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## **New Medicare Agency Provisions of S. 1, as Passed by the Senate, and H.R. 1, as Passed by the House**

**July 25, 2003**

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# New Medicare Agency Provisions of S. 1, as Passed by the Senate, and H.R. 1, as Passed by the House

## Summary

On June 27, 2003, the Senate passed the Prescription Drug and Medicare Improvement Act of 2003 by a vote of 76-21. Later that same evening, the House passed the Medicare Modernization and Prescription Drug Act of 2003 by a recorded vote of 216-215 with one voting present.

Both bills would create a new agency within the Department of Health and Human Services (HHS) to administer the new prescription drug benefit under the new Part D of Medicare and the MedicareAdvantage program under Part C (formerly the Medicare+Choice program). H.R. 1 would also have the new agency administer the new Enhanced Fee-For-Service program under the new Part E of Medicare. In general, the new agency provisions found in the Senate and House bills are similar.

Both bills would establish a presidentially-appointed Administrator who would report directly to the Secretary of HHS and who would exercise all powers and duties of the agency. The Administrator would negotiate, enter into, and enforce contracts with MedicareAdvantage plans (and Enhanced Fee-For-Service, in H.R. 1) and with the prescription drug plan offerors.

The new agency would also be responsible for informing beneficiaries about the Medicare program (not just Parts C and D (and E)) and beneficiary appeal rights. S. 1 would also require the new agency to enroll beneficiaries into Medicare – a responsibility currently handled by the Social Security Administration.

The Administrator would hire staff for the new agency. S. 1 would leave current executive branch civil service laws in place. H.R. 1 would waive some personnel requirements for the new agency – three of the 46 chapters of Title 5 would be waived, in part. Specifically, sections of Chapters 31, 51 and 53 of Title 5 of the U.S. Code that address the authority for employing staff, classification of positions and pay rates and systems would not apply to the new agency. The new agency would still be required to establish a plan for *classifying* positions (retained Section 5101) and for adhering to the general policy that federal *pay* be based on specified principles (retained Section 5301).

S. 1 would fund the administrative expenses for implementing Part D through mandatory appropriations, with the remainder of the new agency's responsibilities funded by the annual appropriations process. H.R. 1 would make the new agency's entire administrative funding subject to the annual appropriations process. The Congressional Budget Office (CBO) estimates that the administrative costs to the government for the administrative tasks implementing Parts C, and D (and E in H.R. 1) would be \$3.6 billion from FY2004 through FY2008 and \$10 billion from FY2004 through FY2013. However, because, depending upon the bill, most or all of these funds are subject to appropriations, the appropriations committees have discretion to determine the actual level at which these new requirements would be funded. This report will be updated as events warrant.

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# New Medicare Agency Provisions of S. 1, as Passed by the Senate, and H.R. 1, as Passed by the House

On June 27, 2003, the Senate passed the Prescription Drug and Medicare Improvement Act of 2003 by a vote of 76-21. Later that same evening, the House passed the Medicare Modernization and Prescription Drug Act of 2003 by a recorded vote of 216-215 with one voting present.

Both bills would create a new agency within the Department of Health and Human Services (HHS) to administer the new prescription drug benefit under the new Part D of Medicare and the Medicare Advantage program under Part C (formerly the Medicare+Choice program). H.R. 1 would also have the new agency administer the new Enhanced Fee-For-Service program under the new Part E of Medicare. The current Centers for Medicare and Medicaid Services (CMS) would continue to administer fee-for-service Medicare, Medicaid, and other duties that have been assigned to CMS. In general, the new agency provisions found in the Senate and House bills are very similar.

S. 1 and H.R. 1 would establish a presidentially-appointed Administrator who would report directly to the Secretary of HHS and who would exercise all powers and duties of the agency. The Administrator of the new agency would negotiate, enter into, and enforce contracts with Medicare Advantage plans (and Enhanced Fee-For-Service, in H.R. 1) and with the prescription drug plan offerors. The authority to promulgate regulations for these new programs would be given to the new Administrator (rather than the Secretary who currently is responsible for all Medicare regulations and would continue to be responsible for fee-for-service regulations under both bills). The new agency would also be responsible for informing beneficiaries about the Medicare program (not just Parts C and D (and E)) and beneficiary appeal rights. S. 1 would also require the new agency to enroll beneficiaries into Medicare – a responsibility currently handled by the Social Security Administration.

