

SENIOR EXECUTIVE SERVICE ACCOUNTABILITY ACT

APRIL 12, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4358]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4358) to amend title 5, United States Code, to enhance accountability within the Senior Executive Service, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 4358, the Senior Executive Service Accountability Act, enhances accountability within the Senior Executive Service.

BACKGROUND AND NEED FOR LEGISLATION

In response to several hearings held during the 114th Congress by the Committee on Oversight and Government Reform on the performance and misconduct of members of the Senior Executive Service (SES), H.R. 4358 would help ensure SES employees are held accountable for their work on behalf of the American people.

H.R. 4358 extends the probationary period for individuals appointed to the Senior Executive Service from one to two years. This provides agencies with the additional time required to ensure that SES employees are meeting the requirements of their positions and the standards expected of federal leaders.

The bill eliminates the provision under current law that allows SES employees to be removed for poor performance and assigned to another position to retain their executive salary. As a result, SES employees downgraded based upon performance will be paid the salary of the position to which they are assigned. The bill also requires that senior executives receive performance requirements in writing no less than 30 days before the start of an appraisal period.

H.R. 4358 makes SES employees subject to suspensions of two weeks or less and holds such employees accountable for conduct contrary to the efficiency of federal service, in the same manner as other civil service workers. The bill also reduces the requirement for agencies to give executives advance written notice of a termination or a suspension of more than 14 days from a minimum of 30 days to a minimum of 15 days. These changes provide additional tools for agencies to use when addressing issues of executive performance and conduct related matters.

The bill also provides agency heads with the authority to place SES employees facing removal for misconduct on mandatory annual leave and the authority to seek removal or transfer of SES employees based on poor performance or misconduct with an abbreviated process for an expedited appeal. Finally, H.R. 4358 requires mandatory reassignments of SES employees at least once every five years, to help ensure federal leaders have broad levels of experience needed to manage the federal government. The mobility of federal leaders was an important aspect in the establishment of the Senior Executive Service.

LEGISLATIVE HISTORY

H.R. 4358, the Senior Executive Service Accountability Act, was introduced on January 8, 2016 by Congressman Tim Walberg (R-MI) and referred to the Committee on Oversight and Government Reform. On January 12, 2016, the Committee ordered H.R. 4358 favorably reported by a vote of 21 to 16, without amendment.

In the 113th Congress, a substantially similar version of this legislation, H.R. 5169, was introduced by Congressman Walberg and

passed the House of Representatives by voice vote on September 16, 2014.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the “Senior Executive Service Accountability Act”.

Section 2. Biennial justification of senior executive service positions

Requires agencies to provide written justification to the Office of Personnel Management for each requested SES position, including existing positions.

Section 3. Extension of probationary period for career appointees

Extends the probationary period for individuals appointed to the SES from one to two years.

Section 4. Modification of pay retention for career appointees removed for under performance

Eliminates the provision in current law which allows an individual removed from the SES for performance to retain his or her SES pay if appointed to a civil service position.

Section 5. Advanced establishment of performance requirements under senior executive service performance appraisal systems

Requires that SES employees must receive performance requirements in writing no less than 30 days before the start of an appraisal period.

Section 6. Amendments with respect to adverse actions against career appointees

Makes SES employees subject to suspensions (without pay) of less than two weeks in the same manner as other civil service workers. Gives agencies authority to remove SES employees for “such cause as would promote the efficiency of the service”—the standard that currently applies to other civil services workers.

Reduces the requirement for agencies to give senior executives advance written notice of termination or suspension of more than 14 days from a minimum of 30 days to 15 days.

Section 7. Mandatory leave for career appointees subject to removal

Gives agency heads authority to place SES employees facing removal for misconduct on mandatory annual leave, and prohibits the accumulation of additional annual leave during this period. Annual leave would be restored to the SES employee if the agency, Merit Systems Protection Board (MSPB), or court found in the employee’s favor during the appeals process.

Section 8. Expedited removal of career appointees for performance or misconduct

Provides authority for heads of agencies to seek removal or transfer of senior executives based on poor performance or misconduct, with an abbreviated process for an expedited appeal. Requires agency heads to notify Congress within 30 days after remov-

ing or transferring an employee and the reason for the removal or transfer. An employee may appeal a termination or transfer notice to the Merit Systems Protection Board within 7 days of receiving notice. Upon receipt of an appeal, an administrative judge has 21 days to issue a decision. If an administrative judge cannot issue a decision, the decision to terminate or transfer will be final, and the MSPB must submit a report to Congress explaining why a decision was not issued. An employee may not receive pay during the appeals process.

