (for himself and Mr. KAINE):

S. 584. A bill to reauthorize the North Korean Human Rights Act of 2004, and for other purposes; to the Committee on Foreign Relations.

By Mr. RUBIO:

S. 585. A bill to require a determination of whether certain Chinese entities meet the criteria for the imposition of sanctions, and for other purposes; to the Committee on Foreign Relations.

By Mr. RUBIO (for himself, Mr. HAGERTY, Mr. LANKFORD, Mr. BRAUN, Mr. HAWLEY, Mr. SCOTT of Florida, and Mr. CRUZ):

S. 586. A bill to modify the limitation on military-to-military exchanges and contacts with the People's Liberation Army to cover all logistical operations and remove the exception for search-and-rescue and humanitarian operations and exercises; to the Committee on Foreign Relations.

By Mr. RUBIO:

S. 587. A bill to impose sanctions with respect to foreign persons responsible for the negligent creation of space debris, and for other purposes; to the Committee on Foreign Relations.

By Mr. RUBIO (for himself, Mr. GRASSLEY, Mr. MARSHALL, Mr. LANKFORD, Mr. CRAMER, Mr. WICKER, Ms. LUMMIS, Mrs. BLACKBURN, Mr. TILLIS, Mr. HOEVEN, Mr. DAINES, Mr. BRAUN, Mrs. HYDE-SMITH, Mr. SCOTT of South Carolina, and Mr. SCOTT of Florida):

S. 588. A bill to impose sanctions and other measures in response to the failure of the Government of the People's Republic of China to allow an investigation into the origins of COVID–19 at suspect laboratories in Wuhan; to the Committee on Foreign Relations.

By Mr. RUBIO (for himself, Mr. SCOTT of Florida, Mrs. FEINSTEIN, Mr. WICKER, and Mr. CRUZ):

S. 589. A bill to amend the Internal Revenue Code of 1986 to provide bonus depreciation for certain space launch expenditures, and for other purposes; to the Committee on Finance.

By Mr. RUBIO (for himself, Mr. SCOTT of Florida, and Mr. CORNYN):

S. 590. A bill to allow the Administrator of the National Aeronautics and Space Administration to enter into agreements with private and commercial entities and State governments to provide certain supplies, support, and services; to the Committee on Commerce, Science, and Transportation.

By Mr. RUBIO (for himself and Mr. CARDIN):

S. 591. A bill to impose sanctions with respect to the People's Republic of China in relation to activities in the South China Sea and the East China Sea, and for other purposes; to the Committee on Foreign Relations.

By Ms. STABENOW (for herself and Mr. WELCH):

S. 592. A bill to amend title 38, United States Code, to increase the mileage rate offered by the Department of Veterans Affairs through their Beneficiary Travel program for health related travel, and for other purposes; to the Committee on Veterans' Affairs.

By Mr. HEINRICH (for himself and Mr. LUJÁN):

S. 593. A bill to amend the John D. Dingell, Jr. Conservation, Management, and Recreation Act to establish the Cerro de la Olla Wilderness in the Rio Grande del Norte National Monument and to modify the boundary of the Rio Grande del Norte National Monument; to the Committee on Energy and Natural Resources.

By Mr. HEINRICH (for himself and Mr. DAINES):

S. 594. A bill to require the Secretary of Agriculture and the Secretary of the Interior to prioritize the completion of the Continental Divide National Scenic Trail, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. HEINRICH (for himself and Mr. LUJÁN):

S. 595. A bill to approve the settlement of water rights claims of the Pueblos of Acoma and Laguna in the Rio San Jose Stream System and the Pueblos of Jemez and Zia in the Rio Jemez Stream System in the State of New Mexico, and for other purposes; to the Committee on Indian Affairs.

By Mr. KAINE (for himself, Mr. BOOZMAN, Ms. HASSAN, Mr. ROUNDS, Ms. CORTEZ MASTO, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. CRAMER, Mr. BOOKER, Mr. COTTON, Ms. WARREN, Mr. SCOTT of Florida, Mr. WARNOCK, Mrs. BLACKBURN, Mrs. SHAHEEN, Ms. MURKOWSKI, Mr. HICKENLOOPER, Mr. MORAN, Mrs. GILLIBRAND, Mr. HOEVEN, and Mr. WARNER):

S. 596. A bill to amend the Internal Revenue Code of 1986 to make employers of spouses of military personnel eligible for the work opportunity credit; to the Committee on Finance.

By Mr. BROWN (for himself, Ms. COLLINS, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. BOOKER, Mr. CASEY, Mr. CASSIDY, Ms. CORTEZ MASTO, Ms. DUCKWORTH, Ms. HASSAN, Ms. HIRONO, Mr. HICKENLOOPER, Mr. KING, Mr. MARKEY, Mr. MENENDEZ, Mr. MERKLEY, Mr. MURPHY, Ms. MURKOWSKI, Mr. PADILLA, Mr. REED, Mr. SANDERS, Ms. SMITH, Ms. WARREN, and Mr. WHITEHOUSE):

S. 597. A bill to amend title II of the Social Security Act to repeal the Government pension offset and windfall elimination provisions; to the Committee on Finance.

By Mr. MENENDEZ (for himself, Mr. MARKEY, Mr. BLUMENTHAL, Mr. REED, Mrs. GILLIBRAND, Mr. BOOKER, Mr. WHITEHOUSE, Mrs. FEINSTEIN, Mr. DURBIN, Ms. WARREN, Ms. HIRONO, Mr. MURPHY, and Ms. DUCKWORTH):

S. 598. A bill to repeal certain impediments to the administration of the firearms laws; to the Committee on the Judiciary.

By Mr. LUJÁN (for himself, Mrs. FEINSTEIN, Ms. KLOBUCHAR, Mr. BLUMENTHAL, Mr. HEINRICH, Mr. MARKEY, Mr. MERKLEY, and Mr. DURBIN):

S. 599. A bill to establish the Foundation for Digital Equity, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. JOHNSON (for himself, Mr. BRAUN, Mr. COTTON, and Mr. MCCONNELL):

S. 600. A bill to amend the Controlled Substance Act to list fentanyl-related substances as schedule I controlled substances; to the Committee on the Judiciary.

By Mr. KENNEDY (for himself and Mr. RUBIO):

S. 601. A bill to amend the National Flood Insurance Act of 1968 to modify the amount by which the chargeable risk premium rate for flood insurance under that Act may be increased in any year; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. KENNEDY (for himself and Mrs. HYDE-SMITH):

S. 602. A bill to require the Administrator of the Federal Emergency Management Agency to take certain actions relating to the National Flood Insurance Program. and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. MANCHIN (for himself, Mr. BRAUN, and Mr. KING):

S. 603. A bill to establish procedures regarding the approval of opioid drugs by the Food and Drug Administration; to the Committee on Health, Education, Labor, and Pensions.

By Mr. MANCHIN (for himself and Mr. BRAUN):

S. 604. A bill to direct the Secretary of Health and Human Services to amend the mission statement of the Food and Drug Administration; to the Committee on Health, Education, Labor, and Pensions.

By Mr. LUJÁN (for himself, Mr. CRAMER, Mr. MANCHIN, and Mr. BARRASSO):

S. 605. A bill to require the Secretary of the Interior and the Secretary of Agriculture to develop long-distance bike trails on Federal recreational lands and waters, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. MANCHIN (for himself and Mr. BRAUN):

S. 606. A bill to require the Food and Drug Administration to revoke the approval of one opioid pain medication for each new opioid medication approved; to the Committee on Health, Education, Labor, and Pensions.

By Mr. MANCHIN (for himself and Mr. BRAUN):

S. 607. A bill to allow the Secretary of Health and Human Services to deny approval of a new drug application for an opioid analgesic drug on the basis of such drug not

being clinically superior to other commercially available drugs; to the Committee on Health, Education, Labor, and Pensions.

By Mr. MARKEY (for himself, Ms. WARREN, Mr. SANDERS, and Mr. WELCH):

S. 608. A bill to amend the Wild and Scenic Rivers Act to direct the Secretary of the Interior to conduct a study of the Deerfield River for potential addition to the national wild and scenic rivers system, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. CARDIN:

S. 609. A bill to establish a pilot program awarding competitive grants to organizations administering entrepreneurial development programming to formerly incarcerated individuals, and other purposes; to the Committee on Small Business and Entrepreneurship.

By Ms. SINEMA (for herself, Mr. HAGERTY, Mr. PADILLA, and Mr. TILLIS):

S. 610. A bill to amend the Federal Credit Union Act to modify the frequency of board of directors meetings, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Ms. KLOBUCHAR (for herself, Mr. VAN HOLLEN, Ms. WARREN, and Ms. SMITH):

S. 611. A bill to amend the Internal Revenue Code of 1986 to increase the low-income housing credit for rehabilitation expenditures for buildings achieving enhanced energy performance, and for other purposes; to the Committee on Finance.

By Ms. CORTEZ MASTO (for herself, Mrs. FEINSTEIN, Ms. ROSEN, and Mr. PADILLA):

S. 612. A bill to reauthorize the Lake Tahoe Restoration Act, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. TUBERVILLE (for himself, Mr. LEE, Mr. LANKFORD, Mr. COTTON, Mrs. BLACKBURN, Mr. MARSHALL, Mr. BUDD, Mr. CRAMER, Mrs. HYDE-SMITH, Mr. BRAUN, Mr. SCOTT of Florida, Mr. RISCH, Mr. CRAPO, Mr. HAGERTY, Mr. RUBIO, Ms. ERNST, Ms. LUMMIS, Mr. DAINES, Mr. HAWLEY, Mr. MULLIN, Mr. GRAHAM, and Mrs. BRITT):

S. 613. A bill to provide that for purposes of determining compliance with title IX of the Education Amendments of 1972 in athletics, sex shall be recognized based solely on a person's reproductive biology and genetics at birth; to the Committee on Health, Education, Labor, and Pensions.

By Mr. COTTON (for himself, Mr. GRAHAM, Mr. MCCONNELL, Mr. KENNEDY, Mr. LEE, Mr. TILLIS, Mr. CORNYN, Mr. CRUZ, and Mr. HAWLEY):

S. 614. A bill to codify the temporary scheduling order for fentanyl-related substances by adding fentanyl-related substances to schedule I of the Controlled Substances Act; to the Committee on the Judiciary.

By Mr. BLUMENTHAL (for himself, Mr. MARKEY, and Mrs. FEINSTEIN):

S. 615. A bill to improve the safety of the air supply on aircraft, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Ms. SMITH (for herself and Ms. KLOBUCHAR):

S. 616. A bill to amend the Leech Lake Band of Ojibwe Reservation Restoration Act to provide for the transfer of additional Federal land to the Leech Lake Band of Ojibwe, and for other purposes; to the Committee on Indian Affairs.

By Mr. MENENDEZ (for himself, Mr. KING, Mr. REED, Mr. BOOKER, Mr. WHITEHOUSE, Mrs. FEINSTEIN, Mr. BLUMENTHAL, Mr. MARKEY, Ms. WARREN, Mr. SANDERS, Mr. CARDIN, Mr. WYDEN, Mr. MERKLEY, Mr. COONS, Mr. PADILLA, and Mr. VAN HOLLEN):

S. 617. A bill to amend the Outer Continental Shelf Lands Act to permanently prohibit the conduct of offshore drilling on the outer Continental Shelf in the Mid-Atlantic, South Atlantic, North Atlantic, and Straits of Florida planning areas; to the Committee on Energy and Natural Resources.

By Mr. COONS (for himself, Mr. GRAHAM, Mr. WHITEHOUSE, Mr. TILLIS, Mr. HEINRICH, and Mr. BOOZMAN):

S. 618. A bill to establish the United States Foundation for International Conservation to promote long-term management of protected and conserved areas, and for other purposes; to the Committee on Foreign Relations.

By Mr. HAWLEY (for himself, Mr. BRAUN, Mr. MARSHALL, Mr. LEE, and Mr. SCOTT of Florida):

S. 619. A bill to require the Director of National Intelligence to declassify information relating to the origin of COVID–19, and for other purposes; considered and passed.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. CRUZ (for himself and Mr. CORNYN):

S. Res. 86. A resolution commemorating the bicentennial of the Texas Ranger Division of the Texas Department of Public Safety, the oldest State law enforcement agency in North America, and honoring the men and women, past and present, of the Texas Rangers; considered and agreed to.

By Mr. BRAUN (for himself, Mrs. BLACKBURN, Mr. CASSIDY, and Mr. SCOTT of Florida):

S. Res. 87. A resolution recognizing the national debt as a threat to national security; to the Committee on Finance.

By Mr. BRAUN:

S. Res. 88. A resolution establishing appropriate thresholds for certain budget points of order in the Senate, and for other purposes; to the Committee on the Budget.

By Mr. BRAUN (for himself, Mr. CASSIDY, and Mr. SCOTT of Florida):

S. Res. 89. A resolution recognizing the duty of the Senate to abandon Modern Monetary Theory and recognizing that the acceptance of Modern Monetary Theory would lead to higher deficits and higher inflation; to the Committee on Banking, Housing, and Urban Affairs.

By Ms. DUCKWORTH (for herself, Mrs. CAPITO, Ms. CANTWELL, Ms. KLOBUCHAR, Mr. BOOKER, Mr. BLUMENTHAL, and Ms. HIRONO):

S. Res. 90. A resolution recognizing the significance of endometriosis as an unmet chronic disease for women and designating March 2023 as ''Endometriosis Awareness Month''; to the Committee on the Judiciary.

ADDITIONAL COSPONSORS

S. 9

At the request of Mr. CRUZ, the name of the Senator from West Virginia (Mrs. CAPITO) was added as a cosponsor of S. 9, a bill to prohibit the Secretary of Energy from sending petroleum products from the Strategic Petroleum Reserve to China, and for other purposes.

S. 70

At the request of Mr. THUNE, the name of the Senator from Wyoming (Ms. LUMMIS) was added as a cosponsor of S. 70, a bill to require the Bureau of Indian Affairs to process and complete all mortgage packages associated with residential and business mortgages on Indian land by certain deadlines, and for other purposes.

S. 110

At the request of Mr. DAINES, the name of the Senator from South Dakota (Mr. ROUNDS) was added as a cosponsor of S. 110, a bill to allow a State to submit a declaration of intent to the Secretary of Education to combine certain funds to improve the academic achievement of students.

S. 141

At the request of Mr. MORAN, the name of the Senator from Connecticut (Mr. BLUMENTHAL) was added as a cosponsor of S. 141, a bill to amend title 38, United States Code, to improve certain programs of the Department of Veterans Affairs for home and community based services for veterans, and for other purposes.

S. 218

At the request of Mr. CRUZ, the name of the Senator from West Virginia (Mrs. CAPITO) was added as a cosponsor of S. 218, a bill to prohibit the Secretary of Energy from sending petroleum products from the Strategic Petroleum Reserve to China, and for other purposes.

S. 282

At the request of Mr. MARKEY, the name of the Senator from California (Mr. PADILLA) was added as a cosponsor of S. 282, a bill to designate a portion of the Arctic National Wildlife Refuge as wilderness.

S. 305

At the request of Mr. BLUMENTHAL, the name of the Senator from Iowa (Ms. ERNST) was added as a cosponsor of S. 305, a bill to require the Secretary of the Treasury to mint coins in commemoration of the 250th anniversary of the United States Marine Corps, and to support programs at the Marine Corps Heritage Center.

At the request of Mr. SULLIVAN, the names of the Senator from Rhode Island (Mr. WHITEHOUSE) and the Senator from North Dakota (Mr. CRAMER) were added as cosponsors of S. 305, supra.