In both bills, the Administrator of the new agency would be appointed by the President with the advice and consent of the Senate. In S. 1, the term of the appointment would be 5 years; in H.R. 1 the term would be 4 years. The appointment and term of office of the Deputy Administrator of the new agency would vary by bill: S. 1 would have him be appointed by the Administrator for a term of 5 years; in H.R. 1, he would be appointed by the President with the advice and consent of the Senate for a term of 4 years. As a result of the term appointments, the Administrator and Deputy Administrator could bridge changes in Presidential Administrations. In contrast, the Administrator of CMS is appointed by the President and serves at his pleasure. The Deputy Administrator of CMS is not a Presidential

appointment. Both bills would set compensation for the new agency Administrator at level III of the executive schedule and increase the compensation for the Administrator of CMS from level IV to level III of the executive schedule.

In general, both bills seek to give the new agency some flexibility with pay rates for personnel. Many observers believe that the federal employment system is cumbersome and incapable of attracting and retaining staff with the outside experience desired in running more competitive-style programs. However, it is unclear how much of the flexibility would be implemented in a new agency. In recent experience, the Department of Homeland Security was given more expansive flexibility (many chapters of Title 5 were waived including Chapters 31, 51, and 53) than the new agency would be and, according to a news report, may be considering retaining the general schedule system because it is an existing classification system with appeal rights and its use avoids disruption caused by switching to a new system.<sup>1</sup>

S. 1 would retain current executive branch civil service laws for the new agency but would require the Administrator to establish the rate of pay for new agency staff (up to a maximum rate of the highest rate of basic pay for the senior executive service<sup>2</sup> (SES)). S. 1 would give the Administrator, with the approval of the Secretary, authority to employ management staff as determined appropriate.

H.R. 1 would give the new agency flexibility in hiring staff, classifying positions, and with rates of pay. In general, the Administrator would be able to establish different payment systems than are used in the executive branch. The new agency would be exempted from portions of 3 of the 46 chapters of Title 5. Specifically, sections of Chapters 31, 51 and 53 of Title 5 of the U.S. Code that address the authority for employing staff, classification of positions and pay rates and systems would not apply to the new agency. Twelve of the 21 sections of Chapter 31 would be retained: Sections 3102-3108, 3110-3113, 3136m, and 3151.<sup>3</sup>

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<sup>1</sup> Tanya Ballard, GovExec.com., "Homeland Security May Retain Standard Pay System," July 25, 2003 at [[www.govexec.com/dailyfed/0703/072503t1.htm](http://www.govexec.com/dailyfed/0703/072503t1.htm)].

<sup>2</sup> The highest rate of basic pay for the SES is level 6 (ES-6) and for 2003 that amount is \$134,000. In the Washington-Baltimore area, the locality pay adjustment boosts the pay rate 12.74%, but pay is capped at level III of the executive schedule (EX-III), so the SES level 6 is \$142,500.

<sup>3</sup> The 12 sections of Chapter 31 that would be retained are: **3102**, permitting agencies to hire personal assistants for handicapped employees; **3103**, requiring employees to render services in connection with and for the purposes of the appropriation from which the individual is paid; **3104**, permitting the Director of the Office of Personnel Management (OPM) to establish, and revise, the maximum number of scientific or professional positions outside of the General Schedule for carrying out research and development functions; **3105**, requiring agencies to appoint as many administrative law judges (ALJs) as are necessary for hearings and other such proceedings; **3106**, prohibiting agency heads from employing private attorneys in litigation that is against the agency and requires the matter be referred to the Department of Justice; **3107**, prohibiting the employment of publicity experts unless specifically appropriated for that purpose; **3108**, prohibiting the employment of Pinkerton Detective Agency employees or employees from similar organizations; **3110**, prohibiting the employment of relatives; **3111**, permitting agencies to accept volunteer services of  
(continued...)

Subchapter II of Chapter 31 which establishes the senior executive service (SES) would be among the provisions waived.

