Calendar No. 481

117TH CONGRESS
2d Session

SENATE

REPORT
117–143

MEMBERS OF CONGRESS OPT OUT CLARIFICATION ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 471

TO ALLOW MEMBERS OF CONGRESS TO OPT OUT OF THE FEDERAL EMPLOYEES RETIREMENT SYSTEM, AND ALLOW MEMBERS WHO OPT OUT OF THE FEDERAL EMPLOYEES RETIREMENT SYSTEM TO CONTINUE TO PARTICIPATE IN THE THRIFT SAVINGS PLAN

SEPTEMBER 12, 2022.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE
29–010 WASHINGTON : 2022

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MEMBERS OF CONGRESS OPT OUT CLARIFICATION ACT

SEPTEMBER 12, 2022.—Ordered to be printed

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

REPORT

[To accompany S. 471]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 471) to allow Members of Congress to opt out of the Federal Employees Retirement System, and allow Members who opt out of the Federal Employees Retirement System to continue to participate in the Thrift Savings Plan, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE AND SUMMARY

S. 471, the *Members of Congress Pension Opt Out Clarification Act*, would allow Members of Congress to opt out of the defined benefit portion of Federal Employee Retirement System (FERS) without also having to opt out of their contribution benefit, the Thrift Savings Plan (TSP). In addition, the bill would extend the FERS opt-out option to include House Members whose first term starts on or after the date of the bill's enactment. Currently, House Members who began serving before September 30, 2003, and all Senators have the ability to opt out of federal retirement benefits.

II. Background and Need for the Legislation

Coverage under FERS consists of three components: (1) Social Security; (2) a defined benefit basic annuity plan meant to complement Social Security; and (3) the Thrift Savings Plan, a defined contribution plan similar to a 401(k).[1] Currently, Members of Congress entering into office are automatically covered under the FERS program. If they are serving in the Senate, Members can choose to opt out of and forgo both the basic annuity plan and Thrift Savings Plan under FERS.

Since the passage of the *Social Security Amendments of 1983*, all Members of Congress are covered by and are required to pay into Social Security.[2] The additional components of FERS coverage were established a few years after 1983 with the passage of the *Federal Employees' Retirement System Act of 1986*.[3] Per this legislation, Members of Congress whose service began in 1984 or later are covered under the FERS plan unless they elect by written notice not to participate.[4] By definition, such an election also means opting out of the Thrift Savings Plan, established as a part of FERS in the same Act.[5] A provision within the *Legislative Branch Appropriations Act, 2004*, amended the underlying statute to exclude Members of the House of Representatives entering into office on or after September 30, 2003 from the option of declining FERS coverage.[6]

Legislation over the years has led to adjustments in the required employee contribution level toward the FERS annuity plan. Since 2014, Members of Congress and other federal employees who enter into FERS coverage must contribute 4.4% of their salary.[7] Members are eligible to receive their annuity at age 62 or older if they have completed at least 5 years of service; at age 50 or older if they have completed at least 20 of years of service; or at any age if they have completed 25 years of service.[8] The annuity benefit accrual rate has also changed over time and depends on when a Member first started serving. Since 2014, the accrual rate for Members and other federal employees entering into service has been 1% per year of service, and increased to 1.1% if the individual serves for at least 20 years and until at least age 62.[9] The pension amount equates to the retiree's highest average basic pay earned during three consecutive years of service multiplied by the number of years of service and the accrual rate.[10]

In addition, Members of Congress and other federal employees covered under FERS are automatically enrolled into a TSP defined contribution plan. The employing agency automatically contributes

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[1] Office of Personnel Management, Retirement Services: FERS Information (www.opm.gov/retirement-services/fers-information/) (accessed on July 21, 2022); Congressional Research Service, *Federal Retirement Plans: Frequently Asked Questions* (R47084) (May 2, 2022).

[2] Social Security Amendments of 1983, Pub. L. No. 98–21; Social Security Administration, FAQS (www.ssa.gov/history/hfaq.html) (accessed July 21, 2022).

[3] Federal Employees' Retirement System Act of 1986, Pub. L. No. 99–335; Congressional Research Service, *Retirement Benefits for Members of Congress* (Aug. 8, 2019).

[4] Federal Employees' Retirement System Act of 1986, *supra* note 3, at 7 (hereinafter "Federal Employees' Retirement").

[5] Federal Employees' Retirement, *supra* note 3, at 28.

[6] Legislative Branch Appropriations, 2004, Pub. L. 113–239, Sec. 104 (2003); 5 U.S.C. § 8401(20).

[7] 5 U.S.C. § 8422(a).

[8] 5 U.S.C. § 8412(f); 5 U.S.C § 8412(c).

[9] 5 U.S.C. § 8415.

[10] Federal Employees' Retirement, *supra*, at 9.