S. 325

At the request of Mr. MURPHY, the name of the Senator from Hawaii (Mr. SCHATZ) was added as a cosponsor of S. 325, a bill to amend title 28, United States Code, to provide for a code of conduct for justices and judges of the courts of the United States, establish an ethics investigations counsel, and require disclosure of recusals.

S. 444

At the request of Mr. JOHNSON, the name of the Senator from Kentucky (Mr. PAUL) was added as a cosponsor of S. 444, a bill to require any convention, agreement, or other international instrument on pandemic prevention, preparedness, and response reached by the

World Health Assembly to be subject to Senate ratification.

S. 473

At the request of Mr. SCOTT of Florida, the name of the Senator from Missouri (Mr. HAWLEY) was added as a cosponsor of S. 473, a bill to provide for drone security.

S. 524

At the request of Mr. BOOKER, the names of the Senator from Minnesota (Ms. KLOBUCHAR) and the Senator from Maine (Ms. COLLINS) were added as cosponsors of S. 524, a bill to eliminate disparity in sentencing for cocaine offenses, and for other purposes.

S. 532

At the request of Mr. PAUL, the name of the Senator from Oklahoma (Mr. MULLIN) was added as a cosponsor of S. 532, a bill to preserve and protect the free choice of individual employees to form, join, or assist labor organizations, or to refrain from such activities.

S. 547

At the request of Mr. WHITEHOUSE, the names of the Senator from Virginia (Mr. KAINE) and the Senator from Florida (Mr. SCOTT) were added as cosponsors of S. 547, a bill to award a Congressional Gold Medal, collectively, to the First Rhode Island Regiment, in recognition of their dedicated service during the Revolutionary War.

S. 548

At the request of Mr. BARRASSO, the names of the Senator from Alaska (Ms. MURKOWSKI) and the Senator from South Dakota (Mr. THUNE) were added as cosponsors of S. 548, a bill to enhance the security of the United States and its allies, and for other purposes.

S. 558

At the request of Mr. COTTON, the name of the Senator from Montana (Mr. DAINES) was added as a cosponsor of S. 558, a bill to codify Executive Order 13950 (relating to combatting race and sex stereotyping), and for other purposes.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. KAINE (for himself, Mr. BOOZMAN, Ms. HASSAN, Mr. ROUNDS, Ms. CORTEZ MASTO, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. CRAMER, Mr. BOOKER, Mr. COTTON, Ms. WARREN, Mr. SCOTT of Florida, Mr. WARNOCK, Mrs. BLACKBURN, Mrs. SHAHEEN, Ms. MURKOWSKI, Mr. HICKENLOOPER, Mr. MORAN, Mrs. GILLIBRAND, Mr. HOEVEN, and Mr. WARNER):

S. 596. A bill to amend the Internal Revenue Code of 1986 to make employers of spouses of military personnel eligible for the work opportunity credit; to the Committee on Finance.

Mr. KAINE. Madam President, today I am introducing the Military Spouse Hiring Act with my colleagues Senators BOOZMAN, HASSAN, ROUNDS, and 17 of our colleagues. Enacting this bill would improve financial stability for Blue Star families across the country.

The families of America's servicemembers make sacrifices that often go unrecognized. Among them is packing up and moving frequently, with military spouses regularly having to leave stable employment to move to a new area and start over. This is compounded by the complex system of State licensing and certification requirements, which can prevent these spouses from taking jobs that utilize their expertise and experience. Because of this, military spouses have unemployment rates substantially higher than the national average, and they are often underemployed when they do have jobs. Adding to the financial struggles caused by frequent periods of unemployment and underemployment, the rising cost of childcare puts a substantial burden on many military families.

The Military Spouse Hiring Act would help these families by making military spouses an eligible population for the work opportunity tax credit. This tax credit has proven effective in improving employment prospects for other groups. Extending it to military spouses would help them find employment more easily after moving to new areas.

I hope my colleagues will support this bill to help families who have made the greatest sacrifice for our Nation.

By Mr. BROWN (for himself, Ms. COLLINS, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. BOOKER, Mr. CASEY, Mr. CASSIDY, Ms. CORTEZ MASTO, Ms. DUCKWORTH, Ms. HASSAN, Ms. HIRONO, Mr. HICKENLOOPER, Mr. KING, Mr. MARKEY, Mr. MENENDEZ, Mr. MERKLEY, Mr. MURPHY, Ms. MURKOWSKI, Mr. PADILLA, Mr. REED, Mr. SANDERS, Ms. SMITH, Ms. WARREN, and Mr. WHITEHOUSE):

S. 597. A bill to amend title II of the Social Security Act to repeal the Government pension offset and windfall elimination provisions; to the Committee on Finance.

Ms. COLLINS. Madam President, I rise today, along with my colleague Senator BROWN, to introduce the Social Security Fairness Act. The bipartisan bill would repeal two Social Security provisions that unfairly penalize many public servants in Maine and in other States.

Social Security is the foundation of retirement income for most Americans. This crucial program has made the difference between poverty and a comfortable retirement for millions of seniors. Yet, some teachers, firefighters, police officers, and other public servants often see their earned Social Security benefits unfairly reduced by two Social Security provisions: the windfall elimination provision and the Government pension offset.

The Windfall elimination provision or W-E-P affects public servants who receive a pension from a job where they did not pay into Social Security but who also worked long enough in another job to qualify for Social Security benefits. Due to the WEP, their Social Security benefits are calculated using a different formula, which can reduce their monthly benefits. For workers who become eligible for benefits in 2023, the WEP reduction can be up to $557.50 per month, subject to other adjustments.

The Government Pension Offset GPO affects public servants who receive a pension from a job where they did not pay into Social Security and are also eligible to receive a Social Security spousal or widow(er)'s benefit. However, the GPO reduces Social Security spousal or widow(er)'s benefits by an amount equal to two-thirds of the noncovered pension.

According to the Social Security Administration, in December 2022, more than 2 million people, including nearly 20,500 people in Maine, had their Social Security benefits reduced by the WEP. Similarly, nearly 735,000 people were affected by the GPO in December 2022, including more than 8,100 people in Maine. While the effects of the WEP and GPO are most acute in certain States, including Maine, data from the Social Security Administration indicate that these provisions affect public servants in all 50 States.

Many Maine teachers have spoken with me about how the WEP and GPO affect their retirement security. I recently heard from a special education teacher in Kennebuck who has spent more than 40 years teaching and also held a second job in the private sector to help support her family after becoming a single parent. Due to the WEP, she is concerned about her financial security once she retires. A retiree in Mount Desert also reached out to me recently to share his story. He wants to make sure his wife, who is a public servant, will be taken care of after he is gone. Due to the GPO, he is concerned that any Social Security widow's benefits his wife receives will be substantially reduced.

The bill we are introducing today, the Social Security Fairness Act, would repeal both the WEP and the GPO for Social Security benefits payable after December 2023. This means current Social Security beneficiaries would have their benefits recalculated without applying the WEP and GPO. Teachers, firefighters, police officers, and other public servants currently in the workforce would no longer have to worry about having their Social Security benefits unfairly reduced in the future. Those who are considering careers in public service would no longer have to weigh the potential negative effects of this choice on their future retirement security.

Our dedicated public servants, such as our teachers who help prepare our

children for future success and our police officers who help keep our communities safe, should receive the full Social Security benefits they have earned. It is time for us to take action to address the WEP and the GPO. I urge my colleagues to support the Social Security Fairness Act.

SUBMITTED RESOLUTIONS

SENATE RESOLUTION 86—COMMEMORATING THE BICENTENNIAL OF THE TEXAS RANGER DIVISION OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, THE OLDEST STATE LAW ENFORCEMENT AGENCY IN NORTH AMERICA, AND HONORING THE MEN AND WOMEN, PAST AND PRESENT, OF THE TEXAS RANGERS

Mr. CRUZ (for himself and Mr. CORNYN) submitted the following resolution; which was considered and agreed to:

S. RES. 86

Whereas the Texas Ranger Division of the Texas Department of Public Safety was established in 1823 and will commemorate its 200th anniversary in 2023;

Whereas the Texas Rangers are the oldest law enforcement organization on the North American continent with statewide jurisdiction;

Whereas the Texas Rangers have played an influential, valiant, and honorable role from the early years of Texas to the present day;

Whereas, through the centuries, the Texas Rangers have served as—

(1) a citizen militia, protecting ranches, farms, and settlements against hostile raids;

(2) frontier peace officers, protecting against outlaws and banditry;

(3) law enforcement to new towns and settlements on burgeoning railroad routes and cattle trails; and

(4) State police, handling lawlessness in oil boomtowns, violations of Prohibition, and gangsters;

Whereas, in 1935, the Texas Rangers were incorporated into one of the first departments of public safety in the United States;

Whereas the Texas Rangers are internationally respected for—

(1) conducting major criminal investigations;

(2) suppressing organized crime;

(3) performing border reconnaissance;

(4) expertise with respect to special weapons and tactics;

(5) serving as bomb squads;

(6) special rapid response capabilities;

(7) crisis negotiation capabilities;

(8) joint intelligence center management; and

(9) investigating unsolved crimes;

Whereas the pioneering initiatives of the Texas Rangers, such as the Interdiction for the Protection of Children program, have resulted in invitations from law enforcement agencies throughout the United States and internationally, from Australia to Great Britain, to help initiate similar law enforcement initiatives;

Whereas the Texas Rangers have partnered with Federal agencies on numerous public safety and relief initiatives, such as in the aftermath of Hurricane Harvey, and with the Federal Bureau of Investigation on numerous occasions, including the pursuit of Bonnie Parker and Clyde Barrow in 1934;

Whereas the Texas Rangers have captured the imagination of the public and have become icons of United States popular culture;

Whereas songs, books, and novels have been written about the Texas Rangers since the 1840s;

Whereas the Texas Rangers are the largest and oldest multimedia ''franchise'' of the United States, dating back to the earliest years of film, radio, and television; and

Whereas the Texas Rangers have been featured in more than 225 movies and 7 television series: Now, therefore, be it

Resolved, That the Senate—

(1) commemorates the 200th anniversary of the Texas Rangers;

(2) applauds the significant achievements of the Texas Rangers;

(3) commends the thousands of men and women who have served in both field and command ranks of the Texas Rangers, both before and after Texas statehood, including the current 234 full-time employees consisting of 166 commissioned Texas Rangers and 68 support personnel;

(4) remembers the 149 Texas Rangers who valiantly lost their lives in the performance of their duties; and

(5) recognizes the critical role the Texas Rangers have played throughout the history of Texas, beginning with Stephen F. Austin, the ''Father of Texas'', who organized the Texas Rangers for the common defense over the range of the Texas Republic.

SENATE RESOLUTION 87—RECOGNIZING THE NATIONAL DEBT AS A THREAT TO NATIONAL SECURITY

Mr. BRAUN (for himself, Mrs. BLACKBURN, Mr. CASSIDY, and Mr. SCOTT of Florida) submitted the following resolution; which was referred to the Committee on Finance:

S. RES. 87

Whereas, in January 2023, the total public debt outstanding was more than $31,000,000,000,000, resulting in a total interest expense of more than $717,611,000,000 for fiscal year 2022;

Whereas, in January 2023, the total public debt as a percentage of gross domestic product was about 121 percent;

Whereas, in January 2023, the debt owed per citizen was $94,240 and $246,864 per taxpayer;

Whereas the last Federal budget surplus occurred in 2001;

Whereas, in fiscal year 2022, Federal tax receipts totaled $4,896,000,000,000, but Federal outlays totaled $6,272,000,000,000, leaving the Federal Government with a 1-year deficit of $1,376,000,000,000;

Whereas the Senate failed to pass a balanced budget for fiscal year 2022 and failed to restore regular order to the legislative process by not allowing Senators to offer and debate amendments;

Whereas the Social Security and Medicare Boards of Trustees project that the Federal Hospital Insurance Trust Fund will be depleted in 2028;

Whereas the Social Security and Medicare Boards of Trustees project that the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund will be depleted in 2034;

Whereas improvements in the business climate in populous countries, and aging populations around the world, will likely contribute to higher global interest rates;

Whereas more than $7,270,000,000,000 of Federal debt is owned by individuals not located in the United States, including more than $870,000,000,000 of which is owned by individuals in China;

Whereas China and the European Union are developing alternative payment systems to weaken the dominant position of the United States dollar as a reserve currency;

Whereas rapidly increasing interest rates would squeeze all policy priorities of the United States, including defense policy and foreign policy priorities;

Whereas, on April 12, 2018, former Secretary of Defense James Mattis warned that ''any Nation that can't keep its fiscal house in order eventually cannot maintain its military power'';

Whereas, on March 6, 2018, Director of National Intelligence Dan Coats warned: ''Our continued plunge into debt is unsustainable and represents a dire future threat to our economy and to our national security'';

Whereas, on November 15, 2017, former Secretaries of Defense Leon Panetta, Ash Carter, and Chuck Hagel warned: ''Increase in the debt will, in the absence of a comprehensive budget that addresses both entitlements and revenues, force even deeper reductions in our national security capabilities''; and

Whereas, on September 22, 2011, former Chairman of the Joint Chiefs of Staff Michael Mullen warned: ''I believe the single, biggest threat to our national security is debt'': Now, therefore, be it

Resolved, That the Senate—

(1) recognizes that the national debt is a threat to the national security of the United States;

(2) realizes that deficits are unsustainable, irresponsible, and dangerous;

(3) commits to restoring regular order in the appropriations process; and

(4) commits to preventing the looming fiscal crisis faced by the United States.

SENATE RESOLUTION 88—ESTABLISHING APPROPRIATE THRESHOLDS FOR CERTAIN BUDGET POINTS OF ORDER IN THE SENATE, AND FOR OTHER PURPOSES

Mr. BRAUN submitted the following resolution; which was referred to the Committee on the Budget:

S. RES. 88

Resolved,

SECTION 1. SHORT TITLE.

This resolution may be cited as the ''Make Rules Matter Resolution''.

SEC. 2. THRESHOLDS FOR BUDGET POINTS OF ORDER.

(a) THRESHOLD FOR POINT OF ORDER AGAINST EMERGENCY DESIGNATIONS.—

(1) DEFINITION.—In this subsection, the term ''emergency designation point of order'' means a point of order raised under—

(A) section 314(e) of the Congressional Budget Act of 1974 (2 U.S.C. 645(e));

(B) section 4(g)(3) of the Statutory Pay-As-You-Go Act of 2010 (2 U.S.C. 933(g)(3)); or

(C) section 4001(a) of S. Con. Res. 14 (117th Congress), the concurrent resolution on the budget for fiscal year 2022.

(2) WAIVER.—In the Senate, an emergency designation point of order may be waived or suspended only by the affirmative vote of two-thirds of the Members, duly chosen and sworn.

(3) APPEAL.—In the Senate, an affirmative vote of two-thirds of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on an emergency designation point of order.

(b) THRESHOLD FOR LARGE BUDGET IMPACT FOR CERTAIN CONGRESSIONAL BUDGET ACT OF 1974 POINTS OF ORDER.—

(1) IN GENERAL.—A point of order described in paragraph (3) may be waived or suspended

in the Senate only by an affirmative vote of two-thirds of the Members, duly chosen and sworn.

(2) APPEAL.—In the Senate, an affirmative vote of two-thirds of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order described in paragraph (3).

(3) DESCRIPTION OF LARGE BUDGET IMPACT.—A point of order described in this paragraph is a point of order under section 302(f)(2) or 311(a)(2)(A) of the Congressional Budget Act of 1974 (2 U.S.C. 633(f)(2), 642(a)(2)(A)) against legislation that would, within the time periods applicable to the point of order, as determined by the Chairman of the Committee on the Budget of the Senate, cause budget authority or outlays to exceed the applicable allocation, suballocation, level, or aggregate by more than $5,000,000,000.

