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The Social Security Protection Act of 2003 (H.R. 743)

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Summary

On September 17, 2003, the Senate Finance Committee approved an amendment in the nature of a substitute to H.R. 743, the *Social Security Protection Act of 2003*, by voice vote. Earlier this year, the House of Representatives passed H.R. 743, as amended, by a vote of 396-28. The bipartisan measure would impose stricter standards on individuals and organizations that serve as representative payees for Social Security and Supplemental Security Income (SSI) recipients; make non-governmental representative payees liable for “misused” funds and subject them to civil monetary penalties; tighten restrictions on attorneys who represent Social Security and SSI disability claimants; limit assessments on attorney fee payments; prohibit fugitive felons from receiving Social Security benefits; and modify the “*last day rule*” under the Government Pension Offset (GPO). The Senate amendment contains several provisions that are not included in the House-passed measure. For example, the Senate amendment would require noncitizens to have work authorization at the time of application for benefits, or to have had work authorization at some point in the past, to receive benefits. In addition, the Senate amendment would require State and local pension plan payers to report to the Internal Revenue Service whether an individual’s pension is based on Social Security-covered employment for purposes of administering the GPO and the Windfall Elimination Provision. The Congressional Budget Office estimates that H.R. 743, as passed by the House, would result in net 10-year savings of \$655 million. This report will be updated as legislative activity occurs.

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The Social Security Protection Act of 2003 (H.R. 743)

On February 12, 2003, Rep. E. Clay Shaw, Chairman of the House Ways and Means Subcommittee on Social Security, introduced H.R. 743, the *Social Security Protection Act of 2003* (H.Rept. 108-46).¹ H.R. 743 closely resembles H.R. 4070 from the 107th Congress, which was passed by the House by a vote of 425-0 in June 2002. A substitute amendment to H.R. 4070 (S.Amdt. 4967) was passed by the Senate under unanimous consent in November 2002. The measure did not receive final action in the House before the 107th Congress adjourned.² On February 27, 2003, the House Ways and Means Subcommittee on Social Security held a hearing on the bill. On March 5, 2003, the House considered H.R. 743, as amended by the Chairman, under suspension of the rules (debate was limited to 40 minutes, floor amendments were not allowed and a two-thirds majority vote was required for passage).³ Following debate in which many Members expressed strong opposition to a provision that would modify the “*last day rule*” under the Government Pension Offset (described below), the measure failed by a vote of 249-180.⁴

On March 13, 2003, the House Ways and Means Committee met to mark up H.R. 743, as amended. Rep. Jefferson offered an amendment that would incorporate H.R. 887 into the bill. Under H.R. 887, sponsored by Rep. Jefferson and co-sponsored by 109 Members, individuals whose combined monthly income from a noncovered pension and a Social Security spousal benefit is \$2,000 or less would be exempt from the Government Pension Offset (GPO). In addition, the Jefferson amendment would hold the Social Security trust funds harmless (i.e., the increased cost to the Social Security system as a result of the change would be paid from general revenues). At the markup, Rep. Jefferson stated that the proposal would cost an estimated \$19 billion over 10 years.⁵ The Jefferson amendment was defeated by a vote of 14-21. Rep. Stark offered an amendment that would reduce the GPO from

¹ H.R. 743 is a bipartisan measure co-sponsored by Rep. Matsui, the Ranking Democrat on the Social Security Subcommittee and 30 other Members. On Feb. 25, 2003, Sen. Jim Bunning introduced a companion measure in the Senate (S. 439).

² For information on H.R. 4070, see CRS Report RS21225, *Social Security Program Protection Act of 2002 (H.R. 4070)*, by Dawn Nuschler.

³ The bill did not go before the House Ways and Means Committee or the Subcommittee on Social Security for markup before consideration in the House on March 5, 2003.

⁴ The provision affecting the “*last day rule*” under the Government Pension Offset was not included in the version of H.R. 4070 that passed the House unanimously in the 107th Congress. It was included in the Senate-passed version of the bill.

⁵ The hold harmless provision is not included in H.R. 887. For more information, see CRS Report RS20148, *Social Security: The Government Pension Offset*, by Geoffrey Kollmann.

two-thirds to one-third of the government pension.⁶ As under the Jefferson amendment, the increased cost to the Social Security system would be paid from general revenues. The Stark amendment was defeated by a vote of 15-22. H.R. 743, as amended, was approved by the Committee by a vote of 35-2.