1% of basic pay per pay period into each TSP account of FERS employees.[11] FERS participants, including Members of Congress, receive matching contributions from their employing agency on the first 5% of basic pay that each individual contributes per pay period.[12]

The *Members of Congress Pension Opt Out Clarification Act* would amend the definitions section of the FERS statute in title 5 so that a Member's written election to not participate in FERS does not also apply to the Member's participation in a TSP. In addition, the bill strikes language in the definitions section added by the *Legislative Branch Appropriations Act, 2004*, that excludes Members of the House of Representatives entering into office on or after September 30, 2003 from the option of declining FERS coverage. The bill states that the change related to Members of the House of Representatives applies only to individuals who first serve on or after the date of the bill's enactment.

III. Legislative History

Senator Mike Braun (R–IN) introduced S. 471, the *Members of Congress Pension Opt Out Clarification Act* on February 25, 2021, with original co-sponsor Senator Rick Scott (R–FL). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 471 at a business meeting on May 25, 2022. The bill was ordered reported favorably by voice vote *en bloc* with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Lankford, Romney, Scott, and Hawley present and with Senator Padilla recorded as "No."

IV. Section-by-Section Analysis of the Bill, as Reported

Section 1. Short title

This section establishes the short title of the bill as the "Members of Congress Opt Out Clarification Act."

Sec. 2. Making FERS optional for Members

Subsection (a) amends the definition of "Member" in chapter 84 of title 5, United States Code. It strikes language that excludes Members of the House of Representatives who have not served as a Member prior to September 30, 2003 from the FERS opt-out option. Changes made by this subsection will apply to individuals who first serve in the House of Representatives on or after the date of the bill's enactment.

Subsection (b) further amends the definition of "Member" in Chapter 84 of title 5, United States Code. Currently, the definition of "Member" for the purposes of Chapter 84 does not include individuals who choose to opt out of FERS, which applies to the subchapter on TSP. The bill specifies that for the FERS subchapter on TSP, the definition of Member still includes individuals who have chosen to opt out of FERS. Changes made by this subsection will take effect on or after the date of the bill's enactment.

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[11] Thrift Savings Plan, Contribution Types: Regular Employee Benefits (www.tsp.gov/making-contributions/contribution-types/) (accessed July 21, 2022).

[12] *Id.*

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 21, 2022.

Hon. GARY PETERS,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 471, the Members of Congress Pension Opt Out Clarification Act.

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

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

At a Glance

S. 471, Members of Congress Pension Opt Out Clarification Act
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on May 25, 2022

By Fiscal Year, Millions of Dollars	2022	2022-2027	2022-2032
Direct Spending (Outlays)	0	*	*
Revenues	0	-1	-4
Increase or Decrease (-) in the Deficit	0	1	4
Spending Subject to Appropriation (Outlays)	0	-4	not estimated

		Mandate Effects	
Statutory pay-as-you-go procedures apply?	Yes		
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2033?	< $5 billion	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

* = between -$500,000 and $500,000.

The bill would:

- Allow Members of the House of Representatives elected after enactment to opt out of the Federal Employee Retirement System (FERS)
- Allow Senators to participate in the Thrift Savings Plan even if they opt out of FERS participation

Estimated budgetary effects would mainly stem from:

- Eliminating employee contributions from Members who opt out of FERS
- Eliminating future retirement benefits for Members who opt out of FERS
- Reducing employer contributions made on behalf of Members who opt out of FERS

Bill summary: S. 471 would allow Members of the House of Representatives who are elected after enactment and all Senators, including those elected before enactment, to opt out of the Federal Employee Retirement System (FERS) but allow them to participate in the Thrift Savings Plan (TSP). Under current law:

- Members of the House of Representatives who entered office in fiscal year 2004 or later may not opt out of FERS. Members who entered office before that date can opt out, but if they do so, they also lose their ability to participate in the TSP.
- Senators can opt out of FERS, regardless of when they entered office, but are then unable to participate in the TSP.

Estimated Federal cost: The estimated budgetary effect of S. 471 is shown in Table 1. The costs of the legislation fall within budget functions 600 (income security) and 800 (general government).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF S. 471

	By fiscal year, millions of dollars—												
	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2022–2027	2022–2032
	Increases or Decreases (−) in Direct Spending												
Estimated Budget Authority	0	*	*	*	*	*	*	*	*	*	*	*	*
Estimated Outlays	0	*	*	*	*	*	*	*	*	*	*	*	*
	Decreases (−) in Revenues												
Estimated Revenues	0	*	*	*	*	*	*	−1	−1	−1	−1	−1	−4
	Net Increase or Decrease (−) in the Deficit From Changes in Direct Spending and Revenues												
Effect on the Deficit	0	*	*	*	*	*	*	1	1	1	1	1	4
	Decreases (−) in Spending Subject to Appropriation												
Estimated Authorization	0	*	−1	−1	−1	−1	n.e.	n.e.	n.e.	n.e.	n.e.	−4	n.e.
Estimated Outlays	0	*	−1	−1	−1	−1	n.e.	n.e.	n.e.	n.e.	n.e.	−4	n.e.