(c) DE MINIMIS BUDGET IMPACT.—For a violation for which the absolute value of the violation is not more than $500,000, a point of order shall not lie—

(1) under the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 621 et seq.) (except for a point of order under section 302 or 311 of such Act (2 U.S.C. 633, 642)); or

(2) under any concurrent resolution on the budget.

(d) THRESHOLD FOR INCREASING SHORT-TERM DEFICITS.—

(1) REDUCTION IN NET INCREASE IN THE DEFICIT.—In the Senate, section 404(a) of S. Con. Res. 13 (111th Congress), the concurrent resolution on the budget for fiscal year 2010, shall be applied by substituting ''$1,000,000,000'' for ''$10,000,000,000''.

(2) WAIVER AND APPEAL FOR LARGE BUDGET IMPACT IN THE SENATE.—

(A) WAIVER.—In the Senate, section 404(a) of S. Con. Res. 13 (111th Congress), the concurrent resolution on the budget for fiscal year 2010, may be waived or suspended by the affirmative vote of two-thirds of the Members, duly chosen and sworn, if the net increase in the deficit in any fiscal year exceeds $10,000,000,000.

(B) APPEAL.—In the Senate, an affirmative vote of two-thirds of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under section 404(a) of S. Con. Res. 13 (111th Congress), the concurrent resolution on the budget for fiscal year 2010, if the net increase in the deficit in any fiscal year exceeds $10,000,000,000.

(e) THRESHOLD FOR INCREASING LONG-TERM DEFICITS.—

(1) REDUCTION IN NET INCREASE IN THE DEFICIT.—In the Senate, subsections (a) and (b)(1) of section 3101 of S. Con. Res. 11 (114th Congress), the concurrent resolution on the budget for fiscal year 2016, shall each be applied by substituting ''$1,000,000,000'' for ''$5,000,000,000''.

(2) WAIVER AND APPEAL FOR LARGE BUDGET IMPACT IN THE SENATE.—

(A) WAIVER.—In the Senate, section 3101(b)(1) of S. Con. Res. 11 (114th Congress), the concurrent resolution on the budget for fiscal year 2016, may be waived or suspended by the affirmative vote of two-thirds of the Members, duly chosen and sworn, if the net increase in on-budget deficits in any 10-fiscal-year period exceeds $10,000,000,000.

(B) APPEAL.—In the Senate, an affirmative vote of two-thirds of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under section 3101(b)(1) of S. Con. Res. 11 (114th Congress), the concurrent resolution on the budget for fiscal year 2016, if the net increase in on-budget deficits in any 10-fiscal-year period exceeds $10,000,000,000.

SENATE RESOLUTION 89—RECOGNIZING THE DUTY OF THE SENATE TO ABANDON MODERN MONETARY THEORY AND RECOGNIZING THAT THE ACCEPTANCE OF MODERN MONETARY THEORY WOULD LEAD TO HIGHER DEFICITS AND HIGHER INFLATION

Mr. BRAUN (for himself, Mr. CASSIDY, and Mr. SCOTT of Florida) submitted the following resolution; which was referred to the Committee on Banking, Housing, and Urban Affairs:

S. RES. 89

Whereas noted economists from across the political spectrum have warned that the implementation of Modern Monetary Theory (referred to in this preamble as ''MMT'') would pose a clear danger to the economy of the United States;

Whereas, in July 2019, Zach Moller, deputy director of the economic program at Third Way, wrote in a memo the problems associated with MMT, including that—

(1) ''Under an MMT regime, policymakers would need to respond to inflation by doing two of the most unpopular things ever: raising taxes and cutting spending. . . . We can easily imagine divided government's paralysis to fight inflation: Republicans refusing to raise taxes and Democrats refusing to cut spending.'';

(2) MMT ''ends our central non-political economic manager'' and ''markets trust the Federal Reserve and, as a result, businesses and individuals have well-anchored inflation expectations. . . . To solve the challenges higher interest rates create, including a possible interest financing spiral, MMT generally says that the Fed will be tasked with keeping interest rates low by making the Federal government, through the Fed, the consistent (if not the primary) purchaser of bonds. This is a different mission for the Fed than it has now. The Fed would no longer be tasked with intervening to keep prices stable because it would be too busy buying bonds. Bond purchases by the Fed generally increase inflation. Thus, the Fed would no longer be an independent manager of the economy.''; and

(3) MMT ''destroys foreign confidence in America's finances. . . . Holders of U.S. debt (in the form of treasuries) expect stability in value, a return from their investments, and the ability to be paid back. MMT blows that up. Bondholders would no longer be assured a return on their investment, and it will no longer be as desirable for our creditors to hold U.S. debt.'';

Whereas, on May 17, 2019, Joel Griffith, a research fellow at The Heritage Foundation, wrote in an article entitled ''The Absurdity of Modern Monetary Theory'' the following: ''There is no free lunch. We will pay either through the visible burden of direct taxation, the hidden tax of inflation, or higher borrowing costs (as the government competes with businesses for available capital). Such realities might not make for a great stump speech, but facing them squarely now can save us a lot of headaches down the road.'';

Whereas, on March 25, 2019, Janet Yellen, former Chair of the Board of Governors of the Federal Reserve System, disagreed with those individuals promoting MMT who suggest that ''you don't have to worry about interest-rate payments because the central bank can buy the debt'', stating: ''That's a very wrong-minded theory because that's how you get hyper-inflation.'';

Whereas former Secretary of the Treasury and Director of the National Economic Council Lawrence H. Summers—

(1) on March 5, 2019, wrote in an opinion piece in the Washington Post entitled ''The left's embrace of modern monetary theory is a recipe for disaster'' that, ''contrary to the claims of modern monetary theorists, it is not true that governments can simply create new money to pay all liabilities coming due and avoid default. As the experience of any number of emerging markets demonstrates, past a certain point, this approach leads to hyperinflation.''; and

(2) on March 4, 2019, said that—

(A) MMT is fallacious at multiple levels;

(B) past a certain point, MMT leads to hyperinflation; and

(C) a policy of relying on a central bank to finance government deficits, as advocated by MMT theorists, would likely result in a collapsing exchange rate;

Whereas, on February 26, 2019, Jerome Powell, Chair of the Board of Governors of the Federal Reserve System, stated: ''The idea that deficits don't matter for countries that can borrow in their own currency I think is just wrong.'';

Whereas, on February 24, 2019, Matt Bruenig, founder of the People's Policy Project, wrote in an article entitled ''What's the Point of Modern Monetary Theory'' that ''the real point of MMT seems to be to deploy misleading rhetoric with the goal of deceiving people about the necessity of taxes in a social democratic system. If successful, these word games might loosen up fiscal and monetary policy a bit in the short term. But insofar as getting government spending permanently up to 50 percent of GDP really will require substantially more taxes in the medium and long term.'';

Whereas, on February 21, 2019, Doug Henwood, a journalist and economic analyst, wrote in an article in Jacobin entitled ''Modern Monetary Theory Isn't Helping'' that ''MMT's lack of interest in the relationship between money and the real economy causes adherents to overlook the connection between taxing, spending, and the allocation of resources'';

Whereas, on January 28, 2019, in a question and answer session with James Pethokoukis of AEIdeas, Stan Veuger, visiting lecturer of economics at Harvard University, stated that, ''if you take MMTers at their word in the most aggressive sense, then what you would see is a massive debt finance expansion of the welfare state with Medicare for All, with a jobs guarantee, and with concerns about inflation being deferred entirely to elected officials who would have to raise taxes to keep it under control. I think in a scenario like that, we do run a risk of going back to the 1970s pre-Volker style macroeconomics and I think that would be bad.'';

Whereas, on January 17, 2019, Michael Strain, Director of Economic Policy Studies at AEI, wrote in an opinion article in Bloomberg entitled ''Modern Monetary Theory Is a Joke That's Not Funny'' that ''if you thought from the start that the whole idea sounded like lunacy, you were right, even if it's possible to admit some sliver of sympathy for it'';

Whereas Paul Krugman, winner of the 2008 Nobel Memorial Prize in Economic Sciences—

(1) on March 1, 2019, posted on Twitter a point-by-point rebuttal to an article entitled ''The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy'' by Stephanie Kelton, which concluded with Krugman tweeting that—

(A) ''Sorry, but this is just a mess. Kelton's response misrepresents standard macroeconomics, my own views, the effects of interest rates, and the process of money creation.'';

(B) ''Otherwise I guess it's all fine.''; and

(C) ''See what I mean about Calvinball?''; and

(2) on February 12, 2019, wrote in an opinion piece in the New York Times the following: ''And debt can't go to infinity—it can't exceed total wealth, and in fact as debt gets ever higher people will demand ever-increasing returns to hold it. So at some point the government would be forced to run large enough primary (non-interest) surpluses to limit debt growth.'';

Whereas, on November 15, 2019, Jason Fichtner and Kody Carmody of the Bipartisan Policy Center wrote in a report entitled ''Does the National Debt Matter? A Look at Modern Monetary Theory, or MMT'' that—

(1) ''deficits do have a role to play in public finance'' but, ''as interest rates rise, some private-sector projects no longer make financial sense and are forgone. Crowding out private investment ultimately leads to a misallocation of resources away from their most economically productive use, hampering economic growth. . . . The more we borrow today, the more expensive it will be to continue borrowing in the future. At some point, debt has to be paid back. There is no free lunch.'';

(2) ''MMT underestimates other downside risks of debt'' and ''MMT advocates note that inflation is the only restraint on debt-financed spending. This leads some to conclude that under the theory of MMT, debt is not a concern, as governments can simply print more money to pay off debt. Such a theory is roundly rejected by academic economists on both sides of the political spectrum.'';

(3) printing money has costs, including a ''loss of credibility for the government'', an ''inflation risk'', and exacerbating ''exchange rates'';

(4) ''MMT assumes away politics'' and puts ''the onus of inflation control on Congress, the institution that lately seems worst-equipped to handle it. The Federal Reserve—which has spent a long time building extensive credibility in its commitment to fight inflation—would be largely sidelined.'';

(5) ''even MMT admits that deficits and debt matter'', noting that Stephanie Kelton has stated: ''I would never take the position that we ought to move forward, passing legislation with no offsets, to do Green New Deals, and Jobs Guarantees, and Medicare for All. In the end, MMT's arguments largely boil down to a disagreement over how much room there is to borrow without accelerating inflation.''; and

(6) it is ''hard to pin MMT down on anything at all'' due, in large part, to the fact that ''prominent supporters of MMT have taken vague, sometimes contradictory positions: When politicians make claims about paying for the Green New Deal through MMT, stay silent, and when economists criticize this view, claim you are being misunderstood.'';

Whereas the March 2019 report entitled ''How Reliable is Modern Monetary Theory as a Guide to Policy?'' by Scott Sumner and Patrick Horan of the Mercatus Center at George Mason University found that—

(1) MMT—

(A) has a flawed model of inflation, which overestimates the importance of economic slack;

(B) overestimates the revenue that can be earned from the creation of money;

(C) overestimates the potency of fiscal policy, while underestimating the effectiveness of monetary policy;

(D) overestimates the ability of fiscal authorities to control inflation; and

(E) contains too few safeguards against the risks of excessive public debt; and

(2) an MMT agenda of having fiscal authorities manage monetary policy would run the risk of—

(A) very high debts;

(B) very high inflation; or

(C) very high debts and very high inflation, each of which may be very harmful to the broader economy;

Whereas the January 2020 working paper entitled ''A Skeptic's Guide to Modern Monetary Theory'' by N. Gregory Mankiw stated: ''Put simply, MMT contains some kernels of truth, but its most novel policy prescriptions do not follow cogently from its premises.'';

Whereas the January 2019 report entitled ''Modern Monetary Theory and Policy'' by Stan Veuger of the American Enterprise Institute warned that ''hyperinflation becomes a real risk'' when a government attempts to pay for massive spending by printing money; and

Whereas the September 2018 report entitled ''On Empty Purses and MMT Rhetoric'' by George Selgin of the Cato Institute warned that—

(1) when it comes to the ability of Congress to rely on the Treasury to cover expenditures, Congress is, in 1 crucial respect, more constrained than an ordinary household or business is when that household or business relies on a bank to cover expenditures because, if Congress is to avoid running out of money, Congress cannot write checks in amounts exceeding the balances in the general account of the Treasury; and

(2) MMT theorists succeed in turning otherwise banal truths about the workings of contemporary monetary systems into novel policy pronouncements that, although tantalizing, are false: Now, therefore, be it

Resolved, That the Senate—

(1) realizes that large deficits are unsustainable, irresponsible, and dangerous; and

(2) recognizes—

(A) that the acceptance of Modern Monetary Theory would lead to higher deficits and higher inflation; and

(B) the duty of the Senate to abandon Modern Monetary Theory in favor of mainstream fiscal and monetary frameworks.

SENATE RESOLUTION 90—RECOGNIZING THE SIGNIFICANCE OF ENDOMETRIOSIS AS AN UNMET CHRONIC DISEASE FOR WOMEN AND DESIGNATING MARCH 2023 AS ''ENDOMETRIOSIS AWARENESS MONTH''

Ms. DUCKWORTH (for herself, Mrs. CAPITO, Ms. CANTWELL, Ms. KLOBUCHAR, Mr. BOOKER, Mr. BLUMENTHAL, and Ms. HIRONO) submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 90

Whereas more than 6,500,000 women in the United States are living with endometriosis;

Whereas endometriosis is a chronic disease that can be painful and debilitating and affects—

(1) approximately 190,000,000 women throughout the world;

(2) an estimated 1 in 10 women of reproductive age in the United States; and

(3) primarily women in their 30s and 40s, but can affect any woman who menstruates;

Whereas the cause of endometriosis is not known, but risk factors include—

(1) having a mother, sister, or daughter with endometriosis;

(2) menstrual cycles that started at an early age;

(3) menstrual cycles that are short; and

(4) periods that are heavy and last more than 7 days;

Whereas endometriosis occurs when tissue similar to that of the lining of the uterus begins to grow outside the uterus;

Whereas, for many women, the only way currently available to be certain of an endometriosis diagnosis is to have a surgical procedure known as a laparoscopy;

Whereas the primary symptoms of endometriosis include pain and infertility, and many women with endometriosis live with debilitating, chronic pain;

Whereas symptoms of anxiety and depression are common among women with endometriosis, with reported rates as high as 75 to 90 percent;

Whereas, although endometriosis is one of the most common gynecological disorders in the United States, there is a lack of awareness and prioritization of endometriosis as an important health issue for women;

Whereas women can suffer from endometriosis for up to 10 years before being properly diagnosed;

Whereas approximately 75 percent of women with endometriosis experience a misdiagnosis;

Whereas the management of symptoms of endometriosis may include low-dose oral contraceptives, intrauterine devices (IUDs), painkillers, including nonsteroidal anti-inflammatory drugs (NSAIDs), and gonadotropin-releasing hormone (GnRH) agonist therapy;

Whereas in vitro fertilization (IVF) is often recognized as the best option for patients experiencing endometriosis-associated infertility and for whom initial surgery was unsuccessful;

Whereas endometriosis is associated with increased health care costs and poses a substantial burden to patients in the health care system;

Whereas, in the United States, the estimated average direct health care cost associated with endometriosis per patient is more than $13,000 per year;

Whereas 40 percent of women with endometriosis report impaired career growth due to endometriosis, and approximately 50 percent of women with endometriosis experience a decreased ability to work;

Whereas the Centers for Disease Control and Prevention found that the average number of ''bed days'' for patients with endometriosis was 18 days per year;

Whereas women with endometriosis can lose 11 hours per workweek through lost productivity;

Whereas the physical and psychological impact of endometriosis affects all domains of life, including social life, relationships, and work;

Whereas medical societies and patient groups have expressed the need for greater public attention and updated resources targeted to public education about this unmet health need for women;

Whereas there is a need for more research and updated guidelines to treat endometriosis;

Whereas there is an ongoing need for additional clinical research and treatment options to manage this debilitating disease; and

Whereas there is no known cure for endometriosis: Now, therefore, be it

Resolved, That the Senate—

(1) designates March 2023 as ''Endometriosis Awareness Month'';

(2) recognizes the importance of endometriosis as a health issue for women that requires far greater attention, public awareness, and education about the disease;

(3) encourages the Secretary of Health and Human Services, the Secretary of Defense, and the Secretary of Veterans Affairs—

(A) to provide information to women, patients, and health care providers with respect to endometriosis, including available screening tools and treatment options, with a goal of improving the quality of life and

health outcomes of women affected by endometriosis;

(B) to conduct additional research on endometriosis and possible clinical options; and

(C) to update information, tools, and studies currently available with respect to helping women live with endometriosis; and

(4) respectfully requests that the Secretary of the Senate transmit an enrolled copy of this resolution to the Secretary of Health and Human Services.