On April 2, 2003, the House considered H.R. 743, as amended, for a second time. The measure was considered under a rule (H.Res. 168, H.Rept. 108-54) that provided for one hour of debate on the measure and 40 minutes of debate on a substitute amendment by Rep. Green of Texas. The Green amendment would strike from the bill the provision that would modify the GPO “*last day rule*” (section 418, described below). It would make no other changes to the measure. The Green amendment failed by a vote of 196-228, mostly along party lines. A motion by Rep. Green to recommit the bill to the House Ways and Means Committee with instructions to report the measure back to the House with an amendment addressing the concerns of federal, state and local government employees with respect to the GPO also failed by a vote of 203-220. H.R. 743, as amended, was then passed by the House by a vote of 396-28. The Congressional Budget Office (CBO) estimates that the House-passed version of H.R. 743 would result in net savings of \$655 million over 10 years (fiscal years 2004-2013).

On September 17, 2003, the Senate Finance Committee met to mark up H.R. 743. The Committee approved an amendment in the nature of a substitute by voice vote. The Senate amendment contains several provisions that are not included in the House-passed version of the bill. For example, the Senate amendment would require noncitizens to have work authorization at the time of application for benefits, or to have had work authorization at some point in the past, to receive benefits. In addition, the Senate amendment would require State and local pension plan payers to report to the Internal Revenue Service whether an individual’s pension is based on employment covered by Social Security. The major provisions of H.R. 743 are described below. Differences between the House-passed measure and the Senate amendment are noted where applicable.

Major Provisions of H.R. 743

Representative Payees. The Social Security Administration (SSA) may designate a “representative payee” to accept monthly benefit payments on behalf of Social Security and Supplemental Security Income (SSI) recipients who are considered physically or mentally incapable of managing their own funds, or on behalf of children under age 18. In December 2001, an estimated 10.5% of Social Security recipients and 34.1% of SSI recipients had representative payees. In most cases, a family member or friend of the recipient serves as the representative payee. Other individuals and organizations that may serve as representative payees include members of community organizations; public agencies or non-profit institutions that

⁶ A reduction in the GPO to one-third of the government pension is included in Rep. Shaw’s Social Security reform bill (H.R. 75, the *Social Security Guarantee Plus Act of 2003*).

have custody of the recipient; noncustodial federal institutions; and private, for-profit organizations licensed under state law that have custody of the recipient.⁷

SSA is required to reissue benefits misused by an individual or organizational representative payee if the Commissioner of Social Security (the Commissioner) finds that SSA negligently failed to investigate or monitor the payee. H.R. 743 would eliminate the requirement that reissuance be subject to a finding of negligence on the part of SSA. As a result, SSA would be required to reissue any payments misused by an organizational payee, or by an individual payee representing 15 or more recipients. Such payments would be reissued directly to the recipient or to an alternative representative payee. The “misuse of benefits” occurs when payments are used by the representative payee for purposes other than the “use and benefit” of the recipient. The bill would authorize the Commissioner to prescribe by regulation the meaning of the term “use and benefit.”

Representative payees are not liable for misused funds. H.R. 743 would make individual payees and non-governmental organizational payees (those other than federal, state and local government agencies) liable for the reimbursement of misused funds. Such funds would be treated as overpayments to the representative payee (not the recipient), subjecting them to current overpayment recovery procedures in the Social Security Act.

Although an individual may not charge a fee for serving as a representative payee, certain organizations (such as Department of Veterans Affairs hospitals, nursing homes and nonprofit agencies) may charge a fee for serving in this capacity. The fee is based on a statutory formula and deducted from the recipient’s benefit payment. H.R. 743 would require the organization to forfeit fee payments for any month for which the Commissioner or a court of jurisdiction finds that the organization misused all or part of a recipient’s benefit.

The Commissioner may impose a civil monetary penalty and an assessment on persons who knowingly provide false information, or knowingly withhold information, to obtain Social Security benefits. The civil monetary penalty may be up to \$5,000 for each violation; the assessment may be up to twice the amount of benefits wrongfully paid to the individual. H.R. 743 would clarify that such penalties may be imposed on persons who withhold information that they know, or should know, affects their eligibility status or benefit amount. It would require the Commissioner to issue a receipt acknowledging notification of changes in a recipient’s work or earnings status until SSA has implemented a centralized computer file to record the date on which changes in work or earnings status are reported. In addition, the measure would impose the same penalties on representative payees who misuse benefits (a civil monetary penalty of up to \$5,000 for each violation and an assessment of up to twice the amount of misused benefits).