Components may not sum to totals because of rounding; n.e. = not estimated; * = between −$500,000 and $500,000.

Basis of estimate: For this estimate, CBO assumes the bill will be enacted near the end of fiscal year 2022.

Revenues: A historical review indicates that, on average, 43 new Members begin serving in each session of Congress. Based on that information, CBO expects that, on average, 11 Members (or 25 percent of new Members in each session) would opt out of FERS under S. 471. If Members chose not to enroll, the portion of their salaries that would have been deposited as revenues into the Civil Service Retirement and Disability Fund (CSRDF) would instead be paid to them directly, and federal revenue collections would decline, on net. The required contribution rate for newly elected Members is 4.4 percent of salary (salaries currently are set at $174,000 for Members not in leadership roles). Thus, eliminating those contributions would reduce revenues by $4 million over the 2022–2032 period, CBO estimates, although that amount would change if the number of Members opting out was larger or smaller than CBO's estimate.

Direct spending: On net, CBO estimates that enacting S. 471 would reduce direct spending by less than $500,000 over the 2022–2032 period.

For most Members who opt out, the reduction in direct spending from eliminating future payments for benefits under FERS would occur after the 2022–2032 period; the average length of service for Members retiring under FERS is about 16 years. Members who are age 62 or older can retire with as few as five years of service, although annuities associated with such short periods of service are relatively small. Thus, CBO estimates, enacting the bill would reduce direct spending over the 2022–2032 period by less than $500,000.

Enacting S. 471 would increase direct spending on behalf of any current Senators who choose to opt out of FERS because of the bill's provision to allow their continued participation in the TSP. Those Senators would receive a refund of any contributions made to FERS before they opted out; the refunds would be recorded as increases in direct spending. CBO expects that only a small number of recently elected Senators would be in the group opting out. As a result, the increase in direct spending from refunded contributions would be less than $500,000 over the 2022–2032 period and would probably be smaller than the reductions in direct spending from the eliminated retirement benefits.

Spending subject to appropriation: Opting out of FERS would eliminate the retirement contributions paid by the employing House of Congress on behalf of Members, reducing spending subject to appropriation by $4 million over the 2022–2027 period, CBO estimates. However, those contributions (currently paid at a rate of 16.6 percent of salary) are recorded as intragovernmental transactions, which have no net effect on the deficit: They are paid from Congressional salaries and expenses accounts and deposited into the CSRDF as offsetting receipts (reductions in direct spending). (The effect on direct spending, however, is not attributed to the cost estimate because the deposit of those receipts is subject to future appropriation action.)

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in Table 1.

Increase in long-term deficits: CBO estimates that enacting S. 471 would not increase on-budget deficits by more than $5 billion in any of the four consecutive 10-year periods beginning in 2033.

Mandates: None.

Previous CBO estimate: On October 16, 2019, CBO transmitted a cost estimate for S. 439, the End Plush Retirements Act, as ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on July 24, 2019. The language of the two bills is identical; CBO's estimate for S. 471 reflects an increase in the agency contribution rate paid by the two Houses of Congress on behalf of Members and the number of new Congresses expected to convene during the 10-year estimating window.

Estimate prepared by: Federal Costs: Amber Marcellino; Mandates: Andrew Laughlin.

Estimate reviewed by: Christina Hawley Anthony, Chief, Projections Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis; Theresa Gullo, Director of Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

UNITED STATES CODE

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TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART III—EMPLOYEES

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Subpart G—Insurance and Annuities

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CHAPTER 84—FEDERAL EMPLOYEES' RETIREMENT SYSTEM

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Subchapter I—General Provisions

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SEC. 8401. DEFINITIONS.

For the purpose of this chapter—

(1) the term "account" means an account established and maintained under section 8439(a) of this title;

* * * * * * *

(20) the ⟦term "Member" has the same meaning as provided in⟧ *term "Member"—*

(A) has the same given the term "Member of Congress" under section 2106, except that, *subject to subparagraph (B)*, such term does not include an individual who irrevocably elects, by written notice to the official by whom such individual is paid, not to participate in the Federal Employees' Retirement System, ⟦and who (in the case of an individual who is a Member of the House of Representatives, including a Delegate or Resident Commissioner to the Congress) serves as a Member prior to the date of the enactment of the Legislative Branch Appropriations Act, 2004⟧; *and*

(B) for purposes of subchapter III, has the meaning given the term "Member of Congress" under section 2106, without regard to whether the individual elects not to participate in the Federal Employees' Retirement System;

* * * * * * *

Subchapter III—Thrift Savings Plan

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SEC. 8431. CERTAIN TRANSFERS TO BE TREATED AS A SEPARATION.

(a) For purposes of this subchapter, *except as provided in section 8401(20)(B),* separation from Government employment includes a transfer from a position that is subject to one of the retirement systems described in subsection (b) to a position that is not subject to any of them.

○