AUTHORITY FOR COMMITTEES TO MEET

Mr: BROWN. Madam President, I have eight requests for committees to meet during today's session of the Senate. They have the approval of the Majority and Minority Leaders.

Pursuant to rule XXVI, paragraph 5(a), of the Standing Rules of the Senate, the following committees are authorized to meet during today's session of the Senate:

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

The Committee on Agriculture, Nutrition, and Forestry is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 10 a.m., to conduct a hearing.

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

The Committee on Agriculture, Nutrition, and Forestry is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 2 p.m., to conduct a business meeting.

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

The Committee on Commerce, Science, and Transportation is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 10 a.m., to conduct a hearing on a nomination.

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

The Committee on Environment and Public Works is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 10 a.m., to conduct a hearing on a nomination.

COMMITTEE ON FOREIGN RELATIONS

The Committee on Foreign Relations is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 2:30 p.m., to conduct a hearing on nominations.

COMMITTEE ON THE JUDICIARY

The Committee on the Judiciary is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 10 a.m., to conduct a hearing.

COMMITTEE ON VETERANS' AFFAIRS

The Committee on Veterans' Affairs is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 10 a.m., to conduct a joint hearing.

SELECT COMMITTEE ON INTELLIGENCE

The Select Committee on Intelligence is authorized to meet during the session of the Senate on Wednesday, March 1, 2023, at 2:30 p.m., to conduct a closed briefing.

OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS

Mr. SCHUMER. Madam President, I ask unanimous consent that the notices of issuance of final regulations from the Office of Congressional Workplace Rights be printed in the RECORD.

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

FEBRUARY 28, 2023.

Re Notice of Issuance of Final Regulations Pursuant to the Congressional Accountability Act.

Hon. PATTY MURRAY,
President Pro Tempore of the U.S. Senate, Washington, DC.

DEAR MADAM PRESIDENT: On December 14, 2022, the House of Representatives passed House Resolution 1516, thereby approving the regulations adopted by the Board of Directors of the Office of Congressional Workplace Rights that were promulgated under section 203(c)(1) of the Congressional Accountability Act (CAA), 2 U.S.C. §1313(c)(1), to the extent such regulations are consistent with the provisions of the CAA. The approved regulations govern minimum wage, overtime, and exemptions thereto for employees in the House.

Section 304 of the CAA, (2 U.S.C. §1384) provides that, after congressional approval of substantive regulations, the Board shall submit the regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate. Accordingly, on behalf of the Board of Directors of the Office of Congressional Workplace Rights, I am transmitting the enclosed Notice of Issuance of Final Regulations, together with a copy of the final regulations.

Pursuant to section 304, the Board also requests that the enclosed notice be published in the *Congressional Record* on the first day on which both the House and the Senate are in session following this transmittal.

Sincerely,

BARBARA CHILDS WALLACE,
Chair of the Board of Directors,
Office of Congressional Workplace Rights.

Attachment.

NOTICE OF ISSUANCE OF FINAL REGULATIONS

The Congressional Accountability Act of 1995 (CAA) was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of 14 federal labor and employment law statutes to covered congressional employees and employing offices. Section 203 of the CAA addresses the application of (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (a)(1) and (d), 207, 212(c)) to covered employees.

Section 203(c)(1) of the Act requires the Board of Directors of the Office of Congressional Workplace Rights (Board) to issue regulations to implement section 203. Section 203(c)(3) of the CAA further requires that the Board issue regulations for covered employees whose work schedules directly depend on the schedule of the House of Representatives or the Senate that shall be comparable to the provisions in the Fair Labor Standards Act of 1938 [29 U.S.C. 201 et seq.] that apply to employees who have irregular work schedules.

The Board, pursuant to section 203(c)(1), adopted and submitted the Regulations Relating to the House of Representatives and Its Employing Offices for publication in the *Congressional Record*. Publication was effectuated on September 28, 2022. The Regulations are attached to this notice.

Pursuant to section 304 of the CAA, 2 U.S.C. §1384, approved regulations become effective not less than 60 days after the date on which they are published in the *Congressional Record*. Although the Board has the authority to provide for an earlier effective date for good cause found, the Board does not find good cause to provide for an earlier effective date for these regulations. Therefore, these regulations will become effective 60 days after the date on which they are published in the *Congressional Record*.

Accordingly, having now been approved by the House, the Board submits its regulations to the Speaker of the House of Representatives for publication in the *Congressional Record*.

BARBARA CHILDS WALLACE,
Chair of the Board of Directors,
Office of Congressional Workplace Rights.

H SERIES OVERTIME EXEMPTION REGULATIONS

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, AND COMPUTER EMPLOYEES

SUBPART A—GENERAL REGULATIONS

Sec.
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541.2 Job titles insufficient.
541.3 Scope of the section 13(a)(1) exemptions.
541.4 Other laws and collective bargaining agreements.

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SUBPART F—Reserved

SUBPART G—SALARY REQUIREMENTS

541.600 Amount of salary required.
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SUBPART H—DEFINITIONS AND MISCELLANEOUS PROVISIONS

541.700 Primary duty.
541.701 Customarily and regularly.
541.702 Exempt and nonexempt work.
541.703 Directly and closely related.
541.704 Use of manuals.
541.705 Trainees.

SUBPART A—GENERAL REGULATIONS (§§541.0–541.4)

§541.0 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) and applies to covered employees by virtue of section 225(e)(1) of the CAA, as amended, 2 U.S.C. 1361(e)(1). Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees and applies to covered employees by virtue of section 225(e)(1) of the CAA, as amended, 2 U.S.C. 1361(e)(1).

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions.

(c) Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools). The equal pay provisions in section 6(d) of the Fair Labor Standards Act are administered and enforced by the Office of Congressional Workplace Rights.

§541.1 Terms used in regulations.

Act means the Fair Labor Standards Act of 1938, as amended. CAA means Congressional Accountability Act of 1995, as amended. Office means the Office of Congressional Workplace Rights. Employee means a ''covered employee'' as defined in section 101(a)(3) through (a)(8) of the CAA, 2 U.S.C. 1301(a)(3) through (a)(8), but not an ''intern'' as defined in section 203(a)(2) of the CAA, 2 U.S.C. 1313(a)(2). Employer, company, business, or enterprise each mean an ''employing office'' as defined in section 101(a)(9) of the CAA, 2 U.S.C. 1301(a)(9).

§541.2 Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

§541.3 Scope of the section 13(a)(1) exemptions.

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other ''blue collar'' workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt ''blue collar'' employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, investigators, inspectors, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the employing office in which the employee is employed or a customarily recognized department or subdivision thereof as required under §541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers, constituents or stakeholders as required under §541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under §541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

§541.4 Other laws and collective bargaining agreements.

The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.

SUBPART B—EXECUTIVE EMPLOYEES (§§541.100–541.106)

§541.100 General rule for executive employees.

(a) The term ''employee employed in a bona fide executive capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis pursuant to §541.600 at a rate of not less than $684 per week, exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof;

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

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase ''salary basis'' is defined at §541.602; ''board, lodging or other facilities'' is defined at §541.606; ''primary duty'' is defined at §541.700; and ''customarily and regularly'' is defined at §541.701.

§541.101 Reserved.

§541.102 Management.

Generally, ''management'' includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

§541.103 Department or subdivision.

(a) The phrase ''a customarily recognized department or subdivision'' is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.

(b) When an employing office has more than one location, the employee in charge of each location may be considered in charge of a recognized subdivision of the employing office.

(c) A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

§ 541.104 Two or more other employees.

(a) To qualify as an exempt executive under § 541.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase ''two or more other employees'' means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

(b) The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee cannot be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

§ 541.105 Particular weight.

To determine whether an employee's suggestions and recommendations are given ''particular weight,'' factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have ''particular weight'' even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

§ 541.106 Concurrent duties.

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

SUBPART C—ADMINISTRATIVE EMPLOYEES (§§ 541.200–541.204)

§ 541.200 General rule for administrative employees.

(a) The term ''employee employed in a bona fide administrative capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate of not less than $684 per week, exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, constituents or stakeholders; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers, constituents or stakeholders. The phrase ''directly related to the management or general business operations'' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the employing office, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers, constituents and/or stakeholders. Thus, for example, employees acting as advisers or consultants to their employer's customers, constituents or stakeholders (as tax experts or financial consultants, for example) may be exempt.

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term ''matters of significance'' refers to the level of importance or consequence of the work performed.

(b) The phrase ''discretion and independent judgment'' must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the employing office; whether the employee performs work that affects business operations of the employing office to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the employing office; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the employing office on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning longer short-term employing office objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the employing office in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term ''discretion and independent judgment'' does not require that the decisions made by an

employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the manager of an employing office may be subject to review by higher employing office officials who may approve or disapprove these policies. The department director who has made a study of the operations of a department and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is approved.

(d) An employer's volume of work may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. See also §541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a ''statistician.''

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

§541.203 Administrative exemption examples.

(a) Employees who investigate claims generally meet the duties requirements for the administrative exemption if their duties include activities such as interviewing witnesses; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in financial services generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a senior management official of an employing office generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of an employing office and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who ''screen'' applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the employing office. The minimum standards are usually set by the exempt human resources manager or other employing office officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other employing office officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the employing office on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for materials in excess of the contemplated needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) **Reserved.**

(j) Inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

§541.204 Educational establishments.

(a) The term ''employee employed in a bona fide administrative capacity'' in section 13(a)(1) of the Act also includes employees:

(1) Compensated on a salary or fee basis at a rate of not less than $684 per week, exclusive of board, lodging, or other facilities; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term ''educational establishment'' means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term ''other educational establishment'' includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase ''performing administrative functions directly related to academic instruction or training'' means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and

grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under §541.200 or under other sections of this part, provided the requirements for such exemptions are met.

SUBPART D—PROFESSIONAL EMPLOYEES (§§ 541.300–541.304)

§541.300 General rule for professional employees.

(a) The term ''employee employed in a bona fide professional capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis pursuant to §541.600 at a rate of not less than $684 per week, exclusive of board, lodging or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term ''salary basis'' is defined at §541.602; ''fee basis'' is defined at §541.605; ''board, lodging or other facilities'' is defined at §541.606; and ''primary duty'' is defined at §541.700.

§541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase ''work requiring advanced knowledge'' means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase ''field of science or learning'' includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase ''customarily acquired by a prolonged course of specialized intellectual instruction'' restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word ''customarily'' means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(e)(1) Registered or certified medical technologists. Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

(2) Nurses. Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(3) Dental hygienists. Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(4) Physician assistants. Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.

(5) Accountants. Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) Chefs. Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) Paralegals. Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) Athletic trainers. Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) **Reserved.**

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in paragraphs (e)(1), (e)(3), (e)(4) and (e)(8) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

§541.302 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

(b) To qualify for exemption as a creative professional, the work performed must be ''in a recognized field of artistic or creative endeavor.'' This includes such fields as music, writing, acting and the graphic arts.

(c) The requirement of ''invention, imagination, originality or talent'' distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary

widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an ''animator'' of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

§ 541.303 Teachers.

(a) The term ''employee employed in a bona fide professional capacity'' in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term ''educational establishment'' is defined in §541.204(b).

(b) Exempt teachers include, but are not limited to: Regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of §541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

§ 541.304 Practice of law or medicine.

(a) The term ''employee employed in a bona fide professional capacity'' in section 13(a)(1) of the Act also shall mean:

(1) Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) Any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(b) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term ''physicians'' includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(d) The requirements of §541.300 and subpart G (salary requirements) of this part do not apply to the employees described in this section.

SUBPART E–COMPUTER EMPLOYEES (§§ 541.400–541.402)

§ 541.400 General rule for computer employees.

(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than $684 per week, exclusive of board, lodging, or other facilities.

The section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate of not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The term ''salary basis'' is defined at §541.602; ''fee basis'' is defined at §541.605; ''board, lodging or other facilities'' is defined at §541.606; and ''primary duty'' is defined at §541.700.

§ 541.401 Computer manufacture and repair.

The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in §541.400(b), are also not exempt computer professionals.

§ 541.402 Executive and administrative computer employees.

Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under subpart B or subpart C of this part. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers, constituents or stakeholders. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption.

SUBPART F—Reserved

SUBPART G—SALARY REQUIREMENTS (§§ 541.600–541.607)

§ 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $684 per week, exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in §541.605.

(b) The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. For example, the $684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than $1,368, semimonthly on a salary basis of not less than $1,482, or monthly on a salary basis of not less than $2,964. However, the shortest

period of payment that will meet this compensation requirement is one week.

(c) In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in §541.204(a)(1).

(d) In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in §541.400(b).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (see §541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (see §541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (see §541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

§541.601 Highly compensated employees.

(a)(1) Beginning on the effective date of these Substantive Regulations, an employee with total annual compensation of at least $107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.

(2) Where the annual period covers periods both prior to and after the effective date of these Substantive Regulations, the amount of total annual compensation due will be determined on a proportional basis.

(b)(1) ''Total annual compensation'' must include at least $684 per week paid on a salary or fee basis as set forth in §§541.602 and 541.605, except that §541.602(a)(3) shall not apply to highly compensated employees. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52–week period. Total annual compensation does not include board, lodging and other facilities as defined in §541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the amount specified in the applicable subsection of paragraph (a) by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, for a 52-week period, an employee may earn $90,000 in base salary, and the employer may anticipate that the employee also will earn $17,432 in other payments. However, in the final quarter of the year, the employee actually only earns $12,000 in other payments. In this situation, the employer may within one month after the end of the year make a payment of at least $5,432 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C, or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a pro rata portion of the minimum amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under §541.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

§541.602 Salary basis.

(a) General rule. An employee will be considered to be paid on a ''salary basis'' within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

(2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the employing office. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(3) Up to ten percent of the salary amount required by §541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply. This provision does not apply to highly compensated employees under §541.601.

(i) If by the last pay period of the 52-week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received is less than 52 times the weekly salary amount required by §541.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any such final payment made after the end of the 52-week period may count only toward the prior year's salary amount and not toward the salary amount in the year it was paid.

(ii) An employee who does not work a full 52-week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a pro rata portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment.

