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The Social Security Protection Act of 2004 (H.R. 743)

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Summary

On March 2, 2004, President Bush signed into law the *Social Security Protection Act of 2004* (P.L. 108-203). The bipartisan measure imposes stricter standards on individuals and organizations that serve as representative payees for Social Security and Supplemental Security Income (SSI) recipients; makes nongovernmental representative payees liable for "misused" funds and subjects them to civil monetary penalties; tightens restrictions on attorneys who represent Social Security and SSI disability claimants; limits assessments on attorney fee payments; prohibits fugitive felons from receiving Social Security benefits; modifies the *"last day rule"* under the Government Pension Offset; and requires certain noncitizens to have authorization to work in the U.S. at the time a Social Security Number is assigned, or at some later time, to gain insured status under the Social Security program. The Congressional Budget Office estimates that P.L. 108-203 reduces direct spending (outlays) by $887 million and increases revenues by $33 million over the fiscal year 2004-2014 period.

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Background

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 (H.R. 887 is a bill sponsored by Rep. Jefferson, co-sponsored by 125 Members). Under H.R. 887, if an individual's combined monthly income from a noncovered pension and a Social Security spousal/widow(er)'s benefit is $2,000 or less, he/she 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

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[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)*.

[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 that modifies 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.

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 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 35-2 vote.

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 offered 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 that addresses the concerns of federal, state and local government employees with respect to the GPO also failed by a vote of 203-220. Then H.R. 743, as amended, was passed by the House by a vote of 396-28. The Congressional Budget Office (CBO) estimates that the House-passed version of the bill would result in net savings of $655 million over 10 years (fiscal years 2004-2013).

On September 17, 2003, the Senate Finance Committee approved an amendment in the nature of a substitute to H.R. 743, by voice vote (S.Rept. 108-176). H.R. 743 as reported by the Senate Finance Committee contains several provisions that are not included in the version of the bill passed by the House in April 2003, including a provision that would require a noncitizen to have work authorization at the time a Social Security Number is assigned, or at some later time, for benefits to be payable on his/her earnings record. In addition, the measure would require State and local pension plan administrators to report to the Internal Revenue Service (IRS), as part of a modified Form 1099R, if an individual's pension is based on employment that was *not* covered by Social Security. The measure would authorize the IRS to provide such information to SSA for purposes of administering the GPO and the Windfall Elimination Provision.[7]

On December 9, 2003, the Senate approved H.R. 743, with an amendment, by unanimous consent. Among other differences, the managers' amendment passed by the Senate, which substitutes for the version of the bill reported by the Senate Finance Committee, excludes the reporting requirement for State and local pension plan administrators. On February 11, 2004, the House of Representatives agreed to

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[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*.

[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*).

[7] 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*.

the Senate amendments and passed H.R. 743 (renamed the *Social Security Protection Act of 2004*) by a vote of 402-19. CBO estimates that H.R. 743, as approved by the Congress on February 11, 2004, reduces direct spending (outlays) by $887 million and increases revenues by $33 million over the fiscal year 2004-2014 period.

On March 2, 2004, President Bush signed into law the *Social Security Protection Act of 2004* (P.L. 108-203). Major provisions of the new law are described below.

Major Provisions of P.L. 108-203

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 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 have custody of the recipient; noncustodial federal institutions; and private, for-profit organizations licensed under state law that have custody of the recipient.[8]

SSA is required to reissue benefits misused by an individual or organizational representative payee if the Commissioner of Social Security (hereafter referred to as the Commissioner) finds that SSA negligently failed to investigate or monitor the payee. P.L. 108-203 eliminates the requirement that reissuance be subject to a finding of negligence on the part of SSA. Under the new law, SSA is required to reissue any payments misused by an organizational payee, or by an individual payee representing 15 or more recipients. Such payments may 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 Commissioner is authorized to prescribe by regulation the meaning of the term "use and benefit."

Before enactment of P.L. 108-203, representative payees were not liable for misused funds. P.L. 108-203 makes individual payees and nongovernmental organizational payees (those other than federal, state and local government agencies) liable for the reimbursement of misused funds. Such funds are treated as overpayments to the representative payee (not the recipient), making them subject to overpayment recovery procedures specified in the Social Security Act.