Section 9. Mandatory reassignment of career appointees

Requires that at least once every five years, an SES employee will be reassigned to another SES position. Gives the head of each agency the authority to waive the requirement, provided the agency head submits a waiver to the relevant House and Senate committees explaining the reason for the waiver.

EXPLANATION OF AMENDMENTS

Delegate Eleanor Holmes Norton offered an amendment to strike sections 3, 6(b), 7, 8 and 9 of the bill. The amendment was not adopted by voice vote.

COMMITTEE CONSIDERATION

On January 12, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 4358, by a record vote of a 21 to 16, a quorum being present.

ROLL CALL VOTES
 COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
 114TH CONGRESS
 ROLL CALL

Vote #: 3

Vote on: H.R. 4358 – Report to House

Date: 1-12-16

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) (<i>Chairman</i>)	X			MR. CUMMINGS (MD) (<i>Ranking</i>)		X	
MR. MICA (FL)	X			MRS. MALONEY (NY)		X	
MR. TURNER (OH)				MS. NORTON (DC)		X	
MR. DUNCAN (TN)	X			MR. CLAY (MO)		X	
MR. JORDAN (OH)	X			MR. LYNCH (MA)		X	
MR. WALBERG (MI)	X			MR. COOPER (TN)			
MR. AMASH (MI)	X			MR. CONNOLLY (VA)		X	
MR. GOSAR (AZ)				MR. CARTWRIGHT (PA)		X	
MR. DesJARLAIS (TN)	X			MS. DUCKWORTH (IL)		X	
MR. GOWDY (SC)				MS. KELLY (IL)		X	
MR. FARENTHOLD (TX)				MS. LAWRENCE (MI)		X	
MRS. LUMMIS (WY)	X			MR. LIEU (CA)		X	
MR. MASSIE (KY)	X			MRS. COLEMAN (NJ)		X	
MR. MEADOWS (NC)	X			MS. PLASKETT (VI)		X	
MR. DeSANTIS (FL)	X			MR. DeSAULNIER (CA)		X	
MR. MULVANEY (SC)	X			MR. BOYLE (PA)		X	
MR. BUCK (CO)	X			MR. WELCH (VT)			
MR. WALKER (NC)	X			MR. LUJAN GRISHAM (NM)		X	
MR. BLUM (IA)	X						
MR. HICE (GA)	X						
MR. RUSSELL (OK)	X						
MR. CARTER (GA)	X						
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						

Roll Call Totals: Ayes: 21 Nays: 16 Present:

Passed: X Failed:

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill amends title 5, United States Code, to enhance accountability within the Senior Executive Service. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of the bill is to amend title 5, United States Code, to enhance accountability within the Senior Executive Service.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

H.R. 4358—Senior Executive Service Accountability Act

H.R. 4358 would modify several personnel procedures that apply to the Senior Executive Service (SES). Provisions of the legislation would make it easier for agencies to discipline and fire members of the SES, disallow SES members who are moved to the civil service from retaining their SES pay, and require members of the SES to transfer to a new agency at least once every five years.

CBO estimates that enacting H.R. 4358 would have no significant budgetary effect because it would not change the number of SES members, the amounts they are paid, or the resources agencies require. The provision disallowing pay retention would have affected only six federal employees from 2009 to 2014, according to the Office of Personnel Management (OPM). On that basis, CBO estimates the total savings from implementing that requirement would be insignificant. Implementing the provision requiring regular transfers would have no significant relocation costs because such transfers would have to be within commuting distance of the SES member's home. Finally, based on information from OPM, CBO estimates that the additional agency overhead for those transfers also would not be significant.

Because enacting the bill would not affect direct spending or revenues, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 4358 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4358 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Dan Ready. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART B—EMPLOYMENT AND RETENTION

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CHAPTER 31—AUTHORITY FOR EMPLOYMENT

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SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

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§ 3133. Authorization of positions; authority for appointment

(a) During each even-numbered calendar year, each agency shall—

(1) examine its needs for Senior Executive Service positions for each of the 2 fiscal years beginning after such calendar year; and

(2) submit to the Office of Personnel Management a written request for a specific number of Senior Executive Service positions, *with a justification for each position (by title and organizational location) and the specific result expected from each position, including the impact of such result on the agency mission*, for each of such fiscal years.

(b) Each agency request submitted under subsection (a) of this section shall—

(1) be based on the anticipated type and extent of program activities and budget requests of the agency for each of the 2 fiscal years involved, and such other factors as may be prescribed from time to time by the Office; and

(2) identify, by position title, positions which are proposed to be designated as or removed from designation as career reserved positions, and set forth justifications for such proposed actions.