(b) Exceptions. The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in

good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

§ 541.603 Effect of improper deductions from salary.

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(b) If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

(c) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

(e) This section shall not be construed in an unduly technical manner so as to defeat the exemption.

§ 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $684 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $684 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $684 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $725 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $210 per shift without violating the $684-per-week salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

§ 541.605 Fee basis.

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a ''fee basis'' within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a ''fee'' is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by §§ 541.600(a) and 541.602(a), if the employee worked 40 hours. Thus, an artist paid $350 for a picture that took 20 hours to complete meets the $684 minimum salary requirement for exemption since earnings at this rate would yield the artist $700 if 40 hours were worked.

§ 541.606 Board, lodging or other facilities.

(a) To qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in § 541.600, ''exclusive of board, lodging or other facilities.'' The phrase ''exclusive of board, lodging or other facilities'' means ''free and clear'' or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption under this part 541. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.

(b) Regulations defining what constitutes ''board, lodging, or other facilities'' are contained in 29 CFR part 531. As described in 29 CFR 531.32, the term ''other facilities'' refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a

college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work.

§ 541.607—Reserved.

SUBPART H—DEFINITIONS AND MISCELLANEOUS PROVISIONS (§§ 541.700–541.710)

§ 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee's ''primary duty'' must be the performance of exempt work. The term ''primary duty'' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

§ 541.701 Customarily and regularly.

The phrase ''customarily and regularly'' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ''customarily and regularly'' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

§ 541.702 Exempt and nonexempt work.

The term ''exempt work'' means all work described in §§ 541.100, 541.101, 541.200, 541.300, 541.301, 541.302, 541.303, 541.304, and 541.400, and the activities directly and closely related to such work. All other work is considered ''nonexempt.''

§ 541.703 Directly and closely related.

(a) Work that is ''directly and closely related'' to the performance of exempt work is also considered exempt work. The phrase ''directly and closely related'' means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, ''directly and closely related'' work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work ''directly and closely related'' to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not ''directly and closely related'' if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(4) A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A manager who makes and administers the budget policy of the employing office, establishes spending limits for the employing office, and authorizes expenditures would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis, and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

§ 541.704 Use of manuals.

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

§ 541.705 Trainees.

The executive, administrative, professional, and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, or computer employee.

§ 541.706 Emergencies.

(a) An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

(b) An ''emergency'' does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

(1) **Reserved.**

(2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

(3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the location and of the executive's department, the nature of the work performed by the employing office, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

(4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

§ 541.707 Occasional tasks.

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: Whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice for the exempt employee to perform the task.

§ 541.708 Combination exemptions.

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

§ 541.709 Reserved.

§ 541.710 Effect of certain deductions on exempt employee pay.

(a) An employee who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

(1) Permission for its use has not been sought or has been sought and denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

FEBRUARY 28, 2023.

Re Notice of Issuance of Final Regulations Pursuant to the Congressional Accountability Act.

Hon. PATTY MURRAY,
President Pro Tempore of the U.S. Senate, Washington, DC.

DEAR MADAM PRESIDENT: On December 14, 2022, the House of Representatives adopted House Resolution 1516, thereby approving the regulations adopted by the Board of Directors of the Office of Congressional Workplace Rights that were promulgated under section 202(e)(1) of the Congressional Accountability Act (CAA), 2 U.S.C. § 1312(e)(1), to the extent such regulations are consistent with the provisions of the CAA. The approved regulations govern family and medical leave for employees in the House.

Section 304 of the CAA, (2 U.S.C. § 1384) provides that, after congressional approval of substantive regulations, the Board shall submit the regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate. Accordingly, on behalf of the Board of Directors of the Office of Congressional Workplace Rights, I am transmitting the enclosed Notice of Issuance of Final Regulations, together with a copy of the final regulations.

Pursuant to section 304, the Board also requests that the enclosed notice be published in the *Congressional Record* on the first day on which both the House and the Senate are in session following this transmittal.

Sincerely,

BARBARA CHILDS WALLACE,
Chair of the Board of Directors,
Office of Congressional Workplace Rights.

Attachment.

NOTICE OF ISSUANCE OF FINAL REGULATIONS

The Congressional Accountability Act of 1995 (CAA) was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of 14 federal labor and employment law statutes to covered congressional employees and employing offices. Section 202 of the CAA addresses the application of the Family and Medical Leave Act of 1993. Section 202(a) of the CAA applies the rights, protections, and responsibilities established under sections 101 through 105 of the Family and Medical Leave Act (29 U.S.C. 2611 through 2615) to employing offices, covered employees, and representatives of covered employees. Application of provisions of section 102 of the Family and Medical Leave Act is subject to section 202(d) of the CAA. Section 202(e) of the Act requires the Board of Directors of the Office of Congressional Workplace Rights (Board) to issue regulations to implement section 202.

The Board, pursuant to section 202(e)(1), adopted and submitted the Regulations Relating to the House of Representatives and Its Employing Offices for publication in the *Congressional Record*. Publication was effectuated on September 28, 2022. The Regulations are attached to this notice.

Pursuant to section 304 of the CAA, 2 U.S.C. § 1384, approved regulations become effective not less than 60 days after the date on which they are published in the *Congressional Record*. Although the Board has the authority to provide for an earlier effective date for good cause found, the Board does not find good cause to provide for an earlier effective date for these regulations. Therefore, these regulations will become effective 60 days after the date on which they are published in the *Congressional Record*.

Accordingly, having now been approved by the House, the Board submits its regulations to the Speaker of the House of Representatives and the President Pro Tem of the Senate for publication in the *Congressional Record*.

BARBARA CHILDS WALLACE,
Chair of the Board of Directors,
Office of Congressional Workplace Rights.

H SERIES REGULATIONS OF THE BOARD OF DIRECTORS OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS EXTENDING RIGHTS AND PROTECTIONS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, AS AMENDED

Part 825—Family and Medical Leave

§ 825.1 Purpose and scope.

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). See §825.102 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors (Board) of the Office of Congressional Workplace Rights, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of section 202 of the CAA except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) of section 202 of the CAA.''

(c) On December 20, 2019, Congress enacted the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, December 20, 2019) (FEPLA). FEPLA amended the FMLA to allow most Federal employees, including eligible employees in the legislative branch, to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in connection with the birth of an employee's son or daughter or for the placement of a son or daughter with an employee for adoption or foster care.

In order to implement FEPLA in the legislative branch, the Board is amending its substantive FMLA regulations pursuant to the CAA rulemaking procedures set forth at sections 202(d) and 304 of the CAA. The Secretary of Labor has not promulgated FEPLA regulations, however, because FEPLA does not extend PPL to private sector employees or other employees directly covered by FMLA title I. The Board has determined that these circumstances constitute good cause for modification of its substantive FMLA regulations in order to effectively implement FEPLA's rights and protections to covered employees in the legislative branch.

(d) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

(e) Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to recommend to Congress a method of approval for these regulations. As the Board has adopted the same regulations for the Senate, the House of Representatives, and the other covered entities and facilities, it therefore recommends that the adopted regulations be approved by concurrent resolution of the Congress.

SUBPART A—COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows eligible employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (See §825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employing office may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12–month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. Subject to §825.208(k), the employing office or a disbursing or other financial office may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

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

(d) The employing office generally has a right to advance notice from the employee. In addition, the employing office may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (See §§825.312 and 825.313)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the FMLA.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employing offices, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

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

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

§ 825.102 Definitions.

For purposes of this part:

(1) ADA means the Americans with Disabilities Act (42 U.S.C. 12101 et seq., as amended), as made applicable by the Congressional Accountability Act.

(2) Birth means the delivery of a child. When the term ''birth'' under this subpart is used in connection with the use of leave before birth, it refers to an anticipated birth.

CAA means the Congressional Accountability Act of 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 et seq., as amended).

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, title X, section 10002; 100 Stat. 227; 29 U.S.C. 1161–1168).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. See also § 825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

(1) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30–day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. See also § 825.115(a)(5).

(2) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. See also § 825.120.

(3) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered active duty or call to covered active duty status means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B). See also § 825.126(a).

Covered employee as defined in the CAA, means any employee of–(1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Congressional Workplace Rights; (9) the Library of Congress; (10) the Stennis Center for Public Service; (11) the Office of Technology Assessment; (12) the China Review Commission; (13) the Congressional Executive China Commission; (14) the Helsinki Commission; or (15) the United States Commission on International Religious Freedom.

Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See §825.127(b)(2).

Eligible employee as defined in the CAA, means:

(1) For purposes of leave under subparagraphs (a)(1) or (a)(2) of section §825.112 or subsections (A) or (B) of section 102(a)(1) of the FMLA a covered employee as defined in the CAA.

(2) For purposes of leave under subparagraphs (a)(3)–(6) of section §825.112 or subsections (C)–(F) of section 102(a)–(1) of the FMLA, a covered employee who has been employed for a total of at least 12 months in any employing office on the date on which any FMLA leave is to commence, except that an employing office need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, unless:

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office, but this section does not provide any greater entitlement to the employee than would be available under the USERRA, as made applicable by the CAA); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes); and

(3) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with an employing office during the previous 12–month period, except that:

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12–month period to meet the hours of service requirement);

(ii) To determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

(iii) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (3) of this section.

Employ means to suffer or permit to work.

Employee means an employee as defined by the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity. See the definition of Teacher in this section.

Employee of the Capitol Police means any member or officer of the Capitol Police.

Employee of the House of Representatives means an individual occupying a position the pay for which is disbursed by the Chief Administrative Officer of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the Members' Representational Allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employee of the Office of the Architect of the Capitol means any employee of the Office of the Architect of the Capitol or the Botanic Garden.

Employee of the Senate means any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under the definition of covered employee above.

Employing Office, as defined by the CAA, means:

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

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

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

(4) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, the Stennis Center for Public Service, the Office of Technology Assessment, the United States Commission on International Religious Freedom, the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. See also §825.209(a).

Family and medical leave means an employee's entitlement of up to 12 workweeks (or 26 workweeks in the case of leave under §825.127) of unpaid leave for certain family and medical needs, as prescribed under the FMLA, as made applicable by the CAA.

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.), as made applicable by the CAA.

FMLA means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 et seq., as amended), as made applicable by the CAA.

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA, as made applicable by the CAA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The FMLA, as made applicable by the CAA, defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Department of Labor to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives and clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(iv) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking,

cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of Teacher in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, birth, or placement, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Invitational travel authorization (ITA) or Invitational travel order (ITO) mean orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. See also §825.310(e).

Key employee means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite. See also §825.217.

Mental disability: See the definition of Physical or mental disability in this section.

Military caregiver leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. See also §825.127.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. See also §825.127(d)(3).

Office of Congressional Workplace Rights means the independent office established in the legislative branch under section 301 of the CAA (2 U.S.C. 1381).

Outpatient status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. See also §825.127(b)(1).

Parent means a biological, adoptive, step or foster father or mother or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' See also §825.127(d)(2).

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., as amended, provide guidance for these terms.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. See also §825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of §825.113 are met.

Serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. See also §825.127(c).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. See also §825.127(d)(1).

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. See also §825.126(a)(5).

Spouse means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

§825.103 Reserved.

§825.104 Covered employing offices.

The FMLA, as made applicable by the CAA, covers all employing offices. As used in the CAA, the term employing office means:

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

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

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

(d) The Office of Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, the Stennis Center for Public Service, the China Review Commission, the Congressional Executive China Commission,

the Helsinki Commission, the United States Commission on International Religious Freedom, and the Office of Technology Assessment.

§ 825.105 Reserved.

§ 825.106 Joint employer coverage.

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

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

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

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

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

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

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

(c) When employing offices employ a covered employee jointly, they may designate one of themselves to be the primary employing office, and the other or others to be the secondary employing office(s). Such a designation shall be made by written notice to the covered employee.

(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for giving required notices to the covered employee, providing FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office(s) may, subject to the limitations in § 825.216, be responsible for accepting the employee returning from FMLA leave.

(e) If employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in §§ 825.302 and 825.303, to whichever of these employing offices the employee chooses. If the employee makes a written request for restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may, subject to the limitations in § 825.216, be responsible for accepting the employee returning from FMLA leave.

§ 825.107 Reserved.

§ 825.108 Reserved.

§ 825.109 Reserved.

§ 825.110 Eligible employee, general rule.

(a) Subject to the exceptions provided in § 825.111, an eligible employee is a covered employee of an employing office who:

(1) Has been employed by any employing office for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.

(b) Any service on active duty (as defined in 29 U.S.C. 2611(14)) by a covered employee who is a member of the National Guard or Reserves shall be counted as time during which such employee has been employed in an employing office for purposes of paragraph (a)(1) and (2) of this section.

(c) The 12 months an employee must have been employed by any employing office need not be consecutive months, provided:

(1) Subject to the exceptions provided in paragraph (c)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by any employing office for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by any employing office for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by any employing office. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employing office's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months.

(4) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employing office (e.g., Federal Employees' Compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(5) Nothing in this section prevents employing offices from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employing office chooses to recognize such prior employment, the employing office must do so uniformly, with respect to all employees with similar breaks in service.

(d)(1) If an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached.

(2) Except as provided in paragraph (c)(3) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA), as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of work. The determining factor is the number of hours an employee has worked for one or more employing offices as defined by the CAA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked under the FLSA's principles, as made applicable by the CAA (2 U.S.C. 1313), may be used.

(3) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employing office added to any hours actually worked during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.

(4) In the event an employing office does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from the overtime requirements of the FLSA, as made applicable by the CAA and its regulations, the employing office has the burden of showing that the employee has not worked the requisite hours. An employing office must be able to clearly demonstrate, for example, that full time teachers (See § 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not covered or eligible for FMLA leave.

(e) The determination of whether an employee meets the hours of service requirement for any employing office and has been employed by any employing office for a total of at least 12 months, must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. See § 825.300(b) for rules governing the content of the eligibility notice given to employees.

§ 825.111 Eligible employee, birth or placement.

For purposes of leave under subsections (A) or (B) of section 102(a)(1) of the FMLA, 29 USC 2612(a)(1)(A) or (B):

(a) an eligible employee is a covered employee of an employing office; and

(b) the eligibility requirements of section § 825.110 shall not apply. See also §§ 825.120–21.

§ 825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employing offices covered by FMLA as made applicable by the CAA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (See § 825.120);

(2) For the placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (See §825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (See §§825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (See §§825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status) (See §§825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (See §§825.122 and 825.127).

(b) Equal Application. The right to take leave under FMLA, as made applicable by the CAA, applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) Active employee. In situations where the employing office/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

§825.113 Serious health condition.

(a) For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115.

(b) The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

§825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in §825.113(b), or any subsequent treatment in connection with such inpatient care.

§825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term extenuating circumstances in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. See also §825.120.

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraphs (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§825.116 Reserved.
§825.117 Reserved.
§825.118 Reserved.

§825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

§825.120 Leave for pregnancy or birth.

(a) General rules. Eligible employees are entitled to FMLA leave for pregnancy or birth of a son or daughter and to care for the newborn child as follows:

(1) Both parents are entitled to FMLA leave for the birth of their child.

(2) Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If the employing office permits bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, both parents are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total

of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.

(5) A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition. See §825.124.

(6) Both parents are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) Intermittent and reduced schedule leave. An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employing office agrees. For example, an employing office and employee may agree to a part-time work schedule after the birth. If the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child. See §§825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. See §825.121 for rules governing leave for adoption or foster care. See §825.601 for special rules applicable to instructional employees of schools.

§825.121 Leave for adoption or foster care.