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[8] For more information, see: 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.

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. P.L. 108-203 requires such organizations 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, and the assessment may be up to twice the amount of benefits wrongfully paid to the individual. P.L. 108-203 clarifies that such penalties may be imposed on persons who withhold information that they know, or should have known, affects their eligibility status or benefit amount. In addition, it requires the Commissioner to issue a receipt to recipients upon notification of changes in a recipient's work or earnings status until SSA has implemented a centralized computer file to record when such changes are reported. The new law imposes the same penalties on representative payees who misuse benefits (i.e., a civil monetary penalty of up to $5,000 for each violation and an assessment of up to twice the amount of misused benefits).

Before enactment of P.L. 108-203, nongovernmental fee-for-service organizational payees were required to be bonded *or* licensed, but they were not required to submit proof of such certification. P.L. 108-203 requires 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, the new law requires periodic onsite reviews of individual representative payees who serve 15 or more recipients; nongovernmental fee-for-service organizational payees; and any other agency that serves as a representative payee for 50 or more recipients. It also requires 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 them.

Individuals are disqualified from serving as a representative payee if they have been convicted of fraudulent conduct involving Social Security programs. P.L. 108-203 extends 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 new law requires the Commissioner to prepare a report on the adequacy of existing procedures and reviews.

Representative payees are required to complete an annual accounting report that describes how a recipient's benefits have been used. If misuse is suspected, a report may be requested by the Commissioner at any time. P.L. 108-203 authorizes the Commissioner to require a representative payee to collect the recipient's benefits in person at a local SSA office if he/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/her services, but the fee must be authorized by SSA under the fee petition process or the fee agreement process. Under the fee petition process, the representative must file a fee petition with SSA after work on a claim is completed (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 that include 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 on the claim is made. 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/her representative is an attorney, SSA withholds the attorney's fee from the benefit award and pays the attorney directly. To cover administrative costs associated with the direct fee payment process, SSA charges an assessment equal to 6.3% of the attorney's fee and deducts that amount from the attorney's fee payment.[9] Before enactment of P.L. 108-203, if the representative was not an attorney, or the claim was for SSI benefits, SSA would pay the total benefit award to the claimant, and the representative would collect his/her fee from the recipient. P.L. 108-203 temporarily extends the attorney fee payment process to certain *non-attorney* representatives[10] and to SSI claims; caps the assessment on direct fee payment at $75 (increased each year thereafter with the rate of inflation); and requires GAO to study the fee payment process for claimant representatives.[11]

Before enactment of P.L. 108-203, SSA was required to recognize as a claimant representative any attorney currently licensed to practice, even if he/she had been disbarred in another jurisdiction. P.L. 108-203 authorizes 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/she was previously admitted to practice, or has been disqualified from participating in or appearing before any federal program or agency. In addition, P.L. 108-203 authorizes the Commissioner to refuse to recognize (or disqualify if already

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[9] 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 2001-2004, the rate has remained 6.3%.

[10] The version of H.R. 743 passed by the House in April 2003 would require the General Accounting Office (GAO) to study extension of the attorney fee payment process to non-attorney representatives before making any changes.

[11] For more information on the attorney fee payment process, see: 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.

recognized) an attorney who has been disbarred or suspended from any court or bar to which he/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.[12] 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. P.L. 108-203 authorizes the Commissioner to withhold *Social Security* benefits as well from fugitive felons and requires SSA to share information about such persons with law enforcement officials. In addition, the new law authorizes the Commissioner to pay, with good cause, withheld SSI and Social Security benefits.[13]

Trial Work Period. Social Security disability recipients are entitled to a "trial work period" in which they may have earnings above a certain amount ($580 a month in 2004) for up to 9 months (not necessarily consecutive) within a rolling 60-month period without any loss of benefits. Under P.L. 108-203, an individual who is convicted of fraudulently concealing work activity during a trial work period is not entitled to receive benefits for trial work period months and is 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/her Social Security spousal/widow(er)'s benefit is reduced by an amount equal to two-thirds of the government pension.[14] Before enactment of P.L. 108-203, under the "last day rule," a State or local government worker could gain exemption from the GPO by working in a government job covered by Social Security on his/her *last day of employment.*

Under P.L. 108-203, a State or local government employee must work in a Social Security-covered position for at least the *last 60 calendar months of employment* to gain exemption from the GPO.[15] Generally, the 60-month

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[12] 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."