⁷ For more information, refer to: SSA, Office of the Inspector General, “Organizational Representative Payee Program.” Testimony by Inspector General James G. Huse, Jr. before the Senate Special Committee on Aging, May 2, 2000; and Testimony by Susan Daniels, Deputy Commissioner, Disability and Income Security Programs, before the House Committee on Ways and Means, Subcommittee on Social Security, May 4, 2000.

Non-governmental fee-for-service organizational payees must be bonded *or* licensed, but they are not required to submit proof of such certification. H.R. 743 would require such representative payees to be bonded *and* licensed (if licensing is available in the state) and to submit proof of such certification annually (along with a copy of any independent audit performed on the organization since the previous certification). In addition to existing periodic onsite reviews of state institutions, H.R. 743 would require periodic onsite reviews of individual representative payees who serve 15 or more recipients; non-governmental fee-for-service organizational payees; and any other agency that serves as a representative payee for 50 or more recipients. The bill would require the Commissioner to submit an annual report to Congress on the findings of such reviews, including problems identified and any action taken or planned to correct those problems.

Individuals are disqualified from serving as a representative payee if they have been convicted of fraudulent conduct involving Social Security programs. H.R. 743 would extend the restriction to individuals convicted of an offense under federal or state law that results in imprisonment for more than 1 year (unless the Commissioner determines that the individual's designation as a representative payee would be appropriate despite the conviction) and to individuals fleeing prosecution, custody, or confinement for a felony. The measure would require the Commissioner to prepare a report on the adequacy of existing procedures and reviews.

Representative payees are required to complete an annual accounting report describing how a recipient's benefits have been used. If misuse is suspected, a report may be requested by the Commissioner at any time. H.R. 743 would authorize the Commissioner to require a representative payee to collect the recipient's benefits in person at a local SSA office if he or she fails to submit annual accounting reports.

Claimant Representatives. Social Security and SSI disability claimants may choose to have an attorney or other qualified individual represent them in proceedings before SSA. The representative may charge a fee for his or her services, but the fee must be authorized by SSA under either the fee petition process or the fee agreement process. Under the fee petition process, the representative must file a fee petition with SSA after completing work on a claim (in addition, a copy must be sent to the claimant). SSA determines the amount of the fee, which is limited to 25% of past-due benefits awarded, based on factors including the complexity of the case and the type of services performed by the representative. Under the more simplified fee agreement process, the representative and the claimant must file a written fee agreement with SSA before a decision is made on the claim. In fee agreement cases, the representative's fee is limited to the lesser of 25% of past-due benefits awarded or \$5,300.

If a Social Security claimant is awarded past-due benefits and his or her representative is an attorney, SSA withholds the attorney's fee from the benefit award and pays the attorney directly. If the representative is not an attorney, or the claim is for SSI benefits, SSA pays the total benefit award to the claimant, and the representative must collect his or her fee from the recipient. To cover the administrative costs associated with the direct fee payment process, SSA charges an assessment of up to 6.3% of the attorney's fee and deducts that amount from the

attorney's fee payment.⁸ H.R. 743 would cap the assessment on attorneys' fees at \$75 (increased each year thereafter with the rate of inflation) and require the General Accounting Office to conduct a study regarding fee withholding for *non-attorney* representatives.⁹ The House-passed version of the measure would extend the attorney fee payment process to SSI claims for 5 years. The Senate amendment would require GAO to conduct a study of extending attorney fee payment to SSI claims.

An attorney who is currently licensed to practice must be recognized by SSA as a claimant representative, even if he or she has been disbarred in another jurisdiction. H.R. 743 would authorize the Commissioner to refuse to recognize as an attorney representative (or disqualify if already recognized) an attorney who has been disbarred or suspended from *any* court or bar to which he or she was previously admitted to practice, or has been disqualified from participating in or appearing before any federal program or agency. H.R. 743 would authorize the Commissioner to refuse to recognize (or disqualify if already recognized) an attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice as a *non-attorney* representative.

Social Security Benefits for Fugitive Felons. The Commissioner is authorized to withhold *SSI* benefits from fugitive felons.¹⁰ In addition, upon written request, SSA is required to provide the current address, Social Security number and photograph of an SSI recipient in fugitive status to federal, state and local law enforcement officials to assist in the individual's apprehension. H.R. 743 would authorize the Commissioner to withhold *Social Security* benefits from fugitive felons and would require SSA to share information about such persons with law enforcement officials. In some cases, the Commissioner would be allowed, with good cause, to pay Social Security benefits that have been withheld (terms governing payment would be prescribed by regulation). Under the Senate amendment, the Commissioner would be authorized to withhold Social Security and SSI benefits only in cases where law enforcement officials have notified SSA that they intend to pursue

⁸ The assessment on attorney fees was established under the *Ticket to Work and Work Incentives Improvement Act of 1999* (P.L. 106-170) and set at 6.3% effective January 31, 2000. For each calendar year thereafter, the rate is set at the level (not to exceed 6.3%) needed to cover full administrative costs. In calendar years 2001-2003, the rate has remained 6.3%.