(a) General rules. Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care and to care for the newly placed child as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If the employing office permits leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12–month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where spouses both use a portion of the total 12–week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§825.113 through 825.115 and 825.122(d) are met. Thus, spouses may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employing office, provided they have not exhausted their entitlements during the applicable 12–month FMLA leave period.

(b) Use of intermittent and reduced schedule leave. An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employing office agrees. Thus, for example, the employing office and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employing office agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employing office's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See §§825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. See §825.120 for general rules governing leave for pregnancy and birth of a child. See §825.601 for special rules applicable to instructional employees of schools.

§825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See §825.127(b)(2).

(b) Spouse means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or

(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

(c) Parent. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section. This term does not include parents ''in law.''

(d) Son or daughter. For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., provide guidance for these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. See §825.127(d)(3).

(f) Adoption means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. See §825.121 for rules governing leave for adoption.

(g) Foster care means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. See §825.121 for rules governing leave for foster care.

(h) Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. See §825.126(a)(5).

(i) Son or daughter of a covered servicemember means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. See §825.127(d)(1).

(j) Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' See §825.127(d)(2).

(k) Documenting relationships. For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employing office is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

§825.123 Unable to perform the functions of the position.

(a) Definition. An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended and made applicable by Section 201(a) of the CAA (2 U.S.C. 1311(a)(3)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) Statement of functions. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employing office can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of the FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See §825.306.

§825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. See §§825.202–825.205 for rules governing the use of intermittent or reduced schedule leave.

§825.125 Definition of health care provider.

(a) The FMLA, as made applicable by the CAA, defines health care provider as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Office of Congressional Workplace Rights to be capable of providing health care services.

(3) In making a determination referred to in subparagraph (a)(2), and absent good cause shown to do otherwise, the Office of Congressional Workplace Rights will follow any determination made by the Department of Labor (under section 101(6)1(B) of FMLA (29 U.S.C. 2611(6)(B))) that a person is capable of providing health care services, provided the determination by the Department of Labor was not made at the request of a person who was then a covered employee.

(b) Others capable of providing health care services include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

§ 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) Covered active duty or call to covered active duty status in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) Covered active duty or call to covered active duty status in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

(3) Deployment of the member with the Armed Forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) Short-notice deployment.

(i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) Military events and related activities.

(i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) Childcare and school activities. For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;

(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) Financial and legal arrangements.

(i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(5) Counseling. To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

(6) Rest and Recuperation.

(i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(7) Post-deployment activities.

(i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) Parental care. For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) Additional activities. To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employing office and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

§ 825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

(a) Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.

(b) Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. Outpatient status means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12–month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(3) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) A serious injury or illness means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces), and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) Son or daughter of a covered servicemember means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) Next of kin of a covered servicemember means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employing office is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(k).

(e) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12–month period.

(1) The single 12–month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employing office to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12–month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12–month period. An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12–month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12–month period.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12–month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: in connection with the birth of a son or daughter of the employee and in order to care for such son or daughter; in connection with the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12–month period, take 16 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12–month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employing office is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12–month period described in paragraph (e) of

this section, the employing office must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the single 12–month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employing offices may retroactively designate leave as leave to care for a covered servicemember pursuant to §825.301(d).

(f) Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 26 workweeks of leave during the single 12–month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

SUBPART B—EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT

§825.200 Amount of Leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12–month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(b) An employing office is permitted to choose any one of the following methods for determining the 12–month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12–month leave year, such as a fiscal year or a year starting on an employee's anniversary date;

(3) The 12–month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or

(4) A ''rolling'' 12–month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12–month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12–month period would begin the first time FMLA leave is taken after completion of any previous 12–month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12–month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employing offices using the rolling 12–month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA-protected.

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) Reserved.

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12–month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60–day notice to all employees of the option the employing office intends to implement. During the running of the 60–day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60–day period the employing office may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12–month period to care for a covered servicemember with a serious injury or illness. An employing office shall determine the single 12–month period in which the 26 weeks of leave entitlement described in this paragraph occurs using the 12–month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. See §825.127(e)(1).

(g) During the single 12–month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. See §825.127(e)(3).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employing office's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12–week leave entitlement are also described in §825.205.

(i)(1) If employing offices jointly employ an employee, and if they designate a primary employing office pursuant to §825.106(c), the primary employing office may choose any one of the alternatives in paragraph (b) of this section for measuring the 12–month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employing office including the jointly employed employee.

(2) If employing offices fail to designate a primary employing office pursuant to §825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employing office of the employee for purposes of the application of paragraphs (d) and (e) of this section.

(j) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, so long as the prior employing office properly designated the leave as FMLA under these regulations or other applicable requirements.

§825.201 Leave to care for a parent.

(a) General rule. An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. See §825.122(c) for definition of parent.

(b) Same employing office limitation. Spouses who are eligible for FMLA leave and are employed by the same covered employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long

as the spouses are employed by the same employing office. It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the spouses both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the spouses would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. See also §825.127(d).

§825.202 Intermittent leave or reduced leave schedule.

(a) Definition. FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) Medical necessity. For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employing office, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. See §§825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. See §§825.113 and 825.127.

(c) Birth or placement. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. See §825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. See also §§825.120 (pregnancy) and 825.121 (adoption and foster care).

(d) Qualifying exigency. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

§825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. See §825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations.

§825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) Transfer or reassignment. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See §825.601 for special rules applicable to instructional employees of schools.

(b) Compliance. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and Federal law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced scheduled leave.

(c) Equivalent pay and benefits. The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) Employing office limitations. An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited acts provisions of the FMLA, as made applicable by the CAA.

(e) Reinstatement of employee. When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) Minimum increment.

(1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employing office must account for the leave using an increment no greater than the shortest period of time that the employing office uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employing office may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. See also §825.205(a)(2) for the physical impossibility exception, and §§825.600 and 825.601 for special rules applicable to employees of schools. If an employing office uses different increments to account for different types of leave, the employing office must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employing office accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger

than one-half hour. If an employing office accounts for use of leave in varying increments at different times of the day or shift, the employing office may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employing office accounts for other forms of leave use in increments greater than one hour, the employing office must account for FMLA leave use in increments no greater than one hour. An employing office may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employing office that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employing office wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employing office is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. See §825.214.

(b) Calculation of leave.

(1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave. Similarly, if a fulltime employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one half (1/2) week of FMLA leave each week. Where an employee works a parttime schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employing office may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave. See also §§825.601 and 825.602 on special rules for schools.

(2) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employing office is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours worked over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) Overtime. If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (1/6) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA qualifying reason may not be counted against the employee's FMLA leave entitlement.

§825.206 Interaction with the FLSA, as made applicable by the Congressional Accountability Act.

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, and as exempt under regulations issued by the Board, at part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employing offices who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with the Board's FLSA regulations at part 541 or with a permissible fluctuating workweek method of payment for overtime may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by the Board's FLSA regulations at part 541 or by a permissible fluctuating workweek method of payment for overtime be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by the FMLA, as made applicable by the CAA. Employing offices may comply with the employing office's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, as made applicable by the CAA, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

§825.207 Substitution of paid leave, generally.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, the FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute accrued paid leave for unpaid FMLA leave. Subject to §825.208, if an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employing office, and accrued pursuant to established policies of the employing office, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employing office's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employing office's normal leave policy. When an employee chooses, or an employing office requires, substitution of accrued paid leave, the employing office must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. See §825.300(c). If an employee does not comply with the additional requirements in an employing office's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee

remains entitled to take unpaid FMLA leave. Employing offices may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§825.112 through 825.115. In such cases, the employing office may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The FMLA, as made applicable by the CAA, provides that a serious health condition may result from injury to the employee on or off the job. If the employing office designates the leave as FMLA leave in accordance with §825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employing office may require the substitution of paid leave. However, employing offices and employees may agree, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a light duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. See also §§825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702 (d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Under the FLSA, as made applicable by the CAA, an employing office always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employing office requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

§825.208 Substitution of paid leave-special rule for paid parental leave.

(a) This section applies to births or placements occurring on or after October 1, 2020.

(b) This section provides the basis for determining the periods of unpaid leave for which paid parental leave or accrued paid leave may be substituted in connection with:

(1) The birth of a son or daughter, and to care for the newborn child (See §825.120); or

(2) The placement of a son or daughter with the employee for adoption or foster care and the care of such son or daughter (See §825.121);

(c) Leave connected to birth or placement. For unpaid leave described in paragraph (b) of this section, an employee may elect to substitute—

(1) Up to 12 workweeks of paid parental leave in connection with the occurrence of a birth or placement, and

(2) Any additional paid annual, vacation, personal, family, medical, or sick leave provided by the employing office to such employee.

(d) Leave entitlement. Since an employee may use only 12 weeks of unpaid FMLA leave in any 12-month period under §825.200(a), any use of unpaid FMLA leave not associated with paid parental leave may affect an employee's ability to use the full 12 weeks of paid parental leave within a single 12-month period. The specific amount of paid parental leave available will depend on when the employee uses various types of unpaid FMLA leave relative to any 12-month period established under §825.200(b).

(e) Employee entitlement to substitute.

(1) An employee is entitled to substitute paid leave for leave without pay as provided in paragraph (c) of this section.

(2) An employing office may not require that an employee first use all or any portion of the leave described in subparagraph (c)(2) of this section before being allowed to use the leave described in subparagraph (c)(1) of this section.

(3) An employing office may not require an employee to substitute paid leave for leave without pay as described in subparagraph (c)(2) of this section.

(4) An employee may request to use annual, vacation, personal, family, medical, or sick leave for the reasons described in paragraph (b) of this section without invoking family and medical leave, and, in that case, the employing office exercises its normal authority with respect to approving or disapproving the timing of when the leave may be used. If the employing office grants the leave request, it must designate whether any leave granted is FMLA leave, in accordance with sections §§825.300 and 825.301.

(f) Notification by employee and retroactive substitution.

(1) An employee must notify the employing office of the employee's election to substitute paid leave for leave without pay under this section prior to the date such paid leave commences (i.e., no retroactive substitution), except as provided in paragraphs (f)(2) and (f)(3) of this section, and provided such retroactive substitution does not violate any applicable law or regulation.

(2) An employee may retroactively substitute paid leave for leave without pay as permitted in paragraph (c) of this section, if the substitution is made in conjunction with the retroactive granting of leave without pay.

(3) An employee may retroactively substitute transferred (donated) annual leave for leave without pay granted under this subpart.

(g) Pay during leave. The pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.

(h) Treatment of unused leave. If an employee has any unused balance of paid parental leave that remains at the end of the 12-month period following the birth or placement involved, the entitlement to the unused leave elapses at that time. No payment may be made for unused paid parental leave that has expired. Paid parental leave may not be considered annual leave for purposes of making a lump-sum payment for annual leave or for any other purpose. The forfeiture of any unused balance of paid parental leave does not impact an employee's ability to use unpaid FMLA leave for other qualifying reasons, if eligible pursuant to §§825.110, 825.112 and 825.200.

(i) Employing office responsibilities. An employing office that has employees covered by this subpart is responsible for the proper administration of §825.208, including the responsibility of informing employees of their entitlements and obligations.

(j) Library of Congress. The OCWR will defer to supplemental regulations on paid parental leave issued by the Library of Congress pursuant to the authority in 29 USC 2617, provided those supplemental regulations are consistent with the regulations in this subpart.

(k) Work obligation. Paid parental leave under this subpart shall apply without regard to:

(1) the limitations in subparagraphs (E), (F), or (G) of section 6382(d)(2) of title 5, United States Code (requiring employees of executive branch agencies to agree in writing to work for the executive branch agency for at least 12 months after returning from leave); or

(2) the limitations in §825.213 (permitting employing offices to recover an amount equal to the total amount of government contributions for maintaining such employee's health coverage if the employee fails to return from leave).

(l) Cases of employee incapacitation.

(1) If an employing office determines that an otherwise eligible employee who could have made an election for a past leave period to substitute paid parental leave (as provided in paragraph (c) of this section) was physically or mentally incapable of doing so during that past period, the employee may, within 5 workdays of the employee's return to duty status, make an election to substitute paid parental leave for applicable unpaid FMLA leave under paragraph (c) of this section on a retroactive basis, provided such retroactive substitution does not violate any applicable law or regulation. Such a retroactive election shall be effective on the date that such an election would have been effective if the employee had not been incapacitated at the time.

(2) If an employing office learns that an otherwise eligible employee is physically or mentally incapable of making an election to substitute paid parental leave (as provided in §825.207), the employing office must, upon the request of a personal representative of the employee, provide conditional approval of substitution of paid parental leave for applicable unpaid FMLA leave on a prospective basis. The conditional approval is based on the presumption that the employee would have elected to substitute paid parental leave for the applicable unpaid FMLA leave. An employee may, within 5 workdays of the employee's return to duty status, request to substitute other leave for the paid parental leave.

(m) Cases of multiple children born or placed in the same time period.

(1) If an employee has multiple children born or placed on the same day, the multiple-child birth/placement event is considered to be a single event that triggers a single entitlement of up to 12 weeks of paid parental leave under paragraph (d) of this section.

(2) If an employee has one or more children born or placed during the 12-month period following the date of an earlier birth or placement of a child of the employee, the provisions of this subpart shall be independently administered for each birth or placement event.

§ 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of group health plan is set forth in §825.102. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employing office;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employing office provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employing office changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employing office.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. See §825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C. 8905a, whichever is applicable, and for key employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12–month period.

(g) If a key employee (See §825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§ 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in §825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employing office has a number of options for obtaining payment from the employee. The employing office may require that payment be made to the employing office or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employing office may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA or 5 U.S.C. 8905a, whichever is applicable;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employing office's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. See §825.300(c).

(e) An employing office may not require more of an employee using unpaid FMLA leave than the employing office requires of other employees on leave without pay.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking FMLA leave. See §825.207(e).

§ 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employing office is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employing offices.

(b) An employing office under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employing offices party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in §825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employing office can show that the employee would have been laid off and the employment relationship terminated; or

(3) The employee provides unequivocal notice of intent not to return to work.

§ 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. See §825.209(a).

(3) All other obligations of an employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employing office maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. See §825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employing office terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employing office may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

§825.213 Employing office recovery of benefit costs.

(a) In addition to the circumstances discussed in §825.212(b), and subject to the exceptions provided in §825.208(k), an employing office may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employing office. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional forms developed for this purpose. See §§825.306(b), 825.310(c)–(d) and Forms A, B, and F. If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable premiums as would be calculated under COBRA, excluding the two percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, etc.), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

§825.214 Employee right to reinstatement.

General Rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also §825.106(e) for the obligations of employing offices that are joint employers.

§825.215 Equivalent position.

(a) Equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Conditions to qualify. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent Pay.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employing office's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or nondiscretionary, made to employees consistent

with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) Equivalent benefits. Benefits include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire work force, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See §825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, §825.209 addresses health benefits.)

(e) Equivalent terms and conditions of employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) De minimis exception. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

§825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work for one employing office for a specific time period, and after that time period has ended, the work was assigned to another employing office, the successor employing office may be required to restore the employee if it is a successor employing office.

(b) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (key employees, as defined in §825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in §825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employing office's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA. See §825.702.

(d) An employee who fraudulently obtains FMLA leave from an employing office is not protected by the job restoration or maintenance of health benefits provisions of the FMLA, as made applicable by the CAA.

(e) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

§825.217 Key employee, general rule.

(a) A key employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

(b) The term salaried means paid on a salary basis, within the meaning of the Board's FLSA regulations at part 541, implementing section 203 of the CAA (2 U.S.C. 1313), regarding employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA.