[13] The version of H.R. 743 passed by the House in April 2003 would authorize the Commissioner to pay, with good cause, withheld Social Security benefits only.

[14] If an individual receives a pension based on work that was covered by Social Security, his/her Social Security spousal/widow(er)'s benefit is reduced by 100% of his/her Social Security benefit earned as a worker, under a feature of current law known as the "dual entitlement rule."

[15] 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

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requirement applies to individuals whose last day of government service occurs after June 30, 2004. If an individual's last day of government service occurs within 5 years after the date enactment (i.e., before March 2, 2009), the required 60 months is reduced (to no less than one month) by the number of months the individual was covered by Social Security under the same retirement system before the date of enactment. The old law (i.e., the last day rule) still applies to State and local government workers who applied for Social Security spousal/widow(er)'s benefits before April 1, 2004, regardless of when their last day of government service occurs.

In addition, P.L. 108-203 includes provisions designed to better inform workers who are not covered by Social Security of the effects of the GPO and the WEP. Currently, SSA is required to provide an annual Social Security account statement to persons age 25 and older who have wages or net self-employment income. The new law requires SSA to provide such statements to persons for whom the Commissioner has information that the pattern of wages or self-employment income indicates a likelihood of noncovered employment. Such statements must include an explanation of the possible effects of noncovered employment on Social Security benefits. In addition, State and local governments are required to provide workers who begin employment in a noncovered position on or after January 1, 2005, with written notice that explains such possible effects. The written notification must include a form that the individual must sign and return before beginning employment.

Social Security Benefits for Noncitizens. The Social Security Act does not explicitly prohibit unauthorized aliens (noncitizens) from receiving Social Security benefits. However, Section 202(y) of the Act does prohibit the payment of benefits to aliens in the U.S. who are not "lawfully present." If an alien residing in the U.S. does not meet the lawful presence requirement, his/her benefits are suspended. If such individual subsequently establishes lawful presence in the U.S., his/her benefits are paid, including benefits based on work performed in the U.S. without authorization. Under certain circumstances, an alien may receive benefits while residing outside the U.S., including benefits based on unauthorized work.

P.L. 108-203 requires noncitizens to have work authorization at the time a Social Security Number is assigned, or at some later time, to gain insured status under the Social Security program, with broad exceptions. In certain cases, if a noncitizen never had authorization to work in the U.S., benefits would not be payable on his/her earnings record. This provision applies to benefit applications based on Social Security Numbers assigned on or after January 1, 2004.[16]

Other Provisions. P.L. 108-203 includes a number of other provisions designed to reduce Social Security program fraud and abuse, such as a requirement

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[15] (...continued)
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).

[16] The version of H.R. 743 passed by the House in April 2003 did not include this provision. For more information on the payment of Social Security benefits to noncitizens, see CRS Report RL32004, *Social Security Benefits for Noncitizens: Current Policy and Legislation*.

that individuals and businesses notify prospective customers that a product or service being offered for a fee is available from SSA free of charge. The new law provides compensation to Social Security Advisory Board members and makes several clarifying and technical amendments to the *Ticket to Work and Work Incentives Improvement Act of 1999* and other aspects of the program. P.L. 108-203 adds Kentucky and Louisiana to the list of 21 States authorized to have retirement systems with either Social Security-covered or noncovered positions.[17] It makes a number of SSI program changes and technical changes to the *Railroad Retirement and Survivors' Improvement Act of 2001*.

[17] The version of H.R. 743 passed by the House in April 2003 would extend the option to Kentucky only. The version of the bill reported by the Senate Finance Committee would extend the option to all States.