⁹ For more information on the attorney fee payment process, refer to: U.S. General Accounting Office (GAO), "Paying Attorneys Who Represent Disability Applicants," testimony by Barbara D. Bovbjerg before the House Ways and Means Subcommittee on Social Security, June 14, 2000; and "Systems Support Could Improve Processing Attorney Fee Payments in the Disability Program," testimony by Barbara D. Bovbjerg before the House Ways and Means Subcommittee on Social Security, May 17, 2001.

¹⁰ As defined under Section 1611(e)(4) of the Social Security Act, a fugitive felon is "an individual fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony under the laws of the place from which the person flees, or which, in the case of the state of New Jersey, is a high misdemeanor under the laws of such state; or violating a condition of probation or parole imposed under federal or state law."

the individual and would be allowed, with good cause, to pay withheld *SSI* benefits as well.

Trial Work Period. Social Security disability recipients are entitled to a “trial work period” in which they may have earnings above a certain amount (\$570 a month in 2003) for up to 9 months (which need not be consecutive) within a rolling 60-month period without any loss of benefits. Under H.R. 743, an individual who is convicted of fraudulently concealing work activity during a trial work period would not be entitled to receive benefits for trial work period months and would be liable for repayment of those benefits, as well as any other applicable penalties, fines or assessments.

Government Pension Offset. If an individual receives a government pension based on work that was not covered by Social Security, under a provision of current law called the Government Pension Offset, his or her Social Security spousal or survivor benefit is reduced by an amount equal to two-thirds of the government pension.¹¹ However, under the “last day rule,” an individual is exempt from the GPO if he or she worked in a government job that was covered by Social Security on his or her *last day of employment*. H.R. 743 would require individuals to work in a government job that is covered by Social Security for the *last 60 calendar months of employment* to be exempt from the GPO.¹² In addition, the Senate amendment would require State and local government pension plan payers to report to the Internal Revenue Service (IRS), as part of a modified Form 1099R, whether an individual’s pension is based on Social Security-covered employment and allow the IRS to provide this information to SSA for purposes of administering the GPO and the Windfall Elimination Provision.¹³

Social Security Benefits for Noncitizens. Under current law, noncitizens must be lawfully present in the U.S. to receive Social Security benefits. However, under certain circumstances, noncitizens may receive benefits outside the United States, including benefits based on work performed in the U.S. without authorization. The Senate amendment would require noncitizens to have work authorization at the time of application for benefits, or to have had work authorization at some point in the past, to receive benefits. The House-passed version of the measure does not

¹¹ If an individual receives a pension based on work that was covered by Social Security, his or her Social Security spousal or survivor benefit is reduced by 100% of his or her Social Security benefit earned as a worker, under a feature of current law known as the “dual entitlement rule.”

¹² Federal government workers who switched from the Civil Service Retirement System (which does not have a Social Security component) to the Federal Employees Retirement System (FERS) must have at least 5 years of service under FERS to be exempt from the GPO. For more information, see General Accounting Office, “Social Security Administration: Revision to the Government Pension Offset Exemption Should Be Considered,” Aug. 2002 (GAO-02-950).

¹³ An individual who receives a pension from employment that was not covered by Social Security may be subject to a reduction in Social Security benefits based on his/her own work record under the Windfall Elimination Provision. For more information, see CRS Report 98-35, *Social Security: The Windfall Benefit Provision*.

include this provision. For more information, see CRS Report RL32004, *Social Security Benefits for Noncitizens: Current Policy and Legislation*.

Miscellaneous Provisions. H.R. 743 would make a number of other changes designed to reduce fraud and abuse within the Social Security program, such as requiring individuals and businesses to notify prospective customers that a product or service being offered for a fee is available directly from SSA free of charge. H.R. 743 would provide compensation to Social Security Advisory Board members and make several clarifying and technical amendments to the *Ticket to Work and Work Incentives Improvement Act of 1999* and other aspects of the program. The House-passed version of the measure would add Kentucky to the list of 21 states currently authorized to have retirement systems that have either Social Security or non-Social Security-covered positions. The Senate amendment would extend the option to all States. In addition, the Senate amendment would make a number of changes to the SSI program and technical changes to the *Railroad Retirement and Survivors' Improvement Act of 2001*