All of Chapter 51 would be waived except 5101 which requires a plan for *classifying* positions for the purposes of pay rates and ensuring that the principle of equal pay for substantially equal work will be followed, and that variations in pay rates will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements. Section 5101 also requires grouping employees by classes and grades in accordance with their duties, responsibilities, and qualifications. Provisions that would be waived include Section 5104 that establishes the general schedule (GS) as the basic classification system for positions covered under Chapter 51 and the requirement that agencies place each position in its appropriate class and grade.

All of Chapter 53 would be waived except 5301 which establishes the general policy that federal *pay* under the general schedule be based on four principles: equal pay for substantially equal work within each local pay area; pay distinctions be maintained within local pay areas for work and performance distinctions; pay rates be comparable with non-federal pay rates for the same levels of work within the same local pay area; and existing pay disparities between federal and non-federal employees should be completely eliminated. Compensation would be capped at level IV of the executive schedule.<sup>4</sup> Provisions that would be waived include subchapter II which establishes the executive schedule that is used to pay executive positions other than the SES as well as the pay bands for the executive schedule, subchapter III which defines the GS pay rates, and subchapter VIII which establishes pay for the SES.

Both bills would establish an Office of Beneficiary Assistance within the new agency to perform outreach and educational activities for beneficiaries. This office would be required to disseminate programmatic and appeals information on the entire Medicare program to Medicare beneficiaries. S. 1 would further require the office to carry out functions relating to Medicare beneficiaries including eligibility determinations and enrolling individuals in Medicare – a responsibility currently performed by the Social Security Administration. Both bills would establish a Medicare Beneficiary Ombudsman – S. 1 within the Office of Beneficiary Assistance and H.R. 1 within HHS.

Both bills would create an advisory board to advise, consult with, and make recommendations to the Administrator regarding Parts C and D (and E in H.R. 1) of Medicare. Reports by the board would be exempt from any kind of review within the Executive Branch and would be published in the *Federal Register*. H.R. 1 would

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<sup>3</sup> (...continued)

students; **3112**, giving hiring preferences to veterans; **3113**, barring federal re-employment if the employee is convicted of certain specified crimes relating to bribery of a public official and drug related crimes; **3136m**, no such provision; and **3151**, permitting the Attorney General to establish a personnel system for senior executives in the FBI and DEA.

<sup>4</sup> Level I of the executive schedule is the highest level (EX-I) and pay for 2003 is \$171,900. 2003 pay for EX-IV is \$134,000.

exempt the board from all of Chapters 31, 51, and 53 of Title 5 of the U.S. Code in the appointment and compensation of board staff.

S. 1 would fund the administrative expenses for implementing Part D through mandatory appropriations, with the remainder of the new agency's responsibilities funded by the annual, discretionary appropriations process. H.R. 1 would make the new agency's entire administrative funding subject to annual appropriations. The Congressional Budget Office (CBO) estimates that the administrative costs to the government for the administrative tasks implementing Parts C, and D (and E in H.R. 1) would be \$3.6 billion from FY2004 through FY2008 and \$10 billion from FY 2004 through FY2013. However, because, depending upon the bill, most or all of these funds are subject to appropriations, the appropriations committees have discretion to determine the actual level at which these new requirements would be funded.

This report will be updated as events warrant.

## Side-by-Side Comparison of the New Agency Provisions of S. 1 and H.R. 1

### New Agency to Administer Parts C and D

Provisions	Current Law	S. 1	H.R. 1
<b><i>Establishes New Agency</i></b>	No provision. The authority for administering the Medicare program resides with the Secretary of Health and Human Services. The Secretary originally created the agency that administers the Medicare and Medicaid programs in 1977 under his administrative authority.	<b>Section 301.</b> A new section, <b>Section 1808(a)</b> would be created which would establish the Center for Medicare Choices (CMC) within the Department of Health and Human Services (HHS) by March 1, 2004. CMC would be required to be separate from the Centers for Medicare and Medicaid Services (CMS).	<b>Section 801.</b> A new section, <b>Section 1809(a)</b> , which would establish the Medicare Benefits Administration (MBA) within HHS.
<b><i>Administrator</i></b>	No provision. The CMS Administrator is appointed by the President with the advice and consent of the Senate. Compensation for the Administrator of CMS is set at the EX-IV level. The Secretary has the authority to prescribe all Medicare regulations.	<b>Section 1808(b)(1).</b> CMC would be headed by an Administrator who was appointed by the President with the advice and consent of the Senate for a 5-year appointment. Compensation would be at level III of the Executive Schedule. The Administrator would have the authority to prescribe such rules and regulations under the Administrative Procedure Act as necessary to carry out the functions of CMC.	<b>Section 1809(b)(1).</b> Same as S. 1, except that the term of the Administrator's appointment would be 4 years.
<b><i>Deputy Administrator</i></b>	No provision.	<b>Section 1808(b)(2).</b> The CMC Deputy Administrator would be appointed by the Administrator. Compensation would be at level IV of the Executive Schedule. The Deputy Administrator would be appointed for 5 years.	<b>Section 1809(b)(2).</b> The MBA Deputy Administrator would be appointed by the President and with the advice and consent of the Senate. Compensation would be the same as S. 1. The term of the appointment would be 4 years.