(c) A key employee must be among the highest paid 10 percent of all the employees-both salaried and non-salaried, eligible and ineligible—who are employed by the employing office within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, e.g., benefits or prerequisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be key employees.

§ 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a key employee threatens the economic viability of the employing office, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute substantial and grievous economic injury.

(d) FMLA's substantial and grievous economic injury standard is different from and more stringent than the undue hardship test under the ADA, as made applicable by the CAA. See also §825.702.

§ 825.219 Rights of a key employee.

(a) An employing office that believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employing office's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employing office may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employing office actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA, as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA, as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has-

(i) Filed any claim, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA, as made applicable by the CAA. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See §825.400(b). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employing office to avoid responsibilities under FMLA, for example:

(1) Reserved.

(2) Changing the essential functions of the job in order to preclude the taking of leave; or

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The FMLA's prohibition against interference prohibits an employing office from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See §825.215.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employing office. Except for settlement agreements covered by 1414 and/or 1415 of the Congressional Accountability Act, this does not prevent the settlement or release of FMLA claims by employees based on past employing office conduct without the approval of the Office of Congressional Workplace Rights or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. See §825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA, or regulations.

SUBPART C—EMPLOYEE AND EMPLOYING OFFICE RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

§ 825.300 Employing office notice requirements.

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office

provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA, as made applicable by the CAA, are available from the Office of Congressional Workplace Rights and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA, as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (c), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Congressional Workplace Rights to provide such guidance.

(b) Eligibility notice.

(1) When an employee requests FMLA leave, or when the employing office acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employing office must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. See §825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. See §§825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in §825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employing office and the hours of service with the employing office during the 12-month period. Notification of eligibility may be oral or in writing; employing offices may use Form C to provide such notification to employees.

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason), the employing office must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) Rights and responsibilities notice.

(1) Employing offices shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (See §§825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (See §§825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (See §§825.305, 825.309, 825.310, 825.313);

(iii) If applicable, the employee's right to substitute paid parental leave for unpaid FMLA leave for a birth or placement (See §825.208) and the employee's right to substitute paid leave generally, whether the employing office will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (See §825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (See §825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (See §825.218);

(vi) The employee's right to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (See §§825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (See §§825.213, 825.208(k)).

(2) The notice of rights and responsibilities may include other information—e.g., whether the employing office will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employing office shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(5) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA, as made applicable under the CAA.

(6) A prototype notice of rights and responsibilities may be obtained in Form C, or from the Office of Congressional Workplace Rights. Employing offices may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) Designation notice.

(1) The employing office is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employing office has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employing office must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employing office determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employing office must notify the employee of that determination. Subject to §825.208, if the employing office requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employing office must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employing office has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employing office may provide the employee with the designation notice at that time.

(3) If the employing office will require the employee to present a fitness-for-duty certification to be restored to employment, the employing office must provide notice of such requirement with the designation notice. If the employing office will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employing office must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. See §825.312. If the employing office's handbook or other written documents (if any) describing the employing office's leave policies clearly provide that a fitness-forduty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employing office is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Form D which may be obtained from the Office of Congressional Workplace Rights. If the leave is not designated as FMLA leave because it does not meet the requirements of the FMLA, as made applicable by the CAA, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. The designation notice may be distributed electronically so long as it otherwise meets the requirements of this section and the employing office can demonstrate that the employee (who may already be on leave and who may not have access to employing office-provided computers) has access to the information electronically.

(5) If the information provided by the employing office to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employing office shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employing office must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, the employee's paid

parental leave entitlement. If the amount of leave needed is known at the time the employing office designates the leave as FMLA-qualifying, the employing office must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employing office must provide notice of the amount of leave counted against the employee's FMLA leave entitlement and, if applicable, paid parental leave entitlement, upon the request by the employee, but no more often than once in a 30–day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement and, if applicable, paid parental leave entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) Consequences of failing to provide notice. Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See §825.400(b).

§825.301 Designation of FMLA leave.

(a) Employing office responsibilities. The employing office's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employing office has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employing office must notify the employee as provided in §825.300(d).

(b) Employee responsibilities. An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in §§825.302 or 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine whether the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employing office denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employing office is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) Disputes. If there is a dispute between an employing office and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(d) Retroactive designation. Subject to §825.208, if an employing office does not designate leave as required by §825.300, the employing office may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by §825.300 provided that the employing office's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employing office and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) Remedies. If an employing office's failure to timely designate leave in accordance with §825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See §825.400(b). For example, if an employing office that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employing office's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employing office's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

§825.302 Employee notice requirements for foreseeable FMLA leave.

(a) Timing of notice. An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency, notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days' notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employing office for such information.

(b) As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) Content of notice. An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in §825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employing office has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case

of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. See § 825.305. An employing office may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. See §§ 825.309, 825.310. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employing office may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(d) Complying with the employing office policy. An employing office may require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employing office's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employing office's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employing office's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) Scheduling planned medical treatment. When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. See §§ 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. See § 825.304(e).

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employing office as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employing office's usual and customary notice requirements applicable to such leave. See § 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employing office promptly after ensuring the child has used the inhaler.

(b) Content of notice. An employee shall provide sufficient information for an employing office to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employing office has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employing office's obligations under the FMLA, as made applicable by the CAA. The employing office will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employing office's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employing office inquiries office regarding the leave request may result in denial of FMLA protection if the employing office is unable to determine whether the leave is FMLA-qualifying.

(c) Complying with employing office policy. When the need for leave is not foreseeable, an employee must comply with the employing office's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employing office may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employing office's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employing office's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

§ 825.304 Employee failure to provide notice.

(a) Proper notice required. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2)) by the Office of Congressional Workplace Rights to the employing office in a manner suitable for posting.

(b) Foreseeable leave—30 days. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employing office may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) Foreseeable leave-less than 30 days. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employing office two weeks' notice but instead only provided one week's notice, then the employing office may delay FMLA-protected leave for one week (thus, if the employing office elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (i.e., a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) Unforeseeable leave. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employing office may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employing office notice of the need for leave very soon after the need arises consistent with the employing office's policy, but instead the employee provided notice two days

after the leave began, then the employing office may delay FMLA coverage of the leave by two days.

(e) Waiver of notice. An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements. If an employing office does not waive the employee's obligations under its internal leave rules, the employing office may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with §825.303(a).

§825.305 Certification, general rule.

(a) General. An employing office may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employing office may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§825.309 and 825.310, respectively. An employing office must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by §825.300(c). An employing office's oral request to an employee to furnish any subsequent certification is sufficient.

(b) Timing. In most cases, the employing office should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employing office within 15 calendar days after the employing office's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employing office provides more than 15 calendar days to return the requested certification.

(c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employing office if required by the employing office in accordance with §§825.306, 825.309, and 825.310. The employing office shall advise an employee whenever the employing office finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employing office receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employing office receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employing office must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employing office are not cured in the resubmitted certification, the employing office may deny the taking of FMLA leave, in accordance with §825.313. A certification that is not returned to the employing office is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) Consequences. At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employing office with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employing office may deny the taking of FMLA leave, in accordance with §825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employing office to support the employee's FMLA request. This provision will apply in any case where an employing office requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness-for-duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. See §§825.306, 825.307, 825.308, and 825.312.

(e) Annual medical certification. Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in §825.200), the employing office may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in §825.307, including second and third opinions.

§825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) Required information. When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employing office may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (See §825.123(b));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in §825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) The Office of Congressional Workplace Rights has developed two optional forms (Form A and Form B) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements, as made applicable by the CAA. (See Forms A and B.) Optional Form A is for use when the employee's need for leave is due to the employee's own serious health condition. Optional Form B is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Forms A and B are modeled closely on Form WH–380E and Form WH–380F, as revised, which were developed by the Department of Labor (See 29 C.F.R. Part 825). The employing office may use the Office of Congressional Workplace Rights's forms, or Form WH–380E and Form WH–380F, as revised, or another form containing the same basic information; however, no information may be required beyond that specified in §§825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employing office or the employing office's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employing office from following the applicable workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employing office may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employing office informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to

FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. See §825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employing office with an authorization, release, or waiver allowing the employing office to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See §825.305(d).

§825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) Clarification and authentication. If an employee submits a complete and sufficient certification signed by the health care provider, the employing office may not request additional information from the health care provider. However, the employing office may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employing office has given the employee an opportunity to cure any deficiencies as set forth in §825.305(c). To make such contact, the employing office must use a health care provider, a human resources professional, a leave administrator, or a management official. An employee's direct supervisor may not contact the employee's health care provider, unless the direct supervisor is also the only individual in the employing office designated to process FMLA requests and the direct supervisor receives specific authorization from the employee to contact the employee's health care provider. For purposes of these regulations, authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.

Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employing offices may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, (See 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employing office by a HIPAA-covered health care provider. If an employee chooses not to provide the employing office with authorization allowing the employing office to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employing office may deny the taking of FMLA leave if the certification is unclear. See §825.305(d). It is the employee's responsibility to provide the employing office with a complete and sufficient certification and to clarify the certification if necessary.

(b) Second Opinion.

(1) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA, as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. In addition, the consequences set forth in §825.305 (d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. The employing office may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) Third opinion. If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in §825.305 (d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) Copies of opinions. The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) Travel expenses. If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) Medical certification abroad. In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employing office with a written translation of the certification upon request.

§825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) 30-day rule. An employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) More than 30 days. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employing office must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employing office must wait 40 days before requesting a recertification. In all cases, an employing office may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employing office would be permitted to request recertification every six months in connection with an absence.

(c) Less than 30 days. An employing office may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employing office to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances

sufficient for an employing office to request a recertification more frequently than every 30 days; or

(3) The employing office receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employing office to request a recertification in less than 30 days.

(d) Timing. The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Content. The employing office may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in §825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. See §825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employing office may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

§825.309 Certification for leave taken because of a qualifying exigency.

(a) Active Duty Orders. The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member (See §825.126(a)), an employing office may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service. This information need only be provided to the employing office once. A copy of new active duty orders or other documentation issued by the military may be required by the employing office if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) Required information. An employing office may require that leave for any qualifying exigency specified in §825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves Rest and Recuperation leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) The Office of Congressional Workplace Rights has developed an optional form (Form E) for employees' use in obtaining a certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form E, or Form WH–384 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section.

(d) Verification. If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employing office may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employing office may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employing office. An employing office also may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); no additional information may be requested and the employee's permission is not required.

§825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) Required information from health care provider. When leave is taken to care for a covered servicemember with a serious injury or illness, an employing office may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

(3) A DOD TRICARE network authorized private health care provider;

(4) A DOD non-network TRICARE authorized private health care provider; or

(5) Any health care provider as defined in §825.125.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator) or an authorized VA representative. An employing office may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

(iii) A DOD TRICARE network authorized private health care provider;

(iv) A DOD non-network TRICARE authorized private health care provider; or

(v) A health care provider as defined in §825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave.

(i) In the case of a current member of the Armed Forces, such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy;

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a

physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in §825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) Required information from employee and/or covered servicemember. In addition to the information that may be requested under §825.310(b), an employing office may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employing office of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employing office may require the employee to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employing office requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. See §825.127(c)(2).

(7) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) The Office of Congressional Workplace Rights has developed an optional form (Form F) for employees' use in obtaining certification that meets FMLA's certification requirements. This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. Form F, or Form WH–385 (developed by the Department of Labor), or another form containing the same basic information, may be used by the employing office; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employing office may seek authentication and/or clarification of the certification under §825.307. Second and third opinions under §825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of healthcare providers identified in section §825.310(a)(1–4). However, second and third opinions under §825.307 are permitted when the certification has been completed by a health care provider as defined in §825.125 that is not one of the types identified in §825.310(a)(1)–(4). Additionally, recertifications under §825.308 are not permitted for leave to care for a covered servicemember. An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to §825.122(k) of the FMLA.

(e) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Office of Congressional Workplace Rights's optional certification form (Form F) or an employing office's own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employing office may request that the employee have one of the authorized health care providers listed under §825.310(a) complete the Office of Congressional Workplace Rights optional certification form (Form F) or an employing office's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employing office may seek authentication and clarification of the ITO or ITA under §825.307. An employing office may not utilize the second or third opinion process outlined in §825.307 or the recertification process under §825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to §825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employing office requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employing office may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under §825.307. An employing office may not utilize the second or third opinion process outlined in §825.307 or the recertification process under §825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.

(2) An employing office may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to §825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employing office may also require an employee to provide documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employing office, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. See §825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employing office with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See §825.305(d).

§825.311 Intent to return to work.

(a) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employing office's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the

changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

§ 825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employing office) in the fitness-for-duty certification process as in the initial certification process. See § 825.305(d).

(b) An employing office may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employing office may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employing office must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employing office satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employing office may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(d) The designation notice required in § 825.300(d) shall advise the employee if the employing office will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notice required in paragraph (d) of this section. If an employing office provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See § 825.313(d).

(f) An employing office is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employing office is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employing office chooses to require a fitness-for-duty certification under such circumstances, the employing office shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employing office can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employing office advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employing office may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employing office should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended and as made applicable by the CAA, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employing office's expense by the employing office's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, as made applicable by the CAA, the FMLA does not prevent the employing office from following the procedures for requesting medical information under the ADA.

§ 825.313 Failure to provide certification.

(a) Foreseeable leave. In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employing office may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employing office can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) Unforeseeable leave. In the case of unforeseeable leave, an employing office may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employing office can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) Recertification. An employee must provide recertification within the time requested by the employing office (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employing office may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) Fitness-for-duty certification. When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.312(a)) if the employing office has provided the required notice (see § 825.300(e)); the employing office may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).

SUBPART D—ADMINISTRATIVE PROCESS

§ 825.400 Administrative process, general rules.

(a) The Procedural Rules of the Office of Congressional Workplace Rights set forth the procedures that apply to the administrative process for considering and resolving alleged violations of the laws made applicable by the CAA, including the FMLA. The Rules include procedures for filing claims and participating in administrative dispute resolution proceedings at the Office of Congressional Workplace Rights, including procedures for the conduct of hearings and for appeals to the Board of Directors. The Procedural Rules also address other matters of general applicability to the dispute resolution process and to the operations of the Office.

(b) If an employing office has violated one or more provisions of FMLA, as incorporated by the CAA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to

interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the hearing officer or the Board because the violation was in good faith and the employing office had reasonable grounds for believing the employer had not violated the CAA. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employing office is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs as would be appropriate if awarded under section 2000e–5(k) of title 42.

(c) The Procedural Rules of the Office of Congressional Workplace Rights are found at 165 Cong. Rec. H4896 (daily ed. June 19, 2019) and 165 Cong. Rec. S4105 (daily ed. June 19, 2019), and may also be found on the Office's website at www.ocwr.gov.

§§ 825.401–825.404 Reserved.

SUBPART E—Reserved.

SUBPART F—SPECIAL RULES APPLICABLE TO EMPLOYEES OF SCHOOLS

§ 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of local educational agencies, including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA, as made applicable by the CAA (and these special rules). The usual requirements for employees to be eligible do apply.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. Instructional employees are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. Periods of a particular duration means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (See §825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met.

§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employing office may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, academic term means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA, as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

§ 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 Special rules for school employees, restoration to an equivalent position.

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. See §825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—EFFECT OF OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS ON EMPLOYEE RIGHTS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA

§ 825.700 Interaction with employing office's policies.

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family

leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA or 5 U.S.C. 8905a, whichever is applicable), to the additional leave period not covered by FMLA.

(b) Nothing in the FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA, as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

§ 825.701 Reserved.