(c) The Office of Personnel Management, in consultation with the Office of Management and Budget, shall review the request of each agency and shall authorize, for each of the 2 fiscal years covered by requests required under subsection (a) of this section, a specific number of Senior Executive Service positions for each agency.

(d)(1) The Office of Personnel Management may, on a written request of an agency or on its own initiative, make an adjustment in the number of positions authorized for any agency. Each agency request under this paragraph shall be submitted in such form, and shall be based on such factors, as the Office shall prescribe.

(2) The total number of positions in the Senior Executive Service may not at any time during any fiscal year exceed 105 percent of the total number of positions authorized under subsection (c) of this section for such fiscal year.

(e)(1) Not later than July 1, 1979, and from time to time thereafter as the Director of the Office of Personnel Management finds appropriate, the Director shall establish, by rule issued in accordance with section 1103(b) of this title, the number of positions out of the total number of positions in the Senior Executive Service, as authorized by this section or section 413 of the Civil Service Reform Act of 1978, which are to be career reserved positions. Except as provided in paragraph (2) of this subsection, the number of positions required by this subsection to be career reserved positions shall not be less than the number of the positions then in the Senior Executive Service which, before the date of such Act, were authorized to be filled only through competitive civil service examination.

(2) The Director may, by rule, designate a number of career reserved positions which is less than the number required by paragraph (1) of this subsection only if the Director determines such lesser number necessary in order to designate as general positions one or more positions (other than positions described in section 3132(b)(3) of this title) which—

(A) involve policymaking responsibilities which require the advocacy or management of programs of the President and support of controversial aspects of such programs;

(B) involve significant participation in the major political policies of the President; or

(C) require the senior executives in the positions to serve as personal assistants of, or advisers to, Presidential appointees. The Director shall provide a full explanation for his determination in each case.

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CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

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SUBCHAPTER VIII—APPOINTMENT, REASSIGNMENT, TRANSFER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE SERVICE

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§ 3393. Career appointments

(a) Each agency shall establish a recruitment program, in accordance with guidelines which shall be issued by the Office of Personnel Management, which provides for recruitment of career appointees from—

- (1) all groups of qualified individuals within the civil service;
- or
- (2) all groups of qualified individuals whether or not within the civil service.

(b) Each agency shall establish one or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency or commissioned officers of the uniformed services serving on active duty in such agency. The boards shall, in accordance with merit staffing requirements established by the Office, conduct the merit staffing process for career appointees, including—

- (1) reviewing the executive qualifications of each candidate for a position to be filled by a career appointee; and
- (2) making written recommendations to the appropriate appointing authority concerning such candidates.

(c)(1) The Office shall establish one or more qualifications review boards, as appropriate. It is the function of the boards to certify the executive qualifications of candidates for initial appointment as career appointees in accordance with regulations prescribed by the Office. Of the members of each board more than one-half shall be appointed from among career appointees. Appointments to such boards shall be made on a non-partisan basis, the sole selection criterion being the professional knowledge of public management and knowledge of the appropriate occupational fields of the intended appointee.

(2) The Office shall, in consultation with the various qualification review boards, prescribe criteria for establishing executive qualifications for appointment of career appointees. The criteria shall provide for—

- (A) consideration of demonstrated executive experience;
- (B) consideration of successful participation in a career executive development program which is approved by the Office; and
- (C) sufficient flexibility to allow for the appointment of individuals who have special or unique qualities which indicate a likelihood of executive success and who would not otherwise be eligible for appointment.

(d) An individual's initial appointment as a career appointee shall become final only after the individual has served a **[1-year]** 2-year probationary period as a career appointee. The preceding sentence shall not apply to any individual covered by section 1599e of title 10.

(e) Each career appointee shall meet the executive qualifications of the position to which appointed, as determined in writing by the appointing authority.

(f) The title of each career reserved position shall be published in the Federal Register.

(g) A career appointee may not be removed from the Senior Executive Service or civil service except in accordance with the applicable provisions of sections 1215, 3592, 3595, 7532, **[or 7543 of this title]**, 7543, or 7553 of this title or section 713 of title 38.

* * * * *

§ 3395. Reassignment and transfer within the Senior Executive Service

(a)(1) A career appointee in an agency—

(A) may, subject to ~~paragraph (2)~~ *paragraphs (2) and (3)* of this subsection, be reassigned to any Senior Executive Service position in the same agency for which the appointee is qualified; and

(B) may transfer to a Senior Executive Service position in another agency for which the appointee is qualified, with the approval of the agency to which the appointee transfers.

(2)(A) Except as provided in subparagraph (B) of this paragraph, a career appointee may be reassigned to any Senior Executive Service position only if the career appointee receives written notice of the reassignment at least 15 days before the effective date of such reassignment.

(B)(i) A career appointee may not be reassigned to a Senior Executive Service position outside the career appointee's commuting area unless—

(I) before providing notice under subclause (II) of this clause (or seeking or obtaining the consent of the career appointee under clause (ii) of this subparagraph to waive such notice), the agency consults with the career appointee on the reasons for, and the appointee's preferences with respect to, the proposed reassignment; and

(II) the career appointee receives written notice of the reassignment, including a statement of the reasons for the reassignment, at least 60 days before the effective date of the reassignment.

(ii) Notice of reassignment under clause (i)(II) of this subparagraph may be waived with the written consent of the career appointee involved.

(3)(A) *Consistent with the requirements of paragraphs (1) and (2), at least once every five years beginning on the date that a career appointee is initially appointed to the Senior Executive Service, each career appointee at an agency shall be reassigned to another Senior Executive Service position at the agency at a different geographic location that does not include the supervision of the same agency personnel or programs.*

(B) *The head of an agency may waive the requirement under subparagraph (A) for any career appointee if the head submits notice of the waiver and an explanation of the reasons for the waiver to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.*

(b)(1) Notwithstanding section 3394(b) of this title, a limited emergency appointee may be reassigned to another Senior Executive Service position in the same agency established to meet a bona fide, unanticipated, urgent need, except that the appointee may not serve in one or more positions in such agency under such appointment in excess of 18 months.

(2) Notwithstanding section 3394(b) of this title, a limited term appointee may be reassigned to another Senior Executive Service position in the same agency the duties of which will expire at the end of a term of 3 years or less, except that the appointee may not

serve in one or more positions in the agency under such appointment in excess of 3 years.

(c) A limited term appointee or a limited emergency appointee may not be appointed to, or continue to hold, a position under such an appointment if, within the preceding 48 months, the individual has served more than 36 months, in the aggregate, under any combination of such types of appointment.

(d) A noncareer appointee in an agency—

(1) may be reassigned to any general position in the agency for which the appointee is qualified; and

(2) may transfer to a general position in another agency with the approval of the agency to which the appointee transfers.

(e)(1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily reassigned—

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

(i) is a noncareer appointee; and

(ii) has the authority to make an initial appraisal of the career appointee's performance under subchapter II of chapter 43.

(2) Paragraph (1) of this subsection does not apply with respect to—

(A) any reassignment under section 4314(b)(3) of this title; or

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

(3) For the purpose of applying paragraph (1) to a career appointee, any days (not to exceed a total of 60) during which such career appointee is serving pursuant to a detail or other temporary assignment apart from such appointee's regular position shall not be counted in determining the number of days that have elapsed since an appointment referred to in subparagraph (A) or (B) of such paragraph.

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CHAPTER 35—RETENTION PREFERENCE, VOLUNTARY SEPARATION INCENTIVE PAYMENTS, RESTORATION, AND REEMPLOYMENT

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SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND GUARANTEED PLACEMENT IN THE SENIOR EXECUTIVE SERVICE

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§ 3592. Removal from the Senior Executive Service

(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service—

(1) during the **[1-year]** 2-year period of probation under section 3393(d) of this title, or

(2) at any time for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title,

except that in the case of a removal under paragraph (2) of this subsection the career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

(b)(1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily removed—

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

(i) is a noncareer appointee; and

(ii) has the authority to remove the career appointee.

(2) Paragraph (1) of this subsection does not apply with respect to—

(A) any removal under section 4314(b)(3) of this title; [or]

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection[.]; or

(C) *any removal under subchapter VI of this title or section 713 of title 38.*

(c) A limited emergency appointee, limited term appointee, or noncareer appointee may be removed from the service at any time.

§ 3593. Reinstatement in the Senior Executive Service

(a) A former career appointee may be reinstated, without regard to section 3393(b) and (c) of this title, to any Senior Executive Service position for which the appointee is qualified if—

(1) the appointee has successfully completed the probationary period established under section 3393(d) of this title; and

(2) the appointee left the Senior Executive Service for reasons other than [misconduct,] *such cause as would promote the efficiency of the service, misconduct, neglect of duty, malfeasance, or less than fully successful executive performance as determined under subchapter II of chapter 43.*

(b) A career appointee who is appointed by the President to any civil service position outside the Senior Executive Service and who leaves the position for reasons other than [misconduct,] *such cause as would promote the efficiency of the service, misconduct, neglect of duty, or malfeasance* shall be entitled to be placed in the Senior Executive Service if the appointee applies to the Office of Personnel Management within 90 days after separation from the Presidential appointment.

(c)(1) A former career appointee shall be reinstated, without regard to section 3393(b) and (c) of this title, to any vacant Senior Executive Service position in an agency for which the appointee is qualified if—

(A) the individual was a career appointee on May 31, 1981;

(B) the appointee was removed from the Senior Executive Service under section 3595 of this title before October 1, 1984, due to a reduction in force in that agency;

(C) before the removal occurred, the appointee successfully completed the probationary period established under section 3393(d) of this title; and

(D) the appointee applies for that vacant position within one year after the Office receives certification regarding that appointee pursuant to section 3595(b)(3)(B) of this title.

(2) A career appointee is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title any determination by the agency that the appointee is not qualified for a position for which the appointee applies under paragraph (1) of this subsection.

§ 3594. Guaranteed placement in other personnel systems

(a) A career appointee who was appointed from a civil service position held under a career or career-conditional appointment (or an appointment of equivalent tenure, as determined by the Office of Personnel Management) and who, for reasons other than **[misconduct,]** *such cause as would promote the efficiency of the service, misconduct*, neglect of duty, or malfeasance, is removed from the Senior Executive Service during the probationary period under section 3393(d) of this title, shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

(b) A career appointee who has completed the probationary period under section 3393(d) of this title, and who—

(1) is removed from the Senior Executive Service for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title; or

(2) is removed from the Senior Executive Service under paragraph (4) or (5) of section 3595(b) of this title;

shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

(c)(1) For purposes of subsections (a) and (b) of this section—

(A) the position in which any career appointee is placed under such subsections shall be a continuing position at GS-15 of the General Schedule or classified above GS-15 pursuant to section 5108, or an equivalent position, and, in the case of a career appointee referred to in subsection (a) of this section, the career appointee shall be entitled to an appointment of a tenure equivalent to the tenure of the appointment held in the position from which the career appointee was appointed;

[(B) any career appointee placed under subsection (a) or (b) of this section shall be entitled to receive basic pay at the highest of—

[(i) the rate of basic pay in effect for the position in which placed;

[(ii) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the Senior Executive Service; or

[(iii) the rate of basic pay in effect for the career appointee immediately before being placed under subsection (a) or (b) of this section; and]

(B)(i) *any career appointee placed under subsection (a) or (b)(2) of this section shall be entitled to receive basic pay at the highest of—*

(I) the rate of basic pay in effect for the position in which placed;

(II) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the Senior Executive Service; or

(III) the rate of basic pay in effect for the career appointee immediately before being placed under subsection (a) or (b) of this section; and

(ii) any career appointee placed under subsection (b)(1) of this section shall be entitled to receive basic pay at the rate of basic pay in effect for the position in which placed; and

(C) the placement of any career appointee under subsection (a) or (b) of this section may not be made to a position which would cause the separation or reduction in grade of any other employee.

(2) An employee who is receiving basic pay under paragraph (1)(B)(ii) or (iii) of this subsection is entitled to have the basic pay rate of the employee increased by 50 percent of the amount of each increase in the maximum rate of basic pay for the grade of the position in which the employee is placed under subsection (a) or (b) of this section until the rate is equal to the rate in effect under paragraph (1)(B)(i) of this subsection for the position in which the employee is placed.

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SUBPART C—EMPLOYEE PERFORMANCE

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CHAPTER 43—PERFORMANCE APPRAISAL

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SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

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§ 4312. Senior Executive Service performance appraisal systems

(a) Each agency shall, in accordance with standards established by the Office of Personnel Management, develop one or more performance appraisal systems designed to—

(1) permit the accurate evaluation of performance in any position on the basis of criteria which are related to the position and which specify the critical elements of the position;

(2) provide for systematic appraisals of performance of senior executives;

(3) encourage excellence in performance by senior executives; and

(4) provide a basis for making eligibility determinations for retention in the Senior Executive Service and for Senior Executive Service performance awards.

(b) Each performance appraisal system established by an agency under subsection (a) of this section shall provide—

(1) that, **[on or]** *not later than 30 calendar days* before the beginning of each rating period, performance requirements for each senior executive in the agency are established in consultation with the senior executive and communicated *in writing* to the senior executive;

(2) that written appraisals of performance are based on the individual and organizational performance requirements established for the rating period involved; and

(3) that each senior executive in the agency is provided a copy of the appraisal and rating under section 4314 of this title and is given an opportunity to respond in writing and have the rating reviewed by an employee, or (with the consent of the senior executive) a commissioned officer in the uniformed services serving on active duty, in a higher level in the agency before the rating becomes final.

(c)(1) The Office shall review each agency's performance appraisal system under this section, and determine whether the agency performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review performance appraisal systems under this section to determine the extent to which any such system meets the requirements under this subchapter and shall periodically report its findings to the Office and to each House of the Congress.

(3) If the Office determines that an agency performance appraisal system does not meet the requirements under this subchapter (including regulations prescribed under section 4315), the agency shall take such corrective action as may be required by the Office.

(d) A senior executive may not appeal any appraisal and rating under any performance appraisal system under this section.

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SUBPART E—ATTENDANCE AND LEAVE

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CHAPTER 63—LEAVE

SUBCHAPTER I—ANNUAL AND SICK LEAVE

Sec.
6301. Definitions.

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SUBCHAPTER II—OTHER PAID LEAVE

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6330. *Mandatory leave for Senior Executive Service career appointees subject to removal.*

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SUBCHAPTER II—OTHER PAID LEAVE

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§ 6330. Mandatory leave for Senior Executive Service career appointees subject to removal(a) *In this section—*(1) *the term “employee” means an employee (as that term is defined in section 7541(1)) who has received written notice of removal from the civil service under subchapter V of chapter 75; and*(2) *the term “mandatory leave” means, with respect to an employee, an absence with pay but without duty during which such employee—*(A) *shall be charged accrued annual leave for the period of such absence; and*(B) *may not accrue any annual leave under section 6303 for the period of such absence.*(b) *Under regulations prescribed by the Office of Personnel Management, an agency may place an employee on mandatory leave for misconduct, neglect of duty, malfeasance, or such cause as would promote the efficiency of the service.*(c) *If an agency determines that an employee should be placed on mandatory leave under subsection (b), such leave shall begin no earlier than the date on which the employee received written notice of a removal under subchapter V of chapter 75.*(d) *If a final order or decision is issued in favor of such employee with respect to removal under subchapter V of chapter 75 by the agency, the Merit Systems Protection Board, or the United States Court of Appeals for the Federal Circuit, any annual leave that is charged to an employee by operation of this section shall be restored to the applicable leave account of such employee.*

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**SUBPART F—LABOR-MANAGEMENT AND
EMPLOYEE RELATIONS**

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CHAPTER 75—ADVERSE ACTIONS

SUBCHAPTER I—SUSPENSION OF 14 DAYS OR LESS

Sec.

7501. Definitions.

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SUBCHAPTER VI—SENIOR EXECUTIVE SERVICE: EXPEDITED REMOVAL

7551. Definitions.

7552. Actions covered.

7553. Cause and procedure.

7554. Expedited review of appeal.

SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purpose of this subchapter—

[(1) “employee” means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or, except as provided in section 1599e of title 10, who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and]

(1) “employee” means—

(A) *an individual in the competitive service who is not serving a probationary period or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; or*

(B) *a career appointee in the Senior Executive Service who—*

(i) has completed the probationary period prescribed under section 3393(d); or

(ii) was covered by the provisions of subchapter II of this chapter immediately before appointment to the Senior Executive Service; and

(2) “suspension” means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

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SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

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§ 7542. Actions covered

This subchapter applies to a removal from the civil service or suspension for more than 14 days, but does not apply to an action initiated under section 1215 of this title, to a suspension or removal under section 7532 of this title, [or to a removal under section 3592 or 3595 of this title] *to a removal under section 3592 or 3595 of this title, to a suspension under section 7503, to a removal or transfer under section 7553, or a removal or transfer under section 713 of title 38.*

§ 7543. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for [misconduct,] *such cause as would promote the efficiency of the service, misconduct,* neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(b) An employee against whom an action covered by this subchapter is proposed is entitled to—

(1) at least [30] 15 days’ advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative;
and

(4) a written decision and specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, and a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

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SUBCHAPTER VI—SENIOR EXECUTIVE SERVICE: EXPEDITED REMOVAL

§ 7551. Definitions

In this subchapter—

(1) the term “employee” has the meaning given such term in section 7541(1), but does not include any career appointee in the Senior Executive Service within the Department of Veterans Affairs; and

(2) the term “misconduct” includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

§ 7552. Actions covered

This subchapter applies to a removal from the civil service or a transfer from the Senior Executive Service, but does not apply to an action initiated under section 1215, to a removal under section 3592 or 3595, to a suspension under section 7503, to a suspension or removal under section 7532, to a suspension or removal under section 7542, or to a suspension or removal under section 713 of title 38.

§ 7553. Cause and procedure

(a)(1) *Under regulations prescribed by the Office of Personnel Management, the head of an agency may remove an employee of the agency from the Senior Executive Service if the head determines that the performance or misconduct of the individual warrants such removal. If the head so removes such an individual, the head may—*

(A) remove the individual from the civil service; or

(B) in the case of an employee described in paragraph (2), transfer the employee from the Senior Executive Service to a General Schedule position at any grade of the General Schedule for which the employee is qualified and that the head determines is appropriate.

(2) *An employee described in this paragraph is an individual who—*

(A) previously occupied a permanent position within the competitive service;

(B) previously occupied a permanent position within the excepted service; or

(C) prior to employment as a career appointee at the agency, did not occupy any position within the Federal Government.

(3) An employee against whom an action is proposed under paragraph (1) is entitled to 5 days' advance written notice.

(b)(1) Notwithstanding any other provision of law, including section 3594, any employee transferred to a General Schedule position under subsection (a)(1)(B) shall, beginning on the date of such transfer, receive the annual rate of pay applicable to such position.

(2) An employee so transferred may not be placed on administrative leave or any other category of paid leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the individual reports for duty. If an employee so transferred does not report for duty, such employee shall not receive pay or other benefits pursuant to section 7554(e).

(c) Not later than 30 days after removing or transferring an employee under subsection (a), the applicable head of the agency shall submit to Congress notice in writing of such removal or transfer and the reason for such removal or transfer.

(d) Section 3592(b)(1) does not apply to an action to remove or transfer an employee under this section.

(e) Subject to the requirements of section 7554, an employee may appeal a removal or transfer under subsection (a) to the Merit Systems Protection Board under section 7701, but only if such appeal is made not later than seven days after the date of such removal or transfer.

§ 7554. Expedited review of appeal

(a) Upon receipt of an appeal under section 7553(d), the Merit Systems Protection Board shall refer such appeal to an administrative judge pursuant to section 7701(b)(1). The administrative judge shall—

(1) expedite any such appeal under such section; and

(2) in any such case, issue a decision not later than 21 days after the date of the appeal.

(b) Notwithstanding any other provision of law, including section 7703, the decision of an administrative judge under subsection (a) shall be final and shall not be subject to any further appeal.

(c) In any case in which the administrative judge cannot issue a decision in accordance with the 21-day requirement under subsection (a)(2), the removal or transfer is final. In such a case, the Merit Systems Protection Board shall, within 14 days after the date that such removal or transfer is final, submit to Congress a report that explains the reasons why a decision was not issued in accordance with such requirement.

(d) The Merit Systems Protection Board or administrative judge may not stay any removal or transfer under this section.

(e) During the period beginning on the date on which an employee appeals a removal from the civil service under section 7553(d) and ending on the date that the administrative judge issues a final decision on such appeal, such employee may not receive any pay,

awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

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TITLE 38, UNITED STATES CODE

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PART I—GENERAL PROVISIONS

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CHAPTER 7—EMPLOYEES

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§ 713. Senior executives: removal based on performance or misconduct

(a) IN GENERAL.—(1) The Secretary may remove an individual employed in a senior executive position at the Department of Veterans Affairs from the senior executive position if the Secretary determines the performance or misconduct of the individual warrants such removal. If the Secretary so removes such an individual, the Secretary may—

(A) remove the individual from the civil service (as defined in section 2101 of title 5); or

(B) in the case of an individual described in paragraph (2), transfer the individual from the senior executive position to a General Schedule position at any grade of the General Schedule for which the individual is qualified and that the Secretary determines is appropriate.

(2) An individual described in this paragraph is an individual who—

(A) previously occupied a permanent position within the competitive service (as that term is defined in section 2102 of title 5);

(B) previously occupied a permanent position within the excepted service (as that term is defined in section 2103 of title 5); or

(C) prior to employment in a senior executive position at the Department of Veterans Affairs, did not occupy any position within the Federal Government.

(b) PAY OF TRANSFERRED INDIVIDUAL.—(1) Notwithstanding any other provision of law, including the requirements of section 3594 of title 5, any individual transferred to a General Schedule position under subsection (a)(2) shall, beginning on the date of such transfer, receive the annual rate of pay applicable to such position.

(2) An individual so transferred may not be placed on administrative leave or any other category of paid leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the individual reports for duty. If an individual so transferred does not report for duty, such individual shall not receive pay or other benefits pursuant to subsection (e)(5).

(c) NOTICE TO CONGRESS.—Not later than 30 days after removing or transferring an individual from a senior executive position under

subsection (a), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives notice in writing of such removal or transfer and the reason for such removal or transfer.

(d) PROCEDURE.—(1) The procedures under section 7543(b) of title 5 shall not apply to a removal or transfer under this section.

(2)(A) Subject to subparagraph (B) and subsection (e), any removal or transfer under subsection (a) may be appealed to the Merit Systems Protection Board under section 7701 of title 5.

(B) An appeal under subparagraph (A) of a removal or transfer may only be made if such appeal is made not later than seven days after the date of such removal or transfer.

(e) EXPEDITED REVIEW BY ADMINISTRATIVE JUDGE.—(1) Upon receipt of an appeal under subsection (d)(2)(A), the Merit Systems Protection Board shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5. The administrative judge shall expedite any such appeal under such section and, in any such case, shall issue a decision not later than 21 days after the date of the appeal.

(2) Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge under paragraph (1) shall be final and shall not be subject to any further appeal.

(3) In any case in which the administrative judge cannot issue a decision in accordance with the 21-day requirement under paragraph (1), the removal or transfer is final. In such a case, the Merit Systems Protection Board shall, within 14 days after the date that such removal or transfer is final, submit to Congress and the Committees on Veterans' Affairs of the Senate and House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

(4) The Merit Systems Protection Board or administrative judge may not stay any removal or transfer under this section.

(5) During the period beginning on the date on which an individual appeals a removal from the civil service under subsection (d) and ending on the date that the administrative judge issues a final decision on such appeal, such individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

(6) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board, and to any administrative judge to whom an appeal under this section is referred, such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(f) RELATION TO TITLE 5.—(1) The authority provided by this section is in addition to the authority provided by section 3592 [or subchapter V], chapter 43, or subchapters V and VI of chapter 75 of title 5.

(2) Section 3592(b)(1) of title 5 does not apply to an action to remove or transfer an individual under this section.

(g) DEFINITIONS.—In this section:

(1) The term “individual” means—

(A) a career appointee (as that term is defined in section 3132(a)(4) of title 5); or

(B) any individual who occupies an administrative or executive position and who was appointed under section 7306(a) or section 7401(1) of this title.

(2) The term “misconduct” includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(3) The term “senior executive position” means—

(A) with respect to a career appointee (as that term is defined in section 3132(a)(4) of title 5), a Senior Executive Service position (as such term is defined in section 3132(a)(2) of title 5); and

(B) with respect to an individual appointed under section 7306(a) or section 7401(1) of this title, an administrative or executive position.

* * * * *

MINORITY VIEWS

Committee Democrats oppose H.R. 4358, the Senior Executive Service Accountability Act, because it would undermine due process protections that were put in place in the 19th Century to ensure that the civil service is free of political influence. The legislation also could enable retaliation against whistleblowers.

The legislation would shorten the notice period before an agency could terminate or suspend a senior executive from 30 to 15 days. This shortened notice period may not be sufficient time for the employee to defend against the charge.

The bill also would allow an agency to charge a senior executive's accrued annual leave pending removal. This could be construed by courts as an unlawful "taking" of a property right that requires notice and an opportunity to respond. In addition, employees faced with the possibility of losing their accrued leave may be less willing to disclose violations of law or waste, fraud, and abuse.

The expedited removal process required in the legislation would not allow a senior executive an opportunity to respond prior to removal or transfer. Although the legislation would permit appeal rights after removal or transfer, the rights would be limited. The senior executive would have only 7 days from the personnel action to file an appeal. The senior executive would not be entitled to appeal the administrative judge's decision, and if the administrative judge could not issue a decision within 21 days, the removal or transfer would be deemed final. The constitutionality of the identical provisions of the Veterans Access, Choice, and Accountability Act is currently being challenged in the Federal Circuit Court of Appeals.

The legislation also would eliminate the authority of the Merit Systems Protection Board or an administrative judge to issue a stay, which is critical for protecting whistleblowers from retaliation. In addition, since the bill would allow an agency to transfer a senior executive to a position "at any grade" of the General Schedule, it would not prevent the transfer of a senior executive to a lower level General Schedule position for which he or she would be overqualified. This provision could also be used to retaliate against whistleblowers.

The legislation's arbitrary, across-the-board extension of the probationary period from one year to two years would extend the period during which an agency could remove or retaliate against an employee without adequate recourse. The Merit Systems Protection Board recently noted that the current one-year probationary period is not being fully and effectively utilized by agencies, so it is unclear why extending the probationary period to all agencies in this manner would be necessary.

The legislation's requirement that agencies reassign senior executives to different locations every five years is arbitrary and in-

flexible, and it would not allow agencies discretion to consider their needs or the developmental needs of their senior executives. This mandate is also unnecessary. The President recently issued an Executive Order to strengthen the Senior Executive Service which requires agencies to establish a two-year plan for increasing the mobility of their senior executives.

During Committee consideration of the bill, Representative Norton offered an amendment to strike the problematic provisions of the bill, but the amendment was not accepted.

We fully support the goal of improving the accountability of the Senior Executive Service, but such reforms must be meaningful, fair, and not instituted at the cost of due process and whistleblower protections.

For these reasons, Committee Democrats oppose H.R. 4358.

ELIJAH E. CUMMINGS,
Ranking Member.