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Provisions	Current Law	S. 1	H.R. 1
<b>Chief Actuary</b>	The Medicare statute requires that the CMS administrator appoint a Chief Actuary who reports directly to such administrator and is paid at the highest rate of basic pay for the Senior Executive Service.	No provision.	<b>Section 1809(b)(3).</b> Would establish a Chief Actuary position that reports directly to the Administrator. Only removal for cause would be permitted. Compensation would be at the highest level of the Senior Executive Service basic pay schedule.
<b>Duties and Administrative Provisions</b>	No provision.	<p><b>Section 1808(c).</b> The Administrator would carry out parts C and D including negotiating, entering into, and enforcing contracts with Medicare+Choice plans, Section 1876 cost contracts, and eligible entities for offering prescription drug plans. The Administrator would conduct demonstrations under parts C or D or any other duty provided for under those parts.</p> <p>In administering the drug benefit, the Administrator would be prohibited from requiring a particular formulary or instituting a price structure for the payment of covered drugs; interfering with negotiations between eligible entities and Medicare+Choice organizations and drug manufacturers, wholesalers, or other suppliers of covered drugs; and otherwise interfering with the competitive nature of providing drug coverage through such entities and organizations. By March 31 of each year, the Administrator would be required to report to Congress and the President on the administration of the voluntary prescription drug delivery program during the previous fiscal year.</p>	<p><b>Section 1809(c).</b> Substantially the same as the Senate but also includes part E. Rather than “eligible entities” uses term “[prescription drug plan] PDP sponsors.” Cost contracts are not included in the list of duties. Also would require the Administrator to implement the prescription drug discount card.</p> <p>The report to Congress and the President would be required to address the administration of parts C, D, and E during the previous fiscal year.</p>

Provisions	Current Law	S. 1	H.R. 1
<b>Staffing and Compensation</b>	No provision.	<p><b>Section 1808(c)(2).</b> The Administrator, with the approval of the Secretary, would be able to employ management staff as determined appropriate. Managers would be required to have demonstrated expertise in the review, negotiation, and administration of health care contracts; the design of health care benefit plans; actuarial sciences; compliance with health plan contracts; and consumer education and decision making.</p> <p>The Administrator would be required to establish the rate of pay for CMC staff. The maximum rate of compensation would be limited to the highest rate of basic pay for the Senior Executive Service.</p>	<p><b>Section 1809(c)(2).</b> The Administrator, with the approval of the Secretary, would be permitted to waive Chapter 31 of Title 5 of the United States Code, except for Sections 3102 through 3108, 3110 through 3113, 3136m and 3151<sup>a</sup> in hiring officers and employees.</p> <p>Flexibility for the compensation of MBA staff would be provided by waiving Chapter 51 (except 5101)<sup>b</sup> and Chapter 53 (except Section 5301) of Title 5.<sup>c</sup> Compensation would be capped at level IV of the Executive Schedule.</p> <p>The number of full-time equivalent (FTE) employees in the CMC would be limited to the number performing the function in CMS on the date of enactment.</p>
<b>Office of Beneficiary Assistance</b>	Medicare entitlement and enrollment activities are performed by the Social Security Administration with funding from the Medicare Trust Fund. Information dissemination regarding the Medicare program (using the Medicare handbook, 1-800-Medicare, www.Medicare.gov, and other methods) is performed by CMS (under delegation from the Secretary).	<b>Section 1808(d)(1).</b> The Secretary would be required to establish within CMC an Office of Beneficiary Assistance to carry out functions relating to Medicare beneficiaries under Title XVIII including eligibility determinations and enrolling individuals in Medicare. The Office would be a separate operating division within CMC. This office would also be required to disseminate programmatic and appeals information on the entire Medicare program to beneficiaries.	<b>Section 1809(d)(1).</b> The Secretary would be required to establish within the MBA an Office of Beneficiary Assistance to coordinate functions relating to outreach and education of Medicare beneficiaries (under parts A, B, C, D, and E). The Office would be a separate operating division within MBA. This office would also be required to disseminate programmatic and appeals information on the entire Medicare program to beneficiaries.

Provisions	Current Law	S. 1	H.R. 1
<b>Beneficiary Ombudsman</b>	No provision.	<b>Section 1808(d)(3)(A).</b> A Medicare Ombudsman would be created within the Office of Beneficiary Assistance. The Ombudsman would receive complaints, grievances, and requests for information and assist beneficiaries with respect to complaints, grievances, and requests regarding any aspect of the Medicare program (parts A, B, C and D). Also requires assistance to beneficiaries with problems relating to disenrollment from MedicareAdvantage plans under part C or prescription drug plans under part D. Further requires an annual report to the Congress, the Secretary, and the Medicare Competitive Policy Advisory Board. Requires the ombudsman to coordinate with state medical ombudsman programs and with state-and community-based consumer organizations regarding Medicare information and outreach to beneficiaries. Authorization for ombudsman appropriation is part of the overall authorization of appropriations for such sums as are necessary for this section creating the CMC. [Sec. 1808(f).]	<b>Section 923(b).</b> In a new <b>Section 1810</b> , a Medicare beneficiary ombudsman would be created within HHS appointed by the Secretary. The specific requirements are substantially the same as in S. 1. The Secretary would be required to appoint the ombudsman within 1 year from the date of enactment.
<b>Medicare Advisory Board (Board)</b>	No provision.	<b>Section 1808(e)(1).</b> The Medicare Competitive Policy Advisory Board would be established within CMC to advise, consult with, and make recommendations to the Administrator regarding parts C and D of Medicare. The Board would be required to submit reports to Congress and the Administrator regarding the administration of parts C and D, as the Board determines appropriate. The reports would be published in the <i>Federal Register</i> and could include recommendations for legislative or administrative changes to improve the administration of parts C and D. Reports would be submitted directly to Congress and would be exempt from review by any executive branch entity [such as HHS or the Office of Management and Budget].	<b>Section 1809(e)(1).</b> Same as S. 1 except the Board is called the Medicare Policy Advisory Board and Medicare part E would be included. Also, the board would be permitted to hire and compensate staff without regard to Chapters 31, 51, and 53 of Title 5 of the U.S. Code.

Provisions	Current Law	S. 1	H.R. 1
		<p>Not later than 90 days after the Board submits a report, the Administrator would be required to submit to Congress and the President an analysis of the recommendations made by the Board and to publish the analysis in the <i>Federal Register</i>.</p> <p>The Board would consist of seven members with three appointed by the President, two by the Speaker, two by the President pro tempore. The members would be required to have experience in health care benefits management and could not be employees of the federal government.</p> <p>The Board chairperson would appoint a director who would appoint staff as the director considers appropriate, with the approval of the Board. The Board would be able to contract with agencies or persons without regard to Section 3709 of the Revised Statutes.</p>	
<b>Authorizing Appropriations</b>	No provision.	<b>Section 1808(f).</b> Appropriations from the Medicare trust funds of such sums as needed to carry out this section would be authorized. New <b>Section 1860D-25</b> (in Title I) would make the administrative costs associated with implementing new Part D mandatory and not subject to appropriations.	<b>Section 1809(f).</b> Same as S. 1 Section 1808(f). H.R. 1 does not contain language making any administrative expenses mandatory.
<b>Toll-free Number (1-800-medicare)</b>	The Secretary is required to provide information on Medicare benefits via a toll-free telephone number. Medicare benefit information is provided at 1-800-Medicare. Claims information can be obtained through a 1-800 number maintained by the beneficiary's Medicare contractor and the contractor's toll-free number is published in the Medicare handbook.	<b>Section 301(b).</b> The provision would also require that the Secretary provide 1-800-Medicare as a means by which individuals seeking information about or assistance with Medicare can receive assistance. The Secretary would be required to route calls to the appropriate entity to provide the assistance or information. The 1-800-Medicare number would be required to be published in the Medicare handbook in place of the listing of phone numbers of individual contractors.	<b>Section 923(e).</b> Same as S. 1. Also would require the General Accounting Office (GAO) to monitor the accuracy, consistency, and sufficiency of information provided to beneficiaries through 1-800-Medicare and report to Congress.

Provisions	Current Law	S. 1	H.R. 1
<b>Effective Date</b>	No provision.	<b>Section 1808(a).</b> The Secretary would be required to establish CMC by March 1, 2004.	<b>Section 801(b).</b> Section 1808 would take effect on the date of enactment. The Administrator would carry out enrollment, make eligibility determinations, and carry out parts C and E of Medicare beginning January 1, 2006. The Secretary would be required to provide for the conduct of any responsibilities of the Administrator of MBA before the Administrator's appointment.
<b>Medicare Trustees</b>	The Board of Trustees of the Medicare Trust Funds is composed of the Commissioner of Social Security, the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services and two members of the public. The Administrator of the Centers for Medicare & Medicaid Services serves as the Secretary of the Board of Trustees.	<b>Section 302(a).</b> The Administrator of CMC would serve as Co-Secretary of the Board of Trustees of the Medicare Trust Funds.	<b>Section 801(c)(1).</b> The Administrator of MBA would be a member of the Medicare Trust Funds Board .
<b>CMS Administrator Pay</b>	The pay level for the CMS Administrator is at level IV of the Executive Schedule.	<b>Section 302(b).</b> The pay level for the Administrator of CMS would increase to level III of the Executive Schedule, beginning March 1, 2004.	<b>Section 801(c)(2).</b> Same as S. 1 but would begin January 1, 2004.

<sup>a</sup> Title 5 of the U. S. Code contains the provisions of law governing personnel employed by the executive branch as well as establishing the salaries for all three branches of the federal government. Chapter 31 addresses authority for employment. The 12 sections of Chapter 31 that would be retained are: **3102**, permitting agencies to hire personal assistants for handicapped employees; **3103**, requiring employees to render services in connection with and for the purposes of the appropriation from which the individual is paid; **3104**, permitting the Director of the Office of Personnel Management (OPM) to establish, and revise, the maximum number of scientific or professional positions outside of the General Schedule for carrying out research and development functions; **3105**, requiring agencies to appoint as many administrative law judges (ALJs) as are necessary for hearings and other such proceedings; **3106**, prohibiting agency heads from employing private attorneys in litigation that is against the agency and requires the matter be referred to the Department of Justice; **3107**, prohibiting the employment of publicity experts unless specifically appropriated for that purpose; **3108**, prohibiting the employment of Pinkerton Detective Agency employees or employees from similar organizations; **3110**, prohibiting the employment of relatives; **3111**, permitting agencies to accept volunteer services of students; **3112**, giving hiring preferences to veterans; **3113**, barring federal re-employment if the employee is convicted of certain specified crimes relating to bribery of a public official and drug related crimes; **3136m**, no such provision; and **3151**, permitting the Attorney General to establish a personnel system for senior executives in the FBI and DEA. Among the eight sections that would be waived are those establishing the Senior Executive Service.

<sup>b</sup> Chapter 51 contains requirements about classification of jobs and establishes the general schedule. Section 5101 requires a plan for *classifying* positions for the purposes of pay rates and ensuring that the principle of equal pay for substantially equal work will be followed, and that variations in pay rates will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements. Section 5101 also requires grouping employees by classes and grades in accordance with their duties, responsibilities, and qualifications.

<sup>c</sup> Chapter 53 addresses pay rates and systems and establishes the executive schedule and general schedule pay rates. Section 5301, which would be retained, establishes the general policy that federal *pay* under the general schedule be based on four principles: equal pay for substantially equal work within each local pay area; pay distinctions be maintained within local pay areas for work and performance distinctions; pay rates be comparable with non-federal pay rates for the same levels of work within the same local pay area; and existing pay disparities between federal and non-federal employees should be completely eliminated