§ 825.702 Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

(a) Nothing in the FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act and as made applicable by the CAA). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 as amended or the regulations issued under that act. Thus, the leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA or the Federal government itself. The purpose of the FMLA, as applied by the CAA, is to make leave available to eligible employees and employing offices within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), as made applicable by the CAA, the employing office must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights, as made applicable by the CAA. ''ADA's disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employing office offers such a position, the employee is permitted but not required to accept the position. See § 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA, as made applicable by the CAA.

(e) If an employing office requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employing office may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301, et seq., veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employing office during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. See §§ 825.110(b)(2)(i) and (c)(2) and 825.802(c).

(h) For further information on Federal antidiscrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including Title VII, the Rehabilitation Act, and the ADA, individuals are encouraged to contact the Office of Congressional Workplace Rights.

SUBPART H—Reserved.

COVID–19 ORIGIN ACT OF 2023

Mr. BROWN. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. 619, which is at the desk.

The PRESIDING OFFICER. The clerk will report the bill by title.

The senior assistant legislative clerk read as follows:

A bill (S. 619) to require the Director of National Intelligence to declassify information relating to the origin of COVID–19, and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. BROWN. I ask unanimous consent that the bill be considered read a third time and passed and that the motion to reconsider be considered made and laid upon the table.

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

The bill (S. 619) was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 619

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''COVID–19 Origin Act of 2023''.

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) identifying the origin of Coronavirus Disease 2019 (COVID–19) is critical for preventing a similar pandemic from occurring in the future;

(2) there is reason to believe the COVID–19 pandemic may have originated at the Wuhan Institute of Virology; and

(3) the Director of National Intelligence should declassify and make available to the public as much information as possible about the origin of COVID–19 so the United States and like-minded countries can—

(A) identify the origin of COVID–19 as expeditiously as possible, and

(B) use that information to take all appropriate measures to prevent a similar pandemic from occurring again.

SEC. 3. DECLASSIFICATION OF INFORMATION RELATED TO THE ORIGIN OF COVID–19.

Not later than 90 days after the date of the enactment of this Act, the Director of National Intelligence shall—

(1) declassify any and all information relating to potential links between the Wuhan Institute of Virology and the origin of the Coronavirus Disease 2019 (COVID–19), including—

(A) activities performed by the Wuhan Institute of Virology with or on behalf of the People's Liberation Army;

(B) coronavirus research or other related activities performed at the Wuhan Institute of Virology prior to the outbreak of COVID–19; and

(C) researchers at the Wuhan Institute of Virology who fell ill in autumn 2019, including for any such researcher—

(i) the researcher's name;

(ii) the researcher's symptoms;

(iii) the date of the onset of the researcher's symptoms;

(iv) the researcher's role at the Wuhan Institute of Virology;

(v) whether the researcher was involved with or exposed to coronavirus research at the Wuhan Institute of Virology;

(vi) whether the researcher visited a hospital while they were ill; and

(vii) a description of any other actions taken by the researcher that may suggest they were experiencing a serious illness at the time; and

(2) submit to Congress an unclassified report that contains—

(A) all of the information described under paragraph (1); and

(B) only such redactions as the Director determines necessary to protect sources and methods.

ORDERS FOR THURSDAY, MARCH 2, 2023

Mr. BROWN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand adjourned until 10 a.m. on Thursday, March 2; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day, and morning business be closed; that following the conclusion of morning business, the Senate proceed to executive session and resume consideration of the Lawless nomination postcloture; further that at 11:30 a.m., the Senate vote on confirmation of the Lawless nomination and the motion to invoke cloture on the Gallagher nomination; that if cloture is invoked, all postcloture time be considered expired and the confirmation votes on the Simmons and Gallagher nominations be at a time to be determined by the majority leader in consultation with the Republican leader; further that the Senate recess following the cloture vote on the Gallagher nomination until 1:45 p.m.; and that at 1:45 p.m., the Senate vote on confirmation of the Grey nomination; finally, if any nominations are confirmed during Thursday's session, the motions to reconsider be considered made and laid upon the table and the President be immediately notified of the Senate's actions.

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

ORDER FOR ADJOURNMENT

Mr. BROWN. Mr. President, if there is no further business to come before the Senate, I ask that it stand adjourned under the previous order following the remarks of Senators LANKFORD and CRUZ.

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

The PRESIDING OFFICER (Ms. HASSAN). The Senator from Oklahoma.

HISTORIC BIG 10 BALLROOM

Mr. LANKFORD. Madam President, I have to tell you, this past weekend, I stood with the Williams' family and Shaw family, with hundreds of other folks, and I listened to live music in the Historic Big 10 Ballroom.

Now, that may not mean a lot to a lot of folks in this room, but it is a really big deal in my State, in Oklahoma, to hear live music in the Big 10 Ballroom.

Let me set the scene for you: Lonnie Williams was one of the first African-American police officers in Tulsa, OK. Now, I have spoken many times to this body about Greenwood and about the race massacre that happened May 31 and June 1 of 1921.

We have talked at length about what happened during that time for what is, in all likelihood, the worst race massacre in American history. It was in 1921. So for Lonnie Williams to be one of the first Black police officers in Tulsa was really a big deal.

He served in the police department, and he opened up several other businesses as his side hustle, and then, eventually, opened up what he called the Big 10 Ballroom in 1948.

It was a venue for Black artists to be able to come in because in 1948, a lot of Black artists couldn't play in a lot of auditoriums in America, including in my State. So they would invite these great musicians to be able to come through, that they would tour, and there was this kind of behind-the-scenes group of venues that was scattered through the country where Black artists could perform, and the one that we had in Oklahoma was the Big 10.

Now, it was no simple thing for them to be able to travel because at the time when those Black artists were traveling, they couldn't be in a lot of hotels; they couldn't eat in a lot of restaurants. But when they came to Greenwood, there were still families who would welcome them in.

The Williams' family, who owned the Big 10, their family, in fact, would host folks. They still tell stories about getting up in the morning and stepping over the Temptations sleeping in their living room. And when I talk about artists playing in the Big 10, I am not talking about just any artists in American history; I am talking about Count Basie, Ella Fitzgerald, Ike and Tina Turner, Ray Charles, James Brown, Wilson Pickett, B.B. King, Fats Domino, Little Richard, and I have already mentioned the Temptations.

Interestingly enough, the last place that Otis Redding played before he died in a plane crash was the Big 10 Ballroom in Tulsa, OK.

Now you know why we call it the Historic Big 10 Ballroom. That Ballroom was the place to be able to get music in North Tulsa for decades, and then it closed down in the 1960s. A lot of urban renewal was happening in that area, and a lot of things were shifting. The building was used for a while as a beauty supply warehouse, quite frankly. The roof caved in eventually as they abandoned it, and it sat idle for more than two decades. Quite frankly, an eyesore in the neighborhood, but to the Williams family and to lots of other folks in North Tulsa, when they drove up and down Apache, they would still see the glory of the Big 10 and what she could be in the days ahead.

But no one took the risk because all that was going to get the Big 10 back alive was hope and a whole bunch of money, until Dr. Lester Shaw stood in the parking lot of the Big 10 and saw it not for what it was—quite frankly, a place where more pigeons lived than anything else—but for what she could be again.

In 2007, Dr. Shaw bought that building. Quite frankly, his wife was pretty nervous about it, thinking what in the world. But Brenda Shaw knows her husband Lester well, and when he got an idea, she knew it must be from God and it was going to turn out OK because he was going to be tenacious enough to get it done.

You see, Dr. Shaw and Brenda Shaw—by the way, both doctors now, so it is Dr. and Dr. Shaw—the two of them have for the last 23 years committed every second of their spare time to thousands of kids in Greenwood. They run a ministry after school called A Pocket Full of Hope, and a Pocket Full of Hope teaches arts, music, photography, videography.

They invest in the lives of students in that area, and for the last 23 years as they have mentored kids after school—brace yourself—they have helped 100 percent of those kids graduate from high school, not a single one of them hasn't finished high school.

They traveled all over the country, including right here to Washington, DC, to be able to perform music, but they never really had a place to perform. They really never had a place that was their own. In this location, where they have about 350 people a year who come through to be able to be mentored by Pocket players—those who have gone through Pocket Full of Hope in the past and those who are helping—and for Lester Shaw and his leadership, those folks have made a remarkable difference in the community.

Dr. Shaw, in 2007, saw the Big 10 for what she could be again and, last weekend, what she is again.

There is live music again at the Big 10. I was listening to it last weekend as it came alive, and you couldn't imagine how beautiful the inside of that building is, as the community and different groups have all invested dollars and lots of sweat and blood and tears to be able to bring it back again. And when you drive down Apache now, you see the Big 10. You see, Black history is not all ancient history. Black history in America and Black history in my State is still going on right now because people like Lonnie Williams, who set a path for my State and my community decades ago—that baton is being picked up by folks like Dr. Lester Shaw, and they are doing remarkable work to help thousands of students.

So, for me, I was honored to sit and listen to live music in the Big 10. And if anybody is traveling through Tulsa, I would encourage you to swing down Apache and hear live music in the same place where B.B. King and James Brown and Ray Charles, Tina Turner, Count Basie, and Fats Domino sang, the place intended to be able to hear history come alive.

By the way, Big 10 is not called the Big 10 anymore. Now they call it the Historic Big 10.

We are living out history right now, and I am grateful for the Williams family and the legacy they have left and what Dr. Shaw has picked up. God bless them in the work, and we are grateful for what they have done in the past.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

REMEMBERING OSWALDO PAYA

Mr. CRUZ. Madam President, I rise today to honor the memory of Oswaldo Paya, who would have celebrated his 71st birthday this week. His memory and his story have been an inspiration to dissidents across the world, and I would like to briefly retell it here today.

Oswaldo Paya was a dissident and a democracy activist in Cuba with unrelenting passion and dedication. He was someone who stood up against the Castro regime at very direct risk to his own life. He had incredible courage. He spoke up for human rights. He spoke up for free speech. He spoke up for democracy.

Eleven years ago, Oswaldo Paya was murdered. On July 22, 2012, Paya left his house with three other people to go visit friends. From the start of their journey, their car was followed. On the way, the Cuban police drove Paya's car off the road and killed him. The crash is widely believed to have been orchestrated by the Castro regime.

Paya had long been a thorn in the side of the Castros, even from a young age. He was the only person at his school who had refused to join the Communist Youth. As a teenager, he publicly opposed the communist crackdown on protesters in Czechoslovakia who were fighting for freedom, and he was punished with 3 years in prison.

Paya went on to found the Varela Project, which sought a referendum on Cuba's communist system. Their demands were simple: democratic government, religious liberty, freedom of expression, and the freedom to start businesses. Paya managed to get 11,000 signatures to petition the government to hold a referendum, and eventually 20,000 people supported the referendum. Twenty thousand people risked their lives by standing with Oswaldo Paya for freedom. But the Cuban Government refused to hold a referendum.

Paya's fight for freedom made him a target repeatedly of the Communist Party in Cuba. They harassed him, tried to intimidate him, and arrested him numerous times. And in 2012, they killed him.

Paya's friend and the driver of the car said that when he awoke after the crash, he was confronted at the hospital by a government operative, and the hospital was flooded with uniformed military personnel. Under extreme duress, drugged, and threatened with death by government officials, he signed a confession that directly contradicted what he knew to be true—that the communist regime had just murdered Oswaldo Paya.

I have met multiple times with Oswaldo Paya's daughter, Rosa Maria, who is an incredible, courageous, powerful leader in her own right, and we have discussed ways we can continue her father's fight for justice in Cuba. One of the things I have done is I have filed legislation to rename the street in front of the Cuban Embassy in Washington, DC, ''Oswaldo Paya Way.'' Renaming the street in front of the Cuban Embassy would send a powerful message to the communist regime.

During the Cold War, President Reagan followed this very same strategy. He renamed the street in front of the Soviet Embassy ''Sakharov Plaza'' after the famed human rights dissident in the Soviet Union. It was part of a broader strategy to call out the evil regime. My strategy is the same here.

Some people may think a street name is not that big a deal, but think about it for a moment. If you change the street name, it means anyone who wants to write to the Cuban Embassy will have to write Oswaldo Paya's name. If you need to go there, you will have to look up the address and see the same. Tyranny exists in darkness. Oppressive regimes are terrified by dissidents. Members of the Cuban Government who deal with the Embassy will have to acknowledge that Paya existed and that this hero who was wrongfully murdered was real. They will have to say his name. There is power in saying his name.

I want to tell you another story that illustrates just how powerful this renaming strategy can be. Several years ago, I introduced legislation to rename the street in front of the Chinese Embassy in Washington, DC, ''Liu Xiaobo Plaza.'' Liu Xiaobo was a Noble Peace laureate and democracy activist in China who was wrongfully imprisoned there. My bill ended up passing the U.S. Senate 100 to nothing. Every Senator, Republican and Democrat, agreed with that bill. Sadly, even though it was a Democrat Senate at the time, the Republican House failed to take up the bill, so it didn't pass into law.

But here is an epilogue to that story. At the beginning of the Trump administration in 2017, I was having breakfast with Rex Tillerson, the new Secretary of State. We were at Foggy Bottom at the State Department. We were talking about China at one point, and he said he had just had a meeting with his counterpart, the Foreign Minister of China. He said the Foreign Minister came out and said the Chinese Communist Government has three top priorities in foreign policy, and Rex kind of shook his head.

He said: Ted, it is the damnedest thing. One of their top three priorities is to prevent your bill to rename the

street in front of their Embassy from passing.

I will tell you what I told Rex that morning. At the time, Liu Xiaobo had passed away. He had never collected the over $1 million that he was entitled to for winning the Noble Peace Prize. But his widow, Liu Xia, was still in China. China would not let her go.

I told Rex: You go back to China, and you tell them the following. If they release Liu Xia, if they let her go, I will stop pressing to pass this bill. But if they don't, I will continue pressing to pass it, and we will succeed. I have already passed it 100 to nothing in the U.S. Senate, and the next time, we are going to get it passed in the House as well and get it passed into law.

Just a few weeks later, communist China released Liu Xia. She was able to receive the prize money for the Noble Peace Prize and escape the oppression of communist China.

This story speaks volumes about the weakness of a tyrannical regime, just how vulnerable they are to sunshine, to truth, to transparency, to being called out.

Renaming the street in front of the Cuban Embassy after Oswaldo Paya would shine a light and would highlight the truth about the communist regime in Cuba. It would be a powerful tool in bringing down the machinery of oppression there.

We saw not long ago thousands of Cubans taking to the street, fighting for liberty. The Cuban people should know the American people stand with them against tyranny and against the communist oppression, the poverty, the misery, the death under which they live every day, and it would be a powerful tool to bringing down the machinery of oppression in Cuba in the nonviolent way that Oswaldo Paya so powerfully championed.

This Congress, I am very hopeful that my bill to rename the street in front of the Cuban Embassy ''Oswaldo Paya Way'' will be passed by both Chambers.

Oswaldo Paya fought for a free Cuba—Cuba libre—built on human decency, on human rights, where citizens are heard, not murdered by their government. Let's come together, Democrats and Republicans, to honor Oswaldo Paya. Let's come together and force the communist regime to say his name.

I yield the floor.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

The PRESIDING OFFICER. Under the previous order, the Senate stands adjourned until 10 a.m. tomorrow.

Thereupon, the Senate, at 7:11 p.m., adjourned until Thursday, March 2, 2023, at 10 a.m.

CONFIRMATION

Executive nomination confirmed by the Senate March 1, 2023:

THE JUDICIARY

MARGARET R. GUZMAN, OF MASSACHUSETTS, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS.