H.R. 3249, THE FEDERAL RETIREMENT COVERAGE CORRECTIONS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

H.R. 3249

TO PROVIDE FOR THE RECTIFICATION OF CERTAIN RETIREMENT COVERAGE ERRORS AFFECTING FEDERAL EMPLOYEES, AND FOR OTHER PURPOSES

FEBRUARY 24, 1998

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H.R. 3249, THE FEDERAL RETIREMENT COVERAGE CORRECTIONS ACT

TUESDAY, FEBRUARY 24, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Morella, Cummings, and Norton.

Staff present: George Nesterczuk, staff director; Garry Ewing, counsel; Caroline Fiel, clerk; and Ned Lynch, senior research director.

Mr. MICA. Good morning, I'd like to call this meeting of the House Civil Service Subcommittee to order.

This morning we're going to start with a legislative hearing and review the Federal Retirement Coverage Corrections Act proposal. I'm going to start with an opening statement. Mr. Cummings, our ranking member, should be joining us and we have Ms. Norton with us. We're going to begin with my opening statement and we'll yield to others.

As I promised last October, our first order of business in this session of Congress is legislation that, hopefully, will correct enrollment errors in the Federal retirement system. It's very important that we consider enactment of this proposed legislation entitled, Federal Retirement Coverage Corrections Act, which I hope will address the serious harm that has been inflicted on so many of our Federal employees. Since our hearing on this issue last July 31, we've heard from many employees and retirees with problems, not only in Civil Service, but also in Foreign Service Retirement and also from individuals who are in our Intelligence community.

A legislative remedy to this problem is long overdue. These problems are very severe and compound with time. The worst cases are those of employees and annuitants who have already been "corrected" without benefit of the remedies provided under this proposed legislation. Most severely affected are the employees who have had to raise funds to reconstruct a reasonable retirement benefit. Some employees did not learn of the errors until they were about to retire and then found that their expected benefits were significantly reduced. Annuitants, who had learned about the enrollment mistakes in their first annuity checks, have not received a full benefit because of "corrections," and they have no way under current law to have these agency mistakes corrected.

The bill we have proposed would provide these employees with the same choices as those provided to uncorrected employees. In this way, we'll undo the damage of past actions. The bill that we have proposed will provide employees with choices. The choices will, hopefully, resolve the problems in an equitable manner. The bill places the financial and administrative burden for correcting the errors where it belongs—with the employer—and the employer in this case is the Federal Government. Private sector employers, who have erred in a like fashion, are held accountable to make employees' 401(k) accounts whole at no cost to the employee. The employer must make up past contributions on behalf of employees, as well as make up lost earnings. We propose to do this in the same fashion for affected Federal employees. Their agencies are required to fix the problem and I believe that this approach is only fair and just.

Our bill assigns the Office of Personnel Management with the responsibility for coordinating resolution of the problems facing our affected Federal employees. Today, to address corrective actions, employees are told that they have problems and their problems lie with the IRS, the Social Security Administration, the Thrift Savings Board, their agencies, and in some cases, State and local tax authorities and officials. This is all a result of a mistake that their agencies made in the first place—when they were first hired. It is unconscionable that the Federal employees are now told to fend for themselves in this bureaucratic nightmare and, sometimes, legal morass.

This bill is carefully structured to preserve the integrity of Social Security trust funds. It amends the Social Security Acts of CSRS-eligible employees who choose to remain in FERS or Social Security coverage may receive Social Security benefits. Current law excludes these Federal employees from the Social Security program. Our bill is also carefully crafted to ensure that employees who benefit are not subjected to unfair tax penalties. We've worked very closely with the Committee on Ways and Means and the Joint Committee on Taxation to achieve these objectives, and we will incorporate additional refinements, as necessary, while we work toward passage of this important legislation.

We have also worked closely with the Committee on International Relations and also with the Intelligence Committee to address corrections of similar errors in the foreign service and the intelligence retirement systems. To provide a consistent process for resolving these errors, employees will be able to make comparable choices. We've also worked closely with the Thrift Investment Board and look forward to their contribution of additional technical information, as well as language, before this bill takes its final form. We would also appreciate assistance in completing this work from the Office of Personnel Management.

This bill is still very much a work-in-progress, but we must keep this process moving forward. People are counting on us. The ranking member and I have been trying to make this a top priority to get this accomplished, and I believe as long as we all cooperate, we'll get the job done quickly. When agencies discover retirement coverage errors, they correct them immediately, and we've found that the corrections required under current law are, in fact, what

has caused most of our more serious problems. This issue has been festering for more than 8 years. There is no reason for further delay.

Along those lines, again, I want to thank our ranking member and his staff, as well as the minority staff of the full committee, for their outstanding support and cooperation. I'm not sure that we could have gotten to this point in the process without your help—so I thank you.

Our first panel today will consist of Mr. Ed Flynn, Associate Director of the Retirement and Insurance Services of the Office of Personnel Management. Our second panel will include Mr. Roger Mehle and he is Executive Director of the Federal Retirement Thrift Savings Board; Mr. Thomas O'Rourke, an attorney with the firm of Shaw, Bransford & O'Rourke, who is representing several employees affected by these agency errors; and Mr. Daniel Geisler of the American Foreign Service Association, whose members will be covered under the committee bill.

Those are my opening comments and I'd like to yield now to our ranking member, the gentleman from Maryland—Mr. Cummings.

[The text of H.R. 3249 follows:]

105TH CONGRESS
2D SESSION

H. R. 3249

To provide for the rectification of certain retirement coverage errors affecting Federal employees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1998

MR. MICA (for himself, Mr. CUMMINGS, Mrs. MORELLA, Mr. PAPPAS, Mr. SESSIONS, Mr. GILMAN, Mr. LEACH, and Mr. FORD) introduced the following bill; which was referred to the Committee on Government Reform and Oversight, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for the rectification of certain retirement coverage errors affecting Federal employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Retirement Coverage Corrections Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.
Sec. 3. Applicability.
Sec. 4. Restriction relating to future corrections.
Sec. 5. Irrevocability of elections.

TITLE I—DESCRIPTION OF RETIREMENT COVERAGE ERRORS TO WHICH THIS ACT APPLIES AND MEASURES FOR THEIR RECTIFICATION

Subtitle A—Employee Who Should Have Been FERS Covered, But Who Was Erroneously CSRS Covered or CSRS-Offset Covered Instead

Sec. 101. Elections.
Sec. 102. Effect of an election to be transferred from CSRS to FERS to correct a retirement coverage error.
Sec. 103. Effect of an election to be transferred from CSRS-Offset to FERS to correct a retirement coverage error.
Sec. 104. Effect of an election to be transferred from CSRS to CSRS-Offset to correct a retirement coverage error.
Sec. 105. Effect of an election to be restored (or transferred) to CSRS-Offset after having been corrected to FERS from CSRS-Offset (or CSRS).

Subtitle B—Employee Who Should Have Been FERS Covered, CSRS-Offset Covered, or CSRS Covered, But Who Was Erroneously Social Security-Only Covered Instead

Sec. 111. Elections.
Sec. 112. Effect of an election to become FERS covered to correct the retirement coverage error.
Sec. 113. Effect of an election to become CSRS-Offset covered to correct the retirement coverage error.
Sec. 114. Effect of an election to become CSRS covered to correct the retirement coverage error.

Subtitle C—Employee Who Should Have Been Social Security-Only Covered, But Who Was Erroneously FERS Covered, CSRS-Offset Covered, or CSRS Covered Instead

Sec. 121. Uncorrected error: employee who should be Social Security-Only covered, but who is erroneously FERS covered instead.
Sec. 122. Uncorrected error: employee who should be Social Security-Only covered, but who is erroneously CSRS-Offset covered instead.
Sec. 123. Uncorrected error: employee who should be Social Security-Only covered, but who is erroneously CSRS covered instead.
Sec. 124. Corrected error: situations under sections 121–123.
Sec. 125. Vested employees excepted from automatic exclusion.

Subtitle D—Employee Who Should Have Been CSRS Covered or CSRS-Offset Covered, But Who Was Erroneously FERS Covered Instead

Sec. 131. Elections.
Sec. 132. Effect of an election to be transferred from FERS to CSRS to correct a retirement coverage error.
Sec. 133. Effect of an election to be transferred from FERS to CSRS-Offset to correct a retirement coverage error.
Sec. 134. Effect of an election to be restored to FERS after having been corrected to CSRS.
Sec. 135. Effect of an election to be restored to FERS after having been corrected to CSRS-Offset.
Sec. 136. Disqualification of certain individuals to whom same election was previously available.

Subtitle E—Employee Who Should Have Been CSRS-Offset Covered, But Who Was Erroneously CSRS Covered Instead

Sec. 141. Automatic transfer to CSRS-Offset.
Sec. 142. Effect of transfer.

Subtitle F—Employee Who Should Have Been CSRS Covered, But Who Was Erroneously CSRS-Offset Covered Instead

Sec. 151. Elections.
Sec. 152. Effect of an election to be transferred from CSRS-Offset to CSRS to correct the retirement coverage error.
Sec. 153. Effect of an election to be restored to CSRS-Offset after having been corrected to CSRS.

Subtitle G—Additional Provisions Relating to Government Agencies

Sec. 161. Repayment required in certain situations.
Sec. 162. Equitable sharing of amounts payable to or from the Government if more than one agency involved.
Sec. 163. Provisions relating to the original responsible agency.

TITLE II—GENERAL PROVISIONS

Sec. 201. Identification and notification requirements.
Sec. 202. Individual appeal rights.
Sec. 203. Information to be furnished by Government agencies to authorities administering this Act.
Sec. 204. Social Security records.
Sec. 205. Conforming amendments respecting Social Security coverage and OASDI taxes.
Sec. 206. Regulations.
Sec. 207. All elections to be approved by OPM.
Sec. 208. Additional transfers to OASDI trust funds in certain cases.
Sec. 209. Technical and conforming amendments.

TITLE III—OTHER PROVISIONS

Sec. 301. Provisions to permit continued conformity of other Federal retirement systems.
Sec. 302. Government contributions payable from the CSRDF.

Sec. 303. Individual right of action preserved for amounts not otherwise provided for under this Act.

TITLE IV—TAX PROVISIONS

Sec. 401. Tax provisions.

SEC. 2. DEFINITIONS.

For purposes of this Act:

(1) CSRS.—The term "CSRS" means the Civil Service Retirement System.

(2) CSRDF.—The term "CSRDF" means the Civil Service Retirement and Disability Fund.

(3) CSRS COVERED.—The term "CSRS covered", with respect to any service, means service that is subject to the provisions of subchapter III of chapter 83 of title 5, United States Code, other than those that apply only with respect to an individual described in section 8402(b)(2) of such title.

(4) CSRS-OFFSET COVERED.—The term "CSRS-Offset covered", with respect to any service, means service that is subject to the provisions of subchapter III of chapter 83 of title 5, United States Code, that apply with respect to an individual described in section 8402(b)(2) of such title.

(5) EMPLOYEE.—The term "employee" means any individual serving in an appointive or elective office or position in the executive, legislative, or judicial branch of the Government who, by virtue of that service, is permitted or required to be CSRS covered, CSRS-Offset covered, FERS covered, or Social Security-Only covered.

(6) EXECUTIVE DIRECTOR.—The term "Executive Director of the Federal Retirement Thrift Investment Board" or "Executive Director" means the Executive Director appointed under section 8474 of title 5, United States Code.

(7) FERS.—The term "FERS" means the Federal Employees' Retirement System.

(8) FERS COVERED.—The term "FERS covered", with respect to any service, means service that is subject to chapter 84 of title 5, United States Code.

(9) GOVERNMENT.—The term "Government" has the meaning given such term by section 8331(7) of title 5, United States Code.

(10) OASDI TAXES.—The term "OASDI taxes" means the OASDI employee tax and the OASDI employer tax.

(11) OASDI EMPLOYEE TAX.—The term "OASDI employee tax" means the tax imposed under section 3101(a) of the Internal Revenue Code of 1986 (relating to Old-Age, Survivors and Disability Insurance).

(12) OASDI EMPLOYER TAX.—The term "OASDI employer tax" means the tax imposed under section 3111(a) of the Internal Revenue Code of 1986 (relating to Old-Age, Survivors and Disability Insurance).

(13) OASDI TRUST FUNDS.—The term "OASDI trust funds" means the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund.

(14) PERIOD OF ERRONEOUS COVERAGE.—The term "period of erroneous coverage" means, in the case of a retirement coverage error, the period throughout which retirement coverage is in effect pursuant to such error (or would have been in effect, but for such error).

(15) RETIREMENT COVERAGE DETERMINATION.—The term "retirement coverage determination" means a determination by an employee or agent of the Government as to whether a particular type of Government service is CSRS covered, CSRS-Offset covered, FERS covered, or Social Security-Only covered.

(16) RETIREMENT COVERAGE ERROR.—The term "retirement coverage error" means a retirement coverage determination that, as a result of any error, misrepresentation, or inaction on the part of an employee or agent of the Government (including an error as described in section 163(b)(2)), causes an individual erroneously to be enrolled or not enrolled in a retirement system, as further described in the applicable subtitle of title I.

(17) SOCIAL SECURITY-ONLY COVERED.—The term "Social Security-Only covered", with respect to any service, means Government service that constitutes employment under section 210 of the Social Security Act (42 U.S.C. 410), and that—

(A) is subject to OASDI taxes; but

(B) is not subject to any retirement system for Government employees (disregarding title II of the Social Security Act).

(18) THRIFT SAVINGS FUND.—The term "Thrift Savings Fund" means the Thrift Savings Fund established under section 8437 of title 5, United States Code.

SEC. 3. APPLICABILITY.

(a) IN GENERAL.—Subject to subsection (b), this Act shall apply with respect to any retirement coverage error that occurs before, on, or after the date of enactment of this Act, excluding any error corrected within 1 year after the date on which it occurs.

(b) LIMITATION.—Nothing in this Act shall affect any retirement coverage or treatment accorded with respect to any individual in connection with any period beginning before the first day of the first applicable pay period beginning on or after January 1, 1984.

SEC. 4. RESTRICTION RELATING TO FUTURE CORRECTIONS.

(a) IN GENERAL.—Except as otherwise provided in this Act, any individual who, on or after the date of enactment of this Act, becomes or remains affected by a retirement coverage error may not be excluded from or made subject to any retirement system for the sole purpose of correcting such error.

(b) COORDINATION WITH OTHER LAWS.—

(1) IN GENERAL.—Nothing in this Act shall be considered to preclude an election under the Federal Employees' Retirement System Open Enrollment Act of 1997 (Public Law 105–61; 111 Stat. 1318) or any other voluntary retirement coverage election authorized by statute.

(2) REGULATIONS.—The Office of Personnel Management shall prescribe any regulations which may be necessary to apply this Act in the case of any individual who changes retirement coverage pursuant to a voluntary election made other than under this Act.

SEC. 5. IRREVOCABILITY OF ELECTIONS.

Any election made (or deemed to have been made) by an employee or any other individual under this Act shall be irrevocable.

TITLE I—DESCRIPTION OF RETIREMENT COVERAGE ERRORS TO WHICH THIS ACT APPLIES AND MEASURES FOR THEIR RECTIFICATION

Subtitle A—Employee Who Should Have Been FERS Covered, But Who Was Erroneously CSRS Covered or CSRS-Offset Covered Instead

SEC. 101. ELECTIONS.

(a) APPLICABILITY.—This subtitle shall apply in the case of any employee who—

(1) should be (or should have been) FERS covered but, as a result of a retirement coverage error, is (or was) CSRS covered instead; or

(2) should be (or should have been) FERS covered but, as a result of a retirement coverage error, is (or was) CSRS-Offset covered instead.

(b) UNCORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in paragraph (1) or (2) of subsection (a) (as applicable) has not been corrected, the employee affected by such error may elect—

(1) to be FERS covered instead; or

(2) to remain (or instead become) CSRS-Offset covered.

(c) CORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in paragraph (1) or (2) of subsection (a) (as applicable) has been corrected, the employee affected by such error may elect—

(1) to be CSRS-Offset covered instead; or

(2) to remain FERS covered.

(d) DEFAULT RULE.—

(1) IN GENERAL.—If the employee is given written notice in accordance with section 201 as to the availability of an election under this section, but does not make any such election within the 6-month period beginning on the date on which such notice is so given, the option under subsection (b)(2) or (c)(2), as applicable, shall be deemed to have been elected on the last day of such period.

(2) CSRS NOT AN OPTION.—Nothing in this section shall be considered to afford an employee the option of becoming or remaining CSRS covered.

(e) RETROACTIVE EFFECT.—An election under this section (including an election by default, and an election to remain covered by the retirement system by which the electing individual is covered as of the date of the election) shall be effective retroactive to the effective date of the retirement coverage error (as referred to in subsection (a)) to which such election relates.

SEC. 102. EFFECT OF AN ELECTION TO BE TRANSFERRED FROM CSRS TO FERS TO CORRECT A RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 101(a)(1) who elects the option under section 101(b)(1).

(b) DISPOSITION OF CONTRIBUTIONS TO THE CSRDF.—

(1) EMPLOYEE CONTRIBUTIONS.—

(A) TRANSFER TO OASDI TRUST FUNDS.—There shall be transferred from the CSRDF to the OASDI trust funds an amount—

(i) equal to the amount of the OASDI employee tax that should have been deducted and withheld from the Federal wages of the employee for the period of erroneous coverage involved; but

(ii) not to exceed the amount of the employee's lump-sum credit attributable to the period of erroneous coverage involved.

(B) RULE IF THERE ARE EXCESS CSRDF CONTRIBUTIONS.—If the amount described in subparagraph (A)(ii) exceeds the sum of—

(i) the amount described in subparagraph (A)(i), plus

(ii) the amount that should have been deducted under section 8422 of title 5, United States Code, from pay of such employee for the period of erroneous coverage involved,

the excess shall be refunded to the employee.

(C) RULE IF CSRDF CONTRIBUTIONS ARE INSUFFICIENT.—If the amount described in subparagraph (A)(ii) is less than the sum of the respective amounts described in clauses (i) and (ii) of subparagraph (B), the shortfall shall be made up (in such manner as the Director of the Office of Personnel Management, with the concurrence of the Commissioner of Social Security, shall by regulation prescribe) by the agency in or under which the employee is then employed, out of amounts otherwise available in the appropriation, fund, or account from which any OASDI employer tax or contribution to the CSRDF (as applicable) may be made.

(D) DEFINITION OF LUMP-SUM CREDIT.—For purposes of this paragraph, the term "lump-sum credit" has the meaning given such term by section 8331 of title 5, United States Code.

(2) GOVERNMENT CONTRIBUTIONS.—

(A) TRANSFER TO OASDI TRUST FUNDS.—There shall be transferred from the CSRDF to the OASDI trust funds the amount of the OASDI employer tax that should have been paid with respect to the employee for the period of erroneous coverage involved.

(B) RULE IF THERE ARE EXCESS CSRDF CONTRIBUTIONS.—If the total Government contributions to the CSRDF that were made with respect to the employee for the period of erroneous coverage involved exceed the sum of—

(i) the amount required to be transferred under subparagraph (A), plus

(ii) the amount that should have been contributed by the Government under section 8423 of title 5, United States Code, for such employee with respect to such period,

the excess shall be transferred to the agency in or under which the employee is then employed, to the credit of the appropriation, fund, or account from which any Government contributions to the CSRDF may be made (to remain available until expended).

(C) RULE IF CSRDF CONTRIBUTIONS ARE INSUFFICIENT.—If the total Government contributions to the CSRDF that were made with respect to the employee for the period of erroneous coverage involved are less than the sum of the respective amounts described in clauses (i) and (ii) of subparagraph (B), the shortfall shall be made up by the agency in or under which the employee is then employed, out of amounts otherwise available in the appropriation, fund, or account referred to in subparagraph (B) in such manner as the Director of the Office of Personnel Management, with the concurrence of the Commissioner of Social Security, shall by regulation prescribe.

(c) MAKEUP CONTRIBUTIONS TO THE THRIFT SAVINGS FUND.—

(1) IN GENERAL.—An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf, in addition to any regular employee or Government contributions that would be permitted or required for the year in which the contributions under this subsection are made, an amount equal to the sum of—

(A) the amount determined under paragraph (2) with respect to such employee for the period of erroneous coverage involved;

(B) an amount equal to the total contributions that should have been made for such employee under section 8432(c)(1) of title 5, United States Code, for the period of erroneous coverage involved;

(C) an amount equal to the total contributions that should have been made for such employee under section 8432(c)(2) of title 5, United States Code, for the period of erroneous coverage involved (taking into account both the amount referred to in subparagraph (A) and any contributions to the Thrift Savings Fund actually made by such employee with respect to the period involved); and

(D) an amount equal to lost earnings on the amounts referred to in subparagraphs (A) through (C), determined in accordance with paragraph (3).

(2) AMOUNT BASED ON AVERAGE PERCENTAGE OF PAY CONTRIBUTED BY EMPLOYEES DURING PERIOD OF ERRONEOUS COVERAGE.—

(A) IN GENERAL.—The amount determined under this paragraph with respect to an employee for a period of erroneous coverage shall be equal to the amount of the contributions such employee would have made if, during each calendar year in such period, the employee had contributed the percentage of such employee's basic pay for such year specified in subparagraph (B) (determined disregarding any contributions actually made by such employee with respect to the year involved).

(B) PERCENTAGE TO BE APPLIED.—The percentage to be applied under this subparagraph in the case of any employee with respect to a particular year is—

(i) the average percentage of basic pay that was contributed for such year under section 8432(a) of title 5, United States Code, by FERS covered employees who contributed to the Thrift Savings Fund in such year; or

(ii) if such average percentage for the year in question is unavailable, the average percentage for the most recent year prior to the year in question that is available.

(C) LIMITATIONS.—In no event may the amount determined under this paragraph for an individual with respect to a year exceed the amount that, if added to the amount of the contributions that were actually made by such individual to the Thrift Savings Fund with respect to such year (if any), would cause the total to exceed—

(i) any limitation under section 415 or any other provision of the Internal Revenue Code of 1986 that would have applied to such employee with respect to such year; or

(ii) any limitation under section 8432(a) or any other provision of title 5, United States Code, that would have applied to such employee with respect to such year.

(3) LOST EARNINGS.—

(A) IN GENERAL.—Lost earnings on any amounts referred to in subparagraph (A), (B), or (C) of paragraph (1) shall, to the extent those amounts are attributable to contributions that should have been made with respect to a particular TSP semiannual period, be determined in the same way as if those amounts had in fact been timely contributed and allocated among the TSP investment funds in accordance with—

(i) the investment fund election that was in effect for the employee with respect to such semiannual period; or

(ii) if no such election was then in effect for the employee, the investment fund election attributed to such employee with respect to such semiannual period.

(B) INVESTMENT FUND ELECTION ATTRIBUTED.—For purposes of subparagraph (A)(ii), the investment fund election attributed to an employee with respect to a particular TSP semiannual period is—

(i) the average percentage allocation of TSP contributions among the TSP investment funds that was in effect, with respect to the year in which such semiannual period (or most of such period) occurs, for all employees contributing to the Thrift Savings Fund during such year; or

(ii) if such average percentage allocation for the year in question is unavailable, the average percentage allocation for the most recent year prior to the year in question that is available.

(C) DEFINITION OF TSP SEMIANNUAL PERIOD, ETC.—For purposes of this paragraph—

(i) the term "TSP semiannual period" means a 6-month period under section 8432(a) of title 5, United States Code;

(ii) the term "investment fund election" means a choice by a participant concerning how contributions to the Thrift Savings Plan shall be allocated among the TSP investment funds;

(iii) the term "participant" means any person with an account in the Thrift Savings Plan, or who would have an account in the Thrift Savings Plan but for an employing agency error (including an error as described in section 163(b)(2));

(iv) the term "TSP investment funds" means the C Fund, the F Fund, the G Fund, and any other investment fund in the Thrift Savings Plan created after December 27, 1996; and

(v) the terms "C Fund", "F Fund", and "G Fund" refer to the funds described in paragraphs (1), (3), and (4), respectively, of section 8438(a) of title 5, United States Code.

(4) MAKEUP CONTRIBUTION TO BE MADE IN A LUMP SUM.—

(A) IN GENERAL.—Any amount to which an employee is entitled under this subsection shall be paid promptly by the agency in or under which the electing employee is (as of the date of the election) employed, in a lump sum, upon notification to such agency under subparagraph (B)(ii) as to the amount due.

(B) BOARD FUNCTIONS.—The regulations under paragraph (6) shall include provisions under which—

(i) each employing agency shall be required to determine and notify the Federal Retirement Thrift Investment Board, in a timely manner, as to any amounts under paragraph (1)(A)–(C) owed by such agency; and

(ii) the Board shall, based on the information it receives from an agency under clause (i), determine lost earnings on those amounts and promptly notify such agency as to the total amounts due from it under this subsection.

(5) JUSTICES AND JUDGES; MAGISTRATES; ETC.—The preceding provisions of this subsection shall not apply in the case of any employee who, pursuant to the election referred to in subsection (a), becomes subject to section 8440a, 8440b, 8440c, or 8440d of title 5, United States Code.

(6) REGULATIONS.—The Executive Director of the Federal Retirement Thrift Investment Board shall prescribe any regulations necessary to carry out this subsection.

SEC. 103. EFFECT OF AN ELECTION TO BE TRANSFERRED FROM CSRS-OFFSET TO FERS TO CORRECT A RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 101(a)(2) who elects the option under section 101(b)(1).

(b) EFFECT OF ELECTION.—In the case of an employee described in subsection (a), the following provisions shall apply:

(1) Section 102(b) (relating to disposition of contributions to the CSRDF), but disregarding provisions relating to transfers to OASDI trust funds.

(2) Section 102(c) (relating to makeup contributions to the Thrift Savings Fund).

SEC. 104. EFFECT OF AN ELECTION TO BE TRANSFERRED FROM CSRS TO CSRS-OFFSET TO CORRECT A RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 101(a)(1) who elects the option under section 101(b)(2).

(b) SAME AS IN THE CASE OF AN ELECTION TO RATIFY ERRONEOUS CSRS-OFFSET COVERAGE.—

(1) IN GENERAL.—The effect of an election described in subsection (a) shall be as described in section 101(b)(2), except that the provisions of section 102(b) shall also apply.

(2) APPROPRIATE PERCENTAGES TO BE USED IN DETERMINING EMPLOYEE AND GOVERNMENT CONTRIBUTIONS TO CSRDF.—For purposes of paragraph (1), section 102(b) shall be applied by substituting "the relevant provisions of section 8334(k)" for "section 8422" and "section 8423".

SEC. 105. EFFECT OF AN ELECTION TO BE RESTORED (OR TRANSFERRED) TO CSRS-OFFSET AFTER HAVING BEEN CORRECTED TO FERS FROM CSRS-OFFSET (OR CSRS).

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in paragraph (1) or (2) of section 101(a) who (after having been corrected to FERS coverage) elects the option under section 101(c)(1).

(b) DISPOSITION OF CONTRIBUTIONS TO THE CSRDF.—

(1) IN GENERAL.—The provisions of section 102(b) shall apply in the case of an employee described in subsection (a), subject to paragraph (2).

(2) NO TRANSFERS FOR AMOUNTS ALREADY PAID INTO OASDI, ETC.—For purposes of paragraph (1), section 102(b) shall be applied in conformance with the following:

(A) NO DOUBLE PAYMENTS INTO OASDI.—To the extent that the appropriate OASDI employee or employer tax has already been paid for the total period involved (or any portion thereof), reduce the respective amounts required by paragraphs (1)(A)(i) and (2)(A) of section 102(b) accordingly.

(B) APPROPRIATE PERCENTAGES TO BE USED IN DETERMINING EMPLOYEE AND GOVERNMENT CONTRIBUTIONS TO CSRDF.—Substitute "the relevant provisions of section 8334(k)" for "section 8422" and "section 8423".

(C) APPROPRIATE LUMP-SUM CREDIT TO BE USED.—Substitute "8401" for "8331" in paragraph (1)(D) thereof.

(D) PROVISIONS TO BE APPLIED WITH RESPECT TO THE TOTAL PERIOD INVOLVED.—Substitute "total period involved (as defined by section 105)" for "period of erroneous coverage involved".

(c) DISPOSITION OF EXCESS TSP CONTRIBUTIONS.—

(1) GOVERNMENT CONTRIBUTIONS.—All Government contributions made on behalf of the employee to the Thrift Savings Fund that are attributable to the total period involved (including any earnings thereon) shall be forfeited. Amounts so forfeited shall be transferred to the agency in or under which the employee is then employed, to the credit of the appropriation, fund, or account from which any Government contributions to the Thrift Savings Fund may be made (to remain available until expended).

(2) EMPLOYEE CONTRIBUTIONS.—The election referred to in subsection (a) shall not be taken into account for purposes of any determination relating to the disposition of any employee contributions to the Thrift Savings Fund, attributable to the total period involved, that were in excess of the maximum amount that would have been allowable under applicable provisions of subchapter III of chapter 83 of title 5, United States Code (including any earnings thereon).

(d) DEFINITION OF TOTAL PERIOD INVOLVED.—For purposes of this section, the term "total period involved" means the period beginning on the effective date of the retirement coverage error involved and ending on the day before the date on which the election described in subsection (a) is made.

Subtitle B—Employee Who Should Have Been FERS Covered, CSRS-Offset Covered, or CSRS Covered, But Who Was Erroneously Social Security-Only Covered Instead

SEC. 111. ELECTIONS.

(a) APPLICABILITY.—This subtitle shall apply in the case of any employee who—

(1) should be (or should have been) FERS covered but, as a result of a retirement coverage error, is (or was) Social Security-Only covered instead;

(2) should be (or should have been) CSRS-Offset covered but, as a result of a retirement coverage error, is (or was) Social Security-Only covered instead; or

(3) should be (or should have been) CSRS covered but, as a result of a retirement coverage error, is (or was) Social Security-Only covered instead.

(b) UNCORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in paragraph (1), (2), or (3) of subsection (a) (as applicable) has not been corrected, the employee affected by such error may elect—

(1)(A) in the case of an error described in subsection (a)(1), to be FERS covered as well;

(B) in the case of an error described in subsection (a)(2), to be CSRS-Offset covered as well; or

(C) in the case of an error described in subsection (a)(3), to be CSRS covered instead; or

(2) to remain Social Security-Only covered.

(c) CORRECTED ERROR.—

(1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, there shall be submitted to the Congress a proposal (including any necessary draft legislation) to carry out the policy described in paragraph (2).

(2) POLICY.—Under the proposal, any employee with respect to whom the retirement coverage error described in paragraph (1), (2), or (3) of subsection (a) (as applicable) has already been corrected, but under terms less advantageous to the employee than would have been the case under this Act, shall be afforded a reasonable opportunity to obtain treatment comparable to the treatment afforded under this Act.

(3) JOINT ACTION.—This subsection shall be carried out by the Director of the Office of Personnel Management, in consultation with the Executive Director of the Federal Retirement Thrift Investment Board and the Commissioner of Social Security.

(d) DEFAULT RULE.—In the case of any employee to whom subsection (b) applies, if the employee is given written notice in accordance with section 201 as to the availability of an election under this section, but does not make any such election within the 6-month period beginning on the date on which such notice is so given, the option under subsection (b)(2) shall be deemed to have been elected on the last day of such period.

(e) RETROACTIVE EFFECT.—An election under this section (including an election by default, and an election to remain covered by the retirement system by which the electing individual is covered as of the date of the election) shall be effective retroactive to the effective date of the retirement coverage error (as referred to in subsection (a)) to which such election relates.

SEC. 112. EFFECT OF AN ELECTION TO BECOME FERS COVERED TO CORRECT THE RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 111(a)(1) who elects the option under section 111(b)(1)(A).

(b) MAKEUP CONTRIBUTIONS TO THE CSRDF.—Upon notification that an employee has made an election under this section, the agency in or under which such employee is employed shall promptly pay to the CSRDF, in a lump sum, an amount equal to the sum of—

(1) the amount that should have been deducted and withheld from the pay of the employee for the period of erroneous coverage involved under section 8422 of title 5, United States Code; and

(2) the Government contributions that should have been paid for the period of erroneous coverage involved under section 8423 of title 5, United States Code.

(c) MAKEUP CONTRIBUTIONS TO THE THRIFT SAVINGS FUND.—Section 102(c) shall apply in the case of an employee described in subsection (a).

SEC. 113. EFFECT OF AN ELECTION TO BECOME CSRS-OFFSET COVERED TO CORRECT THE RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 111(a)(2) who elects the option under section 111(b)(1)(B).

(b) MAKEUP CONTRIBUTIONS TO THE CSRDF.—Upon notification that an employee has made an election under this section, the agency in or under which such employee is employed shall promptly pay to the CSRDF, in a lump sum, an amount equal to the sum of—

(1) the amount that should have been deducted and withheld from the pay of the employee for the period of erroneous coverage involved under section 8334 of title 5, United States Code; and

(2) the Government contributions that should have been paid under section 8334 of title 5, United States Code, for the period of erroneous coverage involved.

(c) MAKEUP CONTRIBUTIONS TO THE THRIFT SAVINGS FUND.—

(1) IN GENERAL.—Makeup contributions to the Thrift Savings Fund shall be made by the employing agency in the same manner as described in section 102(c) (but disregarding subparagraphs (B) and (C) of paragraph (1) thereof, and the other provisions of section 102(c) to the extent that they relate to those subparagraphs).

(2) APPROPRIATE PERCENTAGES, ETC. TO BE USED.—For purposes of paragraph (1), section 102(c) shall be applied—

(A) by substituting "section 8351(b)" for "section 8432(a)" and by substituting "CSRS covered and CSRS-Offset covered" for "FERS covered" in paragraph (2)(B)(i) thereof; and

(B) by substituting "section 8351(b)(2)" for "section 8432(a)" in paragraph (2)(C)(ii) thereof.

SEC. 114. EFFECT OF AN ELECTION TO BECOME CSRS COVERED TO CORRECT THE RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 111(a)(3) who elects the option under section 111(b)(1)(C).

(b) MAKEUP CONTRIBUTIONS TO THE CSRDF.—

(1) IN GENERAL.—Upon notification that an employee has made an election under this section, the agency in or under which such employee is employed shall promptly pay to the CSRDF, in a lump sum, an amount equal to the sum of—

(A) the amount that should have been deducted and withheld from the pay of the employee for the period of erroneous coverage involved under section 8334 of title 5, United States Code; and

(B) the Government contributions that should have been paid under such section for the period of erroneous coverage involved.

(2) AGENCY TO BE REIMBURSED FOR CERTAIN AMOUNTS.—

(A) IN GENERAL.—The employee for whom the payment under paragraph (1) is made shall repay to the agency (referred to in paragraph (1)) an amount equal to the OASDI employee taxes refunded or refundable to such employee for any portion of the period of erroneous coverage involved (computed in such manner as the Director of the Office of Personnel Management, with the concurrence of the Commissioner of Social Security, shall by regulation prescribe), not to exceed the amount described in paragraph (1)(A).

(B) RIGHT OF RECOVERY; WAIVER.—If the employee fails to repay the amount required under subparagraph (A), a sum equal to the amount outstanding is recoverable by the Government from the employee (or the employee's estate, if applicable) by—

(i) setoff against accrued pay, compensation, amount of retirement credit, or another amount due the employee from the Government; and

(ii) such other method as is provided by law for the recovery of amounts owing to the Government.

The head of the agency concerned may waive, in whole or in part, a right of recovery under this paragraph if it is shown that recovery would be against equity and good conscience or against the public interest.

(C) TREATMENT OF AMOUNTS REPAID OR RECOVERED.—Any amount repaid by, or recovered from, an individual (or an estate) under this paragraph shall be credited to the appropriation account from which the amount involved was originally paid.

(c) MAKEUP CONTRIBUTIONS TO THE THRIFT SAVINGS FUND.—In the case of an employee described in subsection (a), makeup contributions to the Thrift Savings Fund shall be made in the same manner as described in section 113(c).

Subtitle C—Employee Who Should Have Been Social Security-Only Covered, But Who Was Erroneously FERS Covered, CSRS-Offset Covered, or CSRS Covered Instead

SEC. 121. UNCORRECTED ERROR: EMPLOYEE WHO SHOULD BE SOCIAL SECURITY-ONLY COVERED, BUT WHO IS ERRONEOUSLY FERS COVERED INSTEAD.

(a) IN GENERAL.—Except as provided in section 125, this section shall apply in the case of any employee who should be Social Security-Only covered but, as a result of a retirement coverage error, is FERS covered instead.

(b) AUTOMATIC EXCLUSION FROM FERS.—An employee described in subsection (a) shall not, by reason of the retirement coverage error described in subsection (a), be eligible to be treated as an individual who is FERS covered.

(c) DISPOSITION OF CONTRIBUTIONS TO THE CSRDF.—

(1) EMPLOYEE CONTRIBUTIONS.—There shall be paid to the employee, from the CSRDF, any lump-sum credit to which such employee would be entitled under section 8424 of title 5, United States Code, to the extent attributable to the period of erroneous coverage involved.

(2) GOVERNMENT CONTRIBUTIONS.—There shall be transferred from the CSRDF to the agency in or under which the employee is then employed, to the credit of the appropriation, fund, or account of such agency from which any Government contributions to the CSRDF may be made (to remain available until expended), an amount equal to the Government contributions, attributable to

such employee for the period of erroneous coverage involved, that were made under section 8423 of title 5, United States Code.

(d) DISPOSITION OF TSP CONTRIBUTIONS.—

(1) GOVERNMENT CONTRIBUTIONS.—All Government contributions made on behalf of the employee to the Thrift Savings Fund that are attributable to the period of erroneous coverage involved (including any earnings thereon) shall be forfeited and transferred in the same manner as described in section 105(c).

(2) EMPLOYEE CONTRIBUTIONS.—Notwithstanding any other provision of this section or any other provision of law, any contributions made by the employee to the Thrift Savings Fund during the period of erroneous coverage involved (including any earnings thereon) shall be treated as if such employee had then been correctly covered.

SEC. 122. UNCORRECTED ERROR: EMPLOYEE WHO SHOULD BE SOCIAL SECURITY-ONLY COVERED, BUT WHO IS ERRONEOUSLY CSRS-OFFSET COVERED INSTEAD.

(a) IN GENERAL.—Except as provided in section 125, this section shall apply in the case of any employee who should be Social Security-Only covered but, as a result of a retirement coverage error, is CSRS-Offset covered instead.

(b) AUTOMATIC EXCLUSION FROM CSRS-OFFSET.—An employee described in subsection (a) shall not, by reason of the retirement coverage error described in subsection (a), be eligible to be treated as an individual who is CSRS-Offset covered.

(c) DISPOSITION OF CONTRIBUTIONS TO THE CSRDF.—

(1) EMPLOYEE CONTRIBUTIONS.—There shall be paid to the employee, from the CSRDF, the lump-sum credit to which such employee would be entitled under section 8342 of title 5, United States Code, to the extent attributable to the period of erroneous coverage involved.

(2) GOVERNMENT CONTRIBUTIONS.—There shall be transferred from the CSRDF to the agency in or under which the employee is then employed, to the credit of the appropriation, fund, or account of such agency from which any Government contributions to the CSRDF may be made (to remain available until expended), an amount equal to the Government contributions that were made under section 8334 of title 5, United States Code, and attributable to such employee for the period of erroneous coverage involved.

(d) DISPOSITION OF TSP CONTRIBUTIONS.—In the case of an employee described in subsection (a), section 121(d)(2) shall apply.

SEC. 123. UNCORRECTED ERROR: EMPLOYEE WHO SHOULD BE SOCIAL SECURITY-ONLY COVERED, BUT WHO IS ERRONEOUSLY CSRS COVERED INSTEAD.

(a) IN GENERAL.—Except as provided in section 125, this section shall apply in the case of any employee who should be Social Security-Only covered but, as a result of a retirement coverage error, is CSRS covered instead.

(b) AUTOMATIC EXCLUSION FROM CSRS.—An employee described in subsection (a) shall not, by reason of the retirement coverage error described in subsection (a), be eligible to be treated as an individual who is CSRS covered.

(c) DISPOSITION OF CONTRIBUTIONS TO THE CSRDF.—

(1) IN GENERAL.—In the case of an employee described in subsection (a), section 102(b) shall apply.

(2) IRRELEVANT PROVISIONS TO BE DISREGARDED.—For purposes of paragraph (1), section 102(b) shall be applied disregarding paragraphs (1)(B)(ii), (1)(C)(ii), (2)(B)(ii), and (2)(C)(ii) thereof.

(d) DISPOSITION OF TSP CONTRIBUTIONS.—In the case of an employee described in subsection (a), section 121(d)(2) shall apply.

SEC. 124. CORRECTED ERROR: SITUATIONS UNDER SECTIONS 121–123.

(a) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, there shall be submitted to the Congress a proposal (including any necessary draft legislation) to carry out the policy described in subsection (b).

(b) POLICY.—Under the proposal, any employee with respect to whom the applicable retirement coverage error (referred to in section 121, 122, or 123, as applicable) has already been corrected, but under terms less advantageous to the employee than would have been the case under this Act, shall be afforded a reasonable opportunity to obtain treatment comparable to the treatment afforded under this Act.

(c) JOINT ACTION.—This section shall be carried out by the Director of the Office of Personnel Management, in consultation with the Executive Director of the Federal Retirement Thrift Investment Board and the Commissioner of Social Security.

SEC. 125. VESTED EMPLOYEES EXCEPTED FROM AUTOMATIC EXCLUSION.

(a) IN GENERAL.—Nothing in this subtitle shall, by reason of any retirement coverage error, result in the automatic exclusion of any employee from FERS, CSRS-Offset, or CSRS if, as of the date on which notice of such error is given (in accord-

ance with section 201), such employee's rights have vested under the retirement system involved.

(b) VESTING.—For purposes of this section, vesting of rights shall be considered to have occurred if, as of the date as of which the determination is made, the employee has completed at least 5 years of civilian service, taking into account only creditable service under section 8332 or 8411 of title 5, United States Code.

(c) ELECTIONS.—

(1) ERRONEOUSLY FERS COVERED.—Any employee affected by an error described in section 121 who is determined under this section to satisfy subsection (b) may elect—

(A) to be treated in accordance with section 121; or

(B) to remain FERS covered.

(2) OTHER CASES.—Any employee affected by an error described in section 122 or 123 who is determined under this section to satisfy subsection (b) may elect—

(A) to be treated in accordance with section 122 or 123 (as applicable); or

(B) to remain (or instead become) CSRS-Offset covered.

(d) EFFECT OF AN ELECTION TO BE TRANSFERRED FROM CSRS TO CSRS-OFFSET.—In the case of an employee affected by an error described in section 123 who elects the option under subsection (c)(2)(B), the effect of the election shall be the same as described in section 104.

(e) DEFAULT RULE.—If the employee does not make any election within the 6-month period beginning on the date on which the appropriate notice is given to such employee, the option under paragraph (1)(B) or (2)(B) of subsection (c), as applicable, shall be deemed to have been elected as of the last day of such period. Nothing in this section shall be considered to afford an employee the option of becoming or remaining CSRS covered.

(f) RETROACTIVE EFFECT.—An election under this section (including an election by default, and an election to remain covered by the retirement system by which the electing individual is covered as of the date of the election) shall be effective retroactive to the effective date of the retirement coverage error to which the election relates.

(g) SPECIAL RULE IN CASE OF DISABILITY.—If, as of the date referred to in subsection (a), the employee is entitled to receive an annuity under chapter 83 or 84 of title 5, United States Code, based on disability, or compensation under subchapter I of chapter 81 of such title for injury to, or disability of, such employee, subsections (a) and (b) shall be applied by substituting (for the date that would otherwise apply) the date as of which entitlement to such annuity or compensation terminates (if at all).

(h) NOTIFICATION.—Any notice under section 201 shall include such additional information or other modifications as the Office of Personnel Management may by regulation prescribe in connection with the situations covered by this subtitle, particularly as they relate to the consequences of being vested or not vested.

Subtitle D—Employee Who Should Have Been CSRS Covered or CSRS-Offset Covered, But Who Was Erroneously FERS Covered Instead

SEC. 131. ELECTIONS.

(a) APPLICABILITY.—This subtitle shall apply in the case of any employee who—

(1) should be (or should have been) CSRS covered but, as a result of a retirement coverage error, is (or was) FERS covered instead; or

(2) should be (or should have been) CSRS-Offset covered but, as a result of a retirement coverage error, is (or was) FERS covered instead.

(b) UNCORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in paragraph (1) or (2) of subsection (a) (as applicable) has not been corrected, the employee affected by such error may elect—

(1)(A) in the case of an error described in subsection (a)(1), to be CSRS covered instead; or

(B) in the case of an error described in subsection (a)(2), to be CSRS-Offset covered instead; or

(2) to remain FERS covered.

(c) CORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in paragraph (1) or (2) of subsection (a) (as applicable) has been corrected, the employee affected by such error may elect—

(1) to be FERS covered instead; or

(2)(A) in the case of an error described in subsection (a)(1), to remain CSRS covered; or

(B) in the case of an error described in subsection (a)(2), to remain CSRS-Offset covered.

(d) DEFAULT RULE.—If the employee is given written notice in accordance with section 201 as to the availability of an election under this section, but does not make any such election within the 6-month period beginning on the date on which such notice is so given, the option under subsection (b)(2) or (c)(2), as applicable, shall be deemed to have been elected on the last day of such period.

(e) RETROACTIVE EFFECT.—An election under this section (including an election by default, and an election to remain covered by the retirement system by which the electing individual is covered as of the date of the election) shall be effective retroactive to the effective date of the retirement coverage error (as referred to in subsection (a)) to which such election relates.

SEC. 132. EFFECT OF AN ELECTION TO BE TRANSFERRED FROM FERS TO CSRS TO CORRECT A RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 131(a)(1) who elects the option available to such employee under section 131(b)(1)(A).

(b) MAKEUP CONTRIBUTIONS TO THE CSRDF.—

(1) IN GENERAL.—Upon notification that an employee has made an election under this section, the agency in or under which such employee is employed shall promptly pay to the CSRDF, in a lump sum, an amount equal to the excess of—

(A) the amount by which—

(i) the amount that should have been deducted and withheld from the pay of the employee for the period of erroneous coverage involved under section 8334 of title 5, United States Code, exceeds

(ii) the amount that was actually deducted and withheld from the pay of the employee for the period of erroneous coverage involved under section 8422 of such title (and not refunded), over

(B) the amount by which—

(i) the amount of the Government contributions actually made under section 8423 of such title with respect to the employee for the period of erroneous coverage involved, exceeds

(ii) the amount of the Government contributions that should have been made under section 8334 of such title with respect to the employee for the period of erroneous coverage involved.

(2) AGENCY TO BE REIMBURSED FOR CERTAIN AMOUNTS.—

(A) IN GENERAL.—The employee for whom the payment under paragraph (1) is made shall repay to the agency (referred to in paragraph (1)) an amount equal to the OASDI employee taxes refunded or refundable to such employee for any portion of the period of erroneous coverage involved (computed in such manner as the Director of the Office of Personnel Management, with the concurrence of the Commissioner of Social Security, shall by regulation prescribe), not to exceed the amount described in paragraph (1)(A).

(B) RIGHT OF RECOVERY; WAIVER.—If the employee fails to repay the amount required under subparagraph (A), a sum equal to the amount outstanding is recoverable by the Government from the employee (or the employee's estate, if applicable) by—

(i) setoff against accrued pay, compensation, amount of retirement credit, or another amount due the employee from the Government; and

(ii) such other method as is provided by law for the recovery of amounts owing to the Government.

The head of the agency concerned may waive, in whole or in part, a right of recovery under this paragraph if it is shown that recovery would be against equity and good conscience or against the public interest.

(C) TREATMENT OF AMOUNTS REPAID OR RECOVERED.—Any amount repaid by, or recovered from, an individual (or an estate) under this paragraph shall be credited to the appropriation, fund, or account from which the amount involved was originally paid.

SEC. 133. EFFECT OF AN ELECTION TO BE TRANSFERRED FROM FERS TO CSRS-OFFSET TO CORRECT A RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 131(a)(2) who elects the option available to such employee under section 131(b)(1)(B).

(b) EFFECT.—The effect of an election referred to in subsection (a) shall be substantially the same as that described in section 105.

SEC. 134. EFFECT OF AN ELECTION TO BE RESTORED TO FERS AFTER HAVING BEEN CORRECTED TO CSRS.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 131(a)(1) who elects the option under section 131(c)(1).

(b) EFFECT.—The effect of an election referred to in subsection (a) shall be substantially the same as that described in section 102.

SEC. 135. EFFECT OF AN ELECTION TO BE RESTORED TO FERS AFTER HAVING BEEN CORRECTED TO CSRS-OFFSET.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 131(a)(2) who elects the option under section 131(c)(1).

(b) EFFECT.—The effect of an election referred to in subsection (a) shall be substantially the same as that described in section 103.

SEC. 136. DISQUALIFICATION OF CERTAIN INDIVIDUALS TO WHOM SAME ELECTION WAS PREVIOUSLY AVAILABLE.

Notwithstanding any other provision of this subtitle, an election under this subtitle shall not be available in the case of any individual to whom an election under section 846.204 of title 5 of the Code of Federal Regulations (as in effect as of January 1, 1997) was made available in connection with the same error pursuant to notification provided in accordance with such section.

Subtitle E—Employee Who Should Have Been CSRS-Offset Covered, But Who Was Erroneously CSRS Covered Instead

SEC. 141. AUTOMATIC TRANSFER TO CSRS-OFFSET.

(a) APPLICABILITY.—This subtitle shall apply in the case of any employee who should be (or should have been) CSRS-Offset covered but, as a result of a retirement coverage error, is (or was) CSRS covered instead.

(b) UNCORRECTED ERROR.—If the error has not been corrected, the employee shall be treated in the same way as if such employee had instead been CSRS-Offset covered, effective retroactive to the effective date of such error.

(c) CORRECTED ERROR.—If the error has been corrected, the correction shall (to the extent not already carried out) be made effective retroactive to the effective date of such error.

SEC. 142. EFFECT OF TRANSFER.

The effect of a transfer under section 141 shall be as set forth in regulations which the Office of Personnel Management shall prescribe consistent with section 104.

Subtitle F—Employee Who Should Have Been CSRS Covered, But Who Was Erroneously CSRS-Offset Covered Instead

SEC. 151. ELECTIONS.

(a) APPLICABILITY.—This subtitle shall apply in the case of any employee who should be (or should have been) CSRS covered but, as a result of a retirement coverage error, is (or was) CSRS-Offset covered instead.

(b) UNCORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in subsection (a) has not been corrected, the employee affected by such error may elect—

(1) to be CSRS covered instead; or

(2) to remain CSRS-Offset covered.

(c) CORRECTED ERROR.—If, at the time of making an election under this section, the retirement coverage error described in subsection (a) has been corrected, the employee affected by such error may elect—

(1) to be CSRS-Offset covered instead; or

(2) to remain CSRS covered.

(d) DEFAULT RULE.—If the employee is given written notice in accordance with section 201 as to the availability of an election under this section, but does not make any such election within the 6-month period beginning on the date on which such notice is so given, the option under subsection (b)(2) or (c)(2), as applicable, shall be deemed to have been elected on the last day of such period.

(e) RETROACTIVE EFFECT.—An election under this section (including an election by default, and an election to remain covered by the retirement system by which

the electing individual is covered as of the date of the election) shall be effective retroactive to the effective date of the retirement coverage error (as referred to in subsection (a)) to which such election relates.

SEC. 152. EFFECT OF AN ELECTION TO BE TRANSFERRED FROM CSRS-OFFSET TO CSRS TO CORRECT THE RETIREMENT COVERAGE ERROR.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 151(a) who elects the option available to such employee under section 151(b)(1).

(b) MAKEUP CONTRIBUTIONS TO THE CSRDF.—

(1) IN GENERAL.—Upon notification that an employee has made an election under this section, the agency in or under which such employee is employed shall promptly pay to the CSRDF, in a lump sum, an amount equal to the amount by which—

(A) the amount that should have been deducted and withheld from the pay of the employee for the period of erroneous coverage involved under section 8334 of title 5, United States Code (by virtue of being CSRS covered), exceeds

(B) any nonrefunded amounts actually deducted and withheld from the pay of the employee for the period of erroneous coverage involved under such section (pursuant to CSRS-Offset coverage).

(2) AGENCY TO BE REIMBURSED FOR CERTAIN AMOUNTS.—

(A) IN GENERAL.—The employee for whom the payment under paragraph (1) is made shall repay to the agency (referred to in paragraph (1)) an amount equal to the OASDI employee taxes refunded or refundable to such employee for any portion of the period of erroneous coverage involved (computed in such manner as the Director of the Office of Personnel Management, with the concurrence of the Commissioner of Social Security, shall by regulation prescribe), not to exceed the amount described in paragraph (1)(A).

(B) RIGHT OF RECOVERY; WAIVER.—If the employee fails to repay the amount required under subparagraph (A), a sum equal to the amount outstanding is recoverable by the Government from the employee (or the employee's estate, if applicable) by—

(i) setoff against accrued pay, compensation, amount of retirement credit, or another amount due the employee from the Government; and

(ii) such other method as is provided by law for the recovery of amounts owing to the Government.

The head of the agency concerned may waive, in whole or in part, a right of recovery under this paragraph if it is shown that recovery would be against equity and good conscience or against the public interest.

(C) TREATMENT OF AMOUNTS REPAID OR RECOVERED.—Any amount repaid by, or recovered from, an individual (or an estate) under this paragraph shall be credited to the appropriation, fund, or account from which the amount involved was originally paid.

SEC. 153. EFFECT OF AN ELECTION TO BE RESTORED TO CSRS-OFFSET AFTER HAVING BEEN CORRECTED TO CSRS.

(a) APPLICABILITY.—This section shall apply in the case of any employee affected by an error described in section 151(a) who elects the option available to such employee under section 151(c)(1).

(b) DISPOSITION OF CONTRIBUTIONS TO THE CSRDF.—In the case of an employee described in subsection (a), the provisions of section 102(b) shall apply, except that, in applying such provisions—

(1) "the applicable provisions of section 8334" shall be substituted for "section 8422" in paragraph (1)(B)(ii) thereof; and

(2) "the applicable provisions of section 8334" shall be substituted for "section 8423" in paragraph (2)(B)(ii) thereof.

Subtitle G—Additional Provisions Relating to Government Agencies

SEC. 161. REPAYMENT REQUIRED IN CERTAIN SITUATIONS.

(a) IN GENERAL.—An individual who previously received a payment ordered by a court or provided as a settlement of claim for losses resulting from a retirement coverage error shall not be entitled to make an election under this Act unless repayment of the amount so received by such individual is waived in whole or in part by the Office of Personnel Management, and any amount not waived is repaid.

(b) REGULATIONS.—Any repayment under this section shall be made in accordance with regulations prescribed by the Office.

SEC. 162. EQUITABLE SHARING OF AMOUNTS PAYABLE TO OR FROM THE GOVERNMENT IF MORE THAN ONE AGENCY INVOLVED.

The Office of Personnel Management shall by regulation prescribe rules under which, in the case of an employee who has been employed in or under more than 1 agency since the date of the retirement coverage error involved (and before its rectification under this Act), any contributions or other amounts required to be paid to or from the then current employing agency (other than lost earnings under section 163(a)(2)) shall be equitably allocated between or among the appropriate agencies.

SEC. 163. PROVISIONS RELATING TO THE ORIGINAL RESPONSIBLE AGENCY.

(a) OBLIGATIONS OF THE ORIGINAL RESPONSIBLE AGENCY.—

(1) EXPENSES FOR SERVICES OF FINANCIAL ADVISOR.—The Office of Personnel Management shall by regulation prescribe rules under which, in the case of any employee eligible to make an election under this Act, the original responsible agency (as determined under succeeding provisions of this section) shall pay (or make reimbursement for) any reasonable expenses incurred by such employee for services received from any licensed financial or legal consultant or advisor in connection with such election.

(2) SPECIAL RULES.—Such regulations shall also include provisions to ensure that, to the extent lost earnings under the Thrift Savings Fund are involved in connection with a particular error, the original responsible agency—

(A) shall pay (or reimburse any other agency that pays) any amounts to the Thrift Savings Fund representing lost earnings with respect to such error; and

(B) shall be entitled to receive (directly from the Thrift Savings Fund or through transfer from another agency) any amounts paid out of the Thrift Savings Fund representing a refund of lost earnings to which the Government is entitled with respect to such error.

(b) ORIGINAL RESPONSIBLE AGENCY DEFINED.—For purposes of this Act, the term "original responsible agency", with respect to a retirement coverage error affecting an employee, means—

(1) except in the situation described in paragraph (2), the agency determined by the Office of Personnel Management to have made the initial retirement coverage error (including one made before January 1, 1984); or

(2) if the error is attributable, in whole or in part, to an erroneous regulation promulgated by the Office of Personnel Management, such Office.

(c) PROCEDURES FOR IDENTIFYING THE ORIGINAL RESPONSIBLE AGENCY.—

(1) IN GENERAL.—For purposes of this section, the original responsible agency, in any situation to which this section applies, shall be identified by the Office of Personnel Management in accordance with regulations which the Office shall prescribe.

(2) FINALITY.—A determination made by the Office under this subsection shall be final and not subject to any review.

(d) IF ORIGINAL RESPONSIBLE AGENCY NO LONGER EXISTS.—If the agency which (before the application of this subsection) is identified as the original responsible agency no longer exists (whether because of a reorganization or otherwise)—

(1) the successor agency (as determined under regulations prescribed by the Office) shall be treated as the original responsible agency; or

(2) if none, this section shall be applied by substituting the CSRDF for the original responsible agency.

(e) SOURCE OF PAYMENTS IF ERROR DUE TO ERRONEOUS OPM REGULATIONS.—In any case in which the Office of Personnel Management is the original responsible agency by reason of subsection (b)(2), any amounts payable to or from the Office under this section shall be payable to or from the CSRDF.

TITLE II—GENERAL PROVISIONS

SEC. 201. IDENTIFICATION AND NOTIFICATION REQUIREMENTS.

(a) IN GENERAL.—The Office of Personnel Management shall prescribe regulations under which Government agencies shall take such measures as may be necessary to ensure that all individuals who are (or have been) affected by a retirement coverage error giving rise to any election or automatic change in retirement coverage under this Act shall be promptly identified and notified in accordance with this section.

(b) MATTER TO BE INCLUDED IN NOTICE TO INDIVIDUALS.—Any notice furnished under this section shall be made in writing and shall include at least the following:

(1) DESCRIPTION OF ERROR.—A description of the error involved, including a clear and concise explanation as to why the original retirement coverage determination was erroneous, citations to (and a summary description of) the pertinent provisions of law, and how that determination should instead have been made.

(2) METHOD FOR RECTIFICATION.—How the error is to be rectified under this Act, including whether rectification will be achieved through an automatic change in retirement coverage (and, if so, the time, form, and manner in which that change will be effected) or an election.

(3) ELECTION PROCEDURES, ETC.—If an election is provided under this Act, all relevant information as to how such an election may be made, the options available, the differences between those respective options (as further specified in succeeding provisions of this subsection), and the consequences of failing to make a timely election.

(4) ACCRUED BENEFITS, ETC.—With respect to the (or each) retirement system by which the individual is then covered (disregarding the Thrift Savings Plan), and to the extent applicable:

(A) A brief summary of any benefits accrued.

(B) The amount of employee contributions made to date and the effect of any applicable disposition rules relating thereto (including provisions relating to excess amounts or shortfalls).

(C) The amount of any Government contributions made to date and the effect of any applicable disposition rules relating thereto (including provisions relating to excess amounts or shortfalls).

(5) THRIFT SAVINGS FUND.—With respect to the Thrift Savings Fund, the balance that then is (or would be) credited to the individual's account depending on the option chosen, with any such balance to be shown both in the aggregate and broken down by—

(A) individual contributions,

(B) automatic (1 percent) Government contributions, and

(C) matching Government contributions,

including lost earnings on each and the extent to which any makeup contributions or forfeitures would be involved.

(6) OASDI BENEFITS.—Such information regarding benefits under title II of the Social Security Act as the Commissioner of Social Security considers appropriate.

(7) OTHER INFORMATION.—Any other information that the Director of the Office of Personnel Management may by regulation prescribe after consultation with the Executive Director of the Federal Retirement Thrift Investment Board and such other agency heads as the Director considers appropriate, including any appeal rights available to the individual.

(c) COMPARISONS.—Any amounts required to be included under subsection (b)(4) shall, with respect to the respective retirement systems involved, be determined—

(1) as of the date the retirement coverage error was corrected (if applicable);

(2) as of the then most recent date for which those benefits and amounts are ascertainable, assuming no change in retirement coverage; and

(3) as of the then most recent date for which those benefits and amounts are ascertainable, assuming the alternative option is chosen.

(d) PAST ERRORS.—All measures required under this section shall, with respect to errors preceding the date specified in section 206(e) (relating to the effective date for all regulations prescribed under this Act), be completed no later than December 31, 2000.

SEC. 202. INDIVIDUAL APPEAL RIGHTS.

(a) IN GENERAL.—An individual aggrieved by a final determination under this Act shall be entitled to appeal such determination to the Merit Systems Protection Board under section 7701 of title 5, United States Code.

(b) NOTIFICATION APPEALS.—The Office of Personnel Management shall by regulation establish procedures under which individuals may bring an appeal to the Office with respect to any failure to have been properly notified in accordance with section 201. A final determination under this subsection shall be appealable under subsection (a).

SEC. 203. INFORMATION TO BE FURNISHED BY GOVERNMENT AGENCIES TO AUTHORITIES ADMINISTERING THIS ACT.

(a) APPLICABILITY.—The authorities identified in this subsection are:

(1) The Director of the Office of Personnel Management.

(2) The Commissioner of Social Security.

(3) The Executive Director of the Federal Retirement Thrift Investment Board.

(b) AUTHORITY TO OBTAIN INFORMATION.—Each authority identified in subsection (a) may secure directly from any department or agency of the United States information necessary to enable such authority to carry out its responsibilities under this Act. Upon request of the authority involved, the head of the department or agency involved shall furnish that information to the requesting authority.

(c) LIMITATION; SAFEGUARDS.—Each of the respective authorities under subsection (a)—

(1) shall request only such information as that authority considers necessary; and

(2) shall establish, by regulation or otherwise, appropriate safeguards to ensure that any information obtained under this section shall be used only for the purpose authorized.

SEC. 204. SOCIAL SECURITY RECORDS.

Notwithstanding any limitations in section 205 of the Social Security Act regarding the modification of wage records maintained by the Commissioner of Social Security for purposes of title II of such Act, the Commissioner of Social Security shall modify the wage record of each employee affected by a retirement coverage error to change, add, or delete any entry regarding service as an employee to the extent necessary to carry out the purposes of this Act or the Social Security Act.

SEC. 205. CONFORMING AMENDMENTS RESPECTING SOCIAL SECURITY COVERAGE AND OASDI TAXES.

(a) SOCIAL SECURITY COVERAGE.—Section 210(a)(5)(H) of the Social Security Act (42 U.S.C. 410(a)(5)(H)) is amended—

(1) in clause (i) by striking "or" at the end;

(2) in clause (ii) by striking the semicolon and inserting ", or"; and

(3) by adding at the end the following:

"(iii)(I) described in section 111(a)(3) of the Federal Retirement Coverage Corrections Act, on or after the effective date of an election (or deemed election) by such individual under section 111(b)(2) of such Act,

"(II) described in section 131(a)(1) of such Act, on or after the effective date of an election (or deemed election) by such individual under subsection (b)(2) or (c)(1) of section 131 of such Act, or

"(III) described in section 151(a) of such Act, on or after the effective date of an election (or deemed election) by such individual under subsection (b)(2) or (c)(1) of section 151 of such Act;".

(b) OASDI TAXES.—Section 3121(b)(5)(H) of the Internal Revenue Code of 1986 is amended—

(1) in clause (i) by striking "or" at the end;

(2) in clause (ii) by striking the semicolon and inserting ", or"; and

(3) by adding at the end the following:

"(iii)(I) described in section 111(a)(3) of the Federal Retirement Coverage Corrections Act, on or after the effective date of an election (or deemed election) by such individual under section 111(b)(2) of such Act,

"(II) described in section 131(a)(1) of such Act, on or after the effective date of an election (or deemed election) by such individual under subsection (b)(2) or (c)(1) of section 131 of such Act, or

"(III) described in section 151(a) of such Act, on or after the effective date of an election (or deemed election) by such individual under subsection (b)(2) or (c)(1) of section 151 of such Act;".

SEC. 206. REGULATIONS.

(a) IN GENERAL.—Any regulations necessary to carry out this Act shall be prescribed by the Director of the Office of Personnel Management, the Executive Director of the Federal Retirement Thrift Investment Board, the Commissioner of Social Security, the Secretary of the Treasury, and any other appropriate authority, with respect to matters within their respective areas of jurisdiction.

(b) MATTERS TO BE INCLUDED.—The regulations prescribed by the Director of the Office of Personnel Management shall include at least the following:

(1) FORMER EMPLOYEES, ANNUITANTS, AND SURVIVOR ANNUITANTS.—

(A) IN GENERAL.—Provisions under which, to the maximum extent practicable and in appropriate circumstances, any election available to an employee under subtitle A, B, D, or F of title I shall be available to a former employee, annuitant, or survivor annuitant.

(B) SUBTITLE C SITUATIONS.—Provisions under which subtitle C of title I shall apply in the case of a former employee.

(C) SUBTITLE E SITUATIONS.—Provisions under which the purposes of this paragraph shall be carried with respect to any situation under subtitle E of title I.

(2) FORMER SPOUSES.—Provisions under which appropriate notification shall be afforded to any former spouse affected by a change in retirement coverage pursuant to this Act.

(3) PROCEDURAL REQUIREMENTS.—Provisions establishing the procedural requirements in accordance with which any determinations under this Act (not otherwise addressed in this Act) shall be made, in conformance with the requirements of this Act.

(4) AUTHORITY TO MAKE ACTUARIAL REDUCTION IN ANNUITY BY REASON OF CERTAIN UNPAID AMOUNTS.—Provisions under which any payment required to be made by an individual to the Government in order to make an election under this Act which remains unpaid may be made by a reduction in the appropriate annuity or survivor annuity. The reduction shall, to the extent practicable, be designed so that the present value of the future reduction is actuarially equivalent to the amount so required.

(c) DEFINITIONS.—For purposes of this section—

(1) the term "annuitant" means any individual who is an annuitant as defined by section 8331(9) or 8401(2) of title 5, United States Code; and

(2) the term "former employee" includes any former employee who satisfies the service requirement for title to a deferred annuity under chapter 83 or 84 of such title 5 (as applicable), but—

(A) has not attained the minimum age required for title to such an annuity; or

(B) has not filed claim therefor.

(d) COORDINATION RULE.—In prescribing regulations to carry out this Act, the Director of the Office of Personnel Management shall consult with—

(1) the Administrative Office of the United States Courts;

(2) the Clerk of the House of Representatives;

(3) the Sergeant at Arms and Doorkeeper of the Senate; and

(4) other appropriate officers or authorities.

(e) EFFECTIVE DATE.—All regulations necessary to carry out this Act shall take effect as of the first day of the first month beginning after the end of the 6-month period beginning on the date of enactment of this Act.

SEC. 207. ALL ELECTIONS TO BE APPROVED BY OPM.

Notwithstanding any other provision of this Act, no election under this Act (other than an election by default) may be given effect until the Office of Personnel Management has determined, in writing, that such election is in compliance with the requirements of this Act.

SEC. 208. ADDITIONAL TRANSFERS TO OASDI TRUST FUNDS IN CERTAIN CASES.

If the Commissioner of Social Security determines that the payment of the OASDI taxes described in this Act did not result in a credit to the OASDI trust funds of an equal amount, the Commissioner of Social Security shall notify the Secretary of the Treasury of the amount of any shortfall. Promptly upon receiving such notification, the Secretary of the Treasury shall transfer an amount equal to such shortfall from the general fund of the Treasury to the OASDI trust funds.

SEC. 209. TECHNICAL AND CONFORMING AMENDMENTS.

(a) AMENDMENT RELATING TO LIMITATION ON SOURCES FROM WHICH CONTRIBUTIONS TO THE THRIFT SAVINGS FUND ARE ALLOWED.—Section 8432(h) of title 5, United States Code, is amended by striking "title." and inserting "title or the Federal Retirement Coverage Corrections Act.".

(b) DESCRIPTION OF AMOUNTS COMPRISING THE THRIFT SAVINGS FUND.—Section 8437(b) of title 5, United States Code, is amended by striking "expenses)." and inserting "expenses), as well as contributions under the Federal Retirement Coverage Corrections Act (and lost earnings made up under such Act).".

(c) ADMINISTRATIVE EXPENSES.—

(1) THRIFT SAVINGS PLAN.—Section 8437(d) of title 5, United States Code, is amended by inserting "(including the provisions of the Federal Retirement Coverage Corrections Act that relate to this subchapter)" after "this subchapter".

(2) CSRS, CSRS-OFFSET, FERS.—Section 8348(a)(2) of title 5, United States Code, is amended by striking "statutes;" and inserting "statutes (including the

provisions of the Federal Retirement Coverage Corrections Act that relate to this subchapter);".

(3) MSPB.—Section 8348(a)(3) of title 5, United States Code, is amended by striking "title." and inserting "title and the Federal Retirement Coverage Corrections Act.".

TITLE III—OTHER PROVISIONS

SEC. 301. PROVISIONS TO PERMIT CONTINUED CONFORMITY OF OTHER FEDERAL RETIREMENT SYSTEMS.

(a) FOREIGN SERVICE.—Sections 827 and 851 of the Foreign Service Act of 1980 (22 U.S.C. 4067 and 4071) shall apply with respect to this Act in the same manner as if this Act were part of—

(1) the Civil Service Retirement System, to the extent this Act relates to the Civil Service Retirement System; and

(2) the Federal Employees' Retirement System, to the extent this Act relates to the Federal Employees' Retirement System.

(b) CENTRAL INTELLIGENCE AGENCY.—Sections 292 and 301 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2141 and 2151) shall apply with respect to this Act in the same manner as if this Act were part of—

(1) the Civil Service Retirement System, to the extent this Act relates to the Civil Service Retirement System; and

(2) the Federal Employees' Retirement System, to the extent this Act relates to the Federal Employees' Retirement System.

SEC. 302. GOVERNMENT CONTRIBUTIONS PAYABLE FROM THE CSRDF.

(a) IN GENERAL.—Notwithstanding any other provision of this Act or any other provision of law, all amounts for which any Government agency would otherwise be liable under this Act shall instead be paid from the CSRDF, subject to subsection (b).

(b) EXCEPTIONS.—This section shall not apply with respect to any amount for which any Government agency would otherwise be liable—

(1) by reason of section 301; or

(2) by reason of any retirement coverage error as to which the notification required under section 201 is not given before January 1, 2003.

(c) AMORTIZATION.—For purposes of section 8348(f) of title 5, United States Code, any unfunded liability created by this section (as determined by the Office of Personnel Management) shall be considered a new benefit payable from the CSRDF.

SEC. 303. INDIVIDUAL RIGHT OF ACTION PRESERVED FOR AMOUNTS NOT OTHERWISE PROVIDED FOR UNDER THIS ACT.

Nothing in this Act shall preclude an individual from bringing a claim against the Government of the United States which such individual may have under section 1346(b) or chapter 171 of title 28, United States Code, or any other provision of law (except to the extent the claim is for any amounts otherwise provided for under this Act).

TITLE IV—TAX PROVISIONS

SEC. 401. TAX PROVISIONS.

(a) PLAN QUALIFICATION.—No retirement plan of the United States (or any agency thereof) shall fail to be treated as a qualified plan under the Internal Revenue Code of 1986 by reason of any action taken under this Act.

(b) TRANSFERS.—For purposes of the Internal Revenue Code of 1986, no amount shall be includible in the gross income of any individual by reason of any direct transfer under this Act between funds or any Government contribution under this Act to any fund or account.

(c) DISTRIBUTION OF EXCESS CSRS CONTRIBUTIONS.—Section 72(t) of the Internal Revenue Code of 1986 (relating to 10-percent additional tax on early distributions from qualified retirement plans) shall not apply to the distribution of the excess described in section 102(b)(1)(B) of this Act or to any other refund paid under this Act from the Civil Service Retirement and Disability Fund.

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Mr. CUMMINGS. Thank you very much, Mr. Chairman. I'm very pleased that you have convened the subcommittee today to take action on a problem which we both agreed last year would be our top legislative priority for this session of Congress. I want to thank you, our respective staffs, and the Office of Personnel Management, for all of their very hard work in producing legislative proposals that will establish the comprehensive framework for the correction of Federal retirement system coverage errors.

Few things in life are more important to a working person than having an adequate and secure retirement plan in place to provide for their future, or that of their spouse. When a worker's retirement security is jeopardized by an employer's mistake, tremendous emotional and financial pain can result—unless a remedy is available that assures prompt and fair correction and avoids economic harm.

At the subcommittee's hearing on this matter last summer, we heard the testimony of four Federal employees who have been the victims of an enrollment mistake made by their employing agency. In each case, the employee was initially placed in the Civil Service Retirement System, then years later informed that they should have been in the Federal Employees Retirement System. Informed they had no recourse or options, these employees were dumped into FERS and confronted with the need to make thousands of dollars of retroactive payments into a thrift savings account. Hundreds of other Federal workers have found themselves in this situation over the past 10 years. Most have also been forced to rearrange their lives and financial plans to rectify a problem not of their making. I find this intolerable. I promised we would correct. I believe that the makings of a solution are now at hand.

First, there is before us the chairman's mark, the Federal Retirement Coverage Corrections Act. This proposal would essentially permit those who have been the victims of an enrollment error to remain in the retirement system they were mistakenly placed in to be covered by the system they should have been in. It would hold the government responsible for making whole an affected employees' thrift savings account. Together these provisions will end the harm now being done. I see them as critical elements of any legislation that finally gets enacted.

The chairman's mark seeks to hold those agencies responsible for making enrollment errors responsible for the cause of their correction. I'm very troubled by this because the resulting budgetary pressure could lead to layoffs. The Congressional Budget Office has not yet been able to produce an estimate of the bill so that we don't know how significant a problem this could be. I believe, however, that our efforts to help out one group of victims must not create another. OPM has submitted its own retirement error correction proposals to Congress for consideration. It takes a different approach than the chairman's mark in providing make whole relief to employees corrected into FERS.

It also does not saddle the agencies with the burden of additional costs. I understand that later this week, OPM's proposal will be introduced in the Senate with bipartisan co-sponsorship. That encouraging news increases the likelihood that a fix will be in place before the upcoming FERS' open season.

This morning's hearing provides the subcommittee with the opportunity to examine and carefully weigh the merits of the two bills. Later, we are scheduled to go to markup and make difficult choices between their competing policies and procedures. I look forward to that—to the testimony of each of our witnesses because I believe we can benefit from the expert analysis they have to offer. It should greatly assist us as we strive to achieve the consensus we need.

Mr. Chairman, again, my thanks to you for moving us forward on this important matter. My thanks go also to the witnesses for making time in your schedules to appear with us today. Thank you and thank you again.

Mr. MICA. Thank you and I'd like to recognize Ms. Norton.

Ms. NORTON. Thank you very much, Mr. Chairman. I want to thank Chairman Mica for holding this important hearing and markup to correct errors made by the Federal Government and the Federal retirement system. In the private sector, the burden of correcting employer errors always lies with the employer on pain of legal action. If the Federal Government were a private employer, the duty to make employees whole for its errors would be a closed case. Surely the Federal Government should correct its own mistakes—in this instance injury to Federal employees—by placing them in the wrong retirement system without exacting a quid pro quo that leaves them less than whole or visits a penalty on non-affected employees.

The errors that concern us occurred solely because of the government's own negligence and of course great financial anxiety and hardship to employees. Many made financial decisions for years based upon the erroneous assumption that they were in the retirement program they had elected. These mistakes are analogous to mistakes which, when made by the Internal Revenue Service, it now sent many members to the drawing boards to design make whole remedies and even to penalize the IRS. I believe that it is incumbent upon the Congress, not only to determine the most equitable way to reimburse employees who have been injured, but also to think through a system that ensures that such mistakes are self-correcting or otherwise remedied in the future without further legislative action.

Although I support the subcommittee's make whole provisions, I'm very concerned that its proposal would subtract the needed funds from agency budgets and do further harm to employees. If enacted into law, this would be the only instance I know of, including discrimination claims and the Tort Claims Act, where such funds would come from agency budgets. Particularly in light of downsizing that has been driven almost entirely by quick revenue savings rather than streamlining for efficiency as the Congress promised, the Federal Government cannot afford reductions-in-force or reductions-in-salary which would harm non-affected, innocent employees.

For this reason, I support the provision put forward by the Office of Personnel Management which would take the funds from the Civil Service Retirement Fund. I hope that the subcommittee majority will work with the minority to find a workable solution—a goal that I believe is well within reach now. However, the govern-

ment's obligation to remedy past errors does not end our responsibility. This painful experience has uncovered flaws in the present system. I, therefore, am investigating private sector models for monitoring and self-correction of such errors. Of course, it would be impossible to design a retirement system immune from error, but it is also true that the burden is on the Federal Government to put in place a system that can periodically monitor itself and prevent and correct mistakes. The average Federal employee necessarily relies on the Federal Government to administer its own system correctly. When Federal employees elect specific retirement coverage and believe that this coverage will be in place when they retire, employees should have reasonable assurance that upon retirement, they will not find themselves shortchanged by the government.

I will be offering a bill, which I hope my colleagues will support to put a monitoring—and a new monitoring and corrective approach—in place, to check periodically and give prompt notice to insure similar mistakes are caught and corrected in time in the future. I believe that this effort will complement the action we seek today to correct past mistakes and assure that we have learned from this experience.

I want to thank the chairman, once again, for this important step. I look forward to the testimony of today's witnesses and am pleased to welcome them. Thank you very much, Mr. Chairman.

Mr. MICA. Thank you. I didn't see any other Members come in. I'd like to call our first witness. We've got this divided into two panels.

Mr. Ed Flynn, if you'd come forward—don't even bother being seated. Raise your right hand—you know the routine.

[Witness sworn.]

Mr. MICA. Thank you. Be seated.

Welcome back. You're recognized, sir, for 5 minutes. Let's keep it short today.

STATEMENT OF ED FLYNN, ASSOCIATE DIRECTOR, RETIREMENT AND INFORMATION SERVICE, OFFICE OF PERSONNEL MANAGEMENT

Mr. FLYNN. Yes, Mr. Chairman. I'll try and do that. You do have a statement from me and what I'd like to do——

Mr. MICA. Without objection, it will be made part of the record. Continue.

Mr. FLYNN. Perhaps just make a few opening comments—first, Mr. Chairman, I want to say that we, at the Office of Personnel Management, do very much appreciate the hard work that has gone into this matter on the part of the subcommittee staff, and we hope that we've helped shed some light on the substantive and technical differences between the two proposals which are now before the subcommittee. Some of which have been commented upon by the members of the subcommittee in their opening comments.

We continue to believe, Mr. Chairman, that the administration's proposal in all of its fundamental aspects remains the best way to proceed. However, we've always indicated a willingness and we, today, continue to stand ready to discuss and resolve where possible aspects of the administration's proposal that are regarded as problematic by others. However, we believe the proposal of the sub-

committee's staff still contains elements which, in our view, are objectionable. I want to summarize three of those.

First, for individuals who choose to be covered by the Federal Employees Retirement System, we're concerned by the creation of a payment to them which attempts to replicate the aggregate amount of makeup contributions, government match and lost earnings for the period of the error. Such a mechanism departs from the principle that employee makeup contributions are the responsibility of the employee, an explicit provision of current law that was fully considered in 1990. Now as you know, recent action by the Thrift Investment Board facilitates the ability of employees to do makeup contributions. For that reason, we feel more strongly that departing from this principle is unwise for several reasons.

First, it creates a situation where employees are doubly compensated. Second, it creates inequities between this group of employees and others who have makeup contribution opportunities for different reasons. It produces different payment amounts for individuals whose circumstances are essentially the same. And more importantly, a make whole component for individuals is available under the framework of the administration's proposal. One that avoids the complexities and differentials introduced by the staff's proposal.

I might just digress for a second, Mr. Chairman, and say that I appreciate very much all of the effort that has gone into this payment mechanism. I will tell you that as we attempted to prepare the administration's proposal when we worked with Federal agencies and among ourselves, we had accountants, actuaries, and people looking at this initially from the standpoint of whether or not a single payment to an individual who chose to stay in the Federal Employees Retirement System would provide the relief that seemed appropriate. Ultimately, we concluded that because of great complications, because of inequities, because of difficulties in administration, such an approach was not going to be feasible. But I don't, for a moment, want to appear to be critical of the subcommittee staff for trying to go down that road. It's a road that we went down and ultimately found wanting.

Second, Mr. Chairman, the staff proposal directs OPM to regulate similar procedures to produce similar outcomes for former employees, retirees and survivors. Our view is that legislation is required in these areas and that these are not subjects which can be resolved through regulatory action. Because of that, individuals most in need of some early resolution of their circumstances, retirees and survivors, will have to await future legislative action addressing their needs.

And finally, the identification and allocation of cost among agencies and the method of financing the administrative costs associated with correcting errors in the staff's proposal, we believe add to difficulties associated with helping individual employees, retirees, and survivors and we would urge the subcommittee to consider the administration's proposal in these areas as acceptable.

Mr. Chairman, while there are others, these seem to me to be the main points of difference between the subcommittee staff's proposal and the administration's. I know you and all the members of the subcommittee appreciate the importance of moving toward a

prompt resolution of this matter—a view which all of us share. Given that the administration's proposal involved the dedicated effort of representatives from five agencies over a period of almost 18 months, I hope we can work from the strength of that proposal to a resolution of this matter for all concerned. Thank you for the opportunity to give a few opening remarks and I'll attempt to answer any questions the subcommittee may have.

[The prepared statement of Mr. Flynn follows:]

STATEMENT OF
WILLIAM E. FLYNN, III, ASSOCIATE DIRECTOR
FOR RETIREMENT AND INSURANCE
OFFICE OF PERSONNEL MANAGEMENT

at a hearing of the

CIVIL SERVICE SUBCOMMITTEE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES

ON

THE FEDERAL EMPLOYEES RETIREMENT COVERAGE CORRECTION ACT OF 1998

FEBRUARY 24, 1998

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I AM PLEASED TO APPEAR TODAY TO DISCUSS THE SUBCOMMITTEE'S PROPOSAL TO CORRECT RETIREMENT COVERAGE ERRORS. THERE ARE CLEAR DIFFERENCES BETWEEN THE APPROACHES OF THE SUBCOMMITTEE AND THE ADMINISTRATION, AND I APPRECIATE THE OPPORTUNITY TO ADDRESS THEM.

THE ADMINISTRATION BELIEVES THAT A COMPREHENSIVE SOLUTION IS ESSENTIAL, ONE THAT ADDRESSES SITUATIONS IN WHICH A LONG-TERM COVERAGE ERROR HAS BEEN CORRECTED IN THE PAST AS WELL

AS THOSE IN WHICH THE ERROR HAS NOT YET BEEN DISCOVERED AND CORRECTED. WE STRONGLY BELIEVE THAT THE REMEDY SHOULD BE COMPLETE, AND THAT IT SHOULD EXPLICITLY DEAL WITH ALL SIGNIFICANT ISSUES, INCLUDING THE CASES OF EMPLOYEES WHO HAVE RETIRED OR DIED.

WE REALIZED FROM THE OUTSET THAT IT WOULD REQUIRE THE COOPERATION AND COORDINATION OF A NUMBER OF AGENCIES TO CRAFT A PROPOSAL THAT WOULD ACHIEVE THE DESIRED RESULT. IT WAS NECESSARY TO RESOLVE MANY COMPLEX AND DIFFICULT ISSUES. TO DO SO, WE WORKED CLOSELY WITH THE FEDERAL RETIREMENT THRIFT INVESTMENT BOARD, THE SOCIAL SECURITY ADMINISTRATION, AND THE TREASURY DEPARTMENT. THE ADMINISTRATION'S PROPOSAL REPRESENTS THE CONSENSUS POSITION THAT IS THE BEST WAY TO RESOLVE THE MYRIAD INTRICATE AND INTERTWINED ASPECTS OF THIS SITUATION. THE FEDERAL RETIREMENT THRIFT INVESTMENT BOARD'S VIEWS ARE DESCRIBED IN EXECUTIVE DIRECTOR ROGER MEHLE'S STATEMENT.

AS DISCUSSED IN OUR REPORT AND MY PRIOR TESTIMONY, WE BELIEVE THAT, TO SUCCEED, THERE ARE FOUR SPECIFIC OBJECTIVES THAT ANY

REMEDY MUST MEET.

- THE REMEDY SHOULD DEMONSTRATE THAT THE GOVERNMENT CARES ABOUT FEDERAL EMPLOYEES WHO HAVE BEEN DISADVANTAGED BY AN ERROR IN THEIR RETIREMENT COVERAGE, AND IS COMMITTED TO AN EQUITABLE SOLUTION FOR THESE EMPLOYEES AND THEIR FAMILIES.
- EMPLOYEES SHOULD HAVE A CHOICE BETWEEN CORRECTED COVERAGE AND THE BENEFIT THE EMPLOYEE EXPECTED TO RECEIVE, WITHOUT DISTURBING SOCIAL SECURITY COVERAGE LAWS.
- THE OPTIONS PROVIDED TO THE EMPLOYEE SHOULD BE EASY TO UNDERSTAND.
- FINALLY, WE WANT TO MINIMIZE ADMINISTRATIVE ASPECTS OF THE REMEDY IN ORDER TO KEEP THE SOLUTIONS SIMPLE AND TIMELY.

MR CHAIRMAN, WE BELIEVE THE ADMINISTRATION PROPOSAL MEETS THESE OBJECTIVES. SINCE WE HAVE JUST RECEIVED THE FINAL VERSION OF THE SUBCOMMITTEE'S PROPOSAL, WE HAVE NOT YET HAD THE OPPORTUNITY TO FULLY REVIEW ALL DETAILS OF IT. NEVERTHELESS, THERE ARE FUNDAMENTAL DIFFERENCES BETWEEN THE PROPOSALS THAT I WOULD LIKE TO DISCUSS THIS MORNING.

UNDER BOTH PROPOSALS, INDIVIDUALS WHO SHOULD HAVE BEEN

UNDER FERS, BUT WHO WERE ERRONEOUSLY PLACED IN CSRS OR CSRS OFFSET, WILL HAVE THE OPTION TO ELECT TO BE RETROACTIVELY PLACED UNDER FERS COVERAGE. HOWEVER, UNDER THE SUBCOMMITTEE PROPOSAL, INDIVIDUALS ELECTING FERS COVERAGE WILL BE ENTITLED TO A SUBSTANTIAL AGENCY-FUNDED PAYMENT TO THE THRIFT SAVINGS PLAN.

UNDER CURRENT THRIFT SAVINGS PLAN RULES, EMPLOYEES WHO ARE COVERED UNDER THE IMPROPER PLAN MAY MAKE RETROACTIVE CONTRIBUTIONS AND RECEIVE MATCHING CONTRIBUTIONS AND EARNINGS. WHILE THE THRIFT SAVINGS BOARD PREVIOUSLY LIMITED MAKE-UP TSP CONTRIBUTIONS TO THE TOTAL PERMITTED FOR THE YEAR IN WHICH THE MAKE-UP WAS MADE, THAT IS NO LONGER THE CASE IN THE EVENT OF RETIREMENT COVERAGE ERRORS. IN THAT CASE, CONTRIBUTIONS CAN BE MADE FOR EACH YEAR OF ERRONEOUS COVERAGE UP TO THE MAXIMUM PERMITTED AMOUNT FOR EACH YEAR.

OUR UNDERSTANDING IS THAT THE AGENCY PAYMENT ELEMENT OF THE SUBCOMMITTEE'S PROPOSAL IS BASED UPON THE RULES APPLICABLE IN THE PRIVATE SECTOR WHEN AN INDIVIDUAL HAS ERRONEOUSLY BEEN DENIED COVERAGE UNDER AN EMPLOYER'S RETIREMENT SYSTEM.

SUCH PAYMENTS ARE NECESSARY IN THE PRIVATE SECTOR BECAUSE, UNDER A DEFINED CONTRIBUTION RETIREMENT PROGRAM, THEY ARE THE ONLY MEANS POSSIBLE TO CORRECT THE HARM TO EMPLOYEE. HOWEVER, WITH CSRS AND FERS BOTH OPERATING, WE HAVE AN APPROACH WHICH IS GENERALLY UNAVAILABLE IN THE PRIVATE SECTOR, AND WHICH ENABLES AN INDIVIDUAL TO BE RESTORED TO THE STATUS HE OR SHE PRESUMED WAS CORRECT.

DURING OUR STUDY OF THIS MATTER, WE CONSIDERED THE OPTION OF PLACING INDIVIDUALS UNDER FERS AND MAKING A PAYMENT TO THE TSP, BUT REALIZED THERE WERE INTRACTABLE BASIC PROBLEMS INVOLVING COST, EQUITY, AND COMPLEXITY. MORE IMPORTANTLY, WE CONCLUDED THAT THE APPROACH OF OFFERING CSRS OFFSET COVERAGE PROVIDED A MAKE-WHOLE SOLUTION TO AFFECTED INDIVIDUALS. UNDER THIS APPROACH, NOT AVAILABLE IN THE PRIVATE SECTOR, INDIVIDUALS WILL ALWAYS RECEIVE AT LEAST AS MUCH AS THEY BELIEVED THEY WERE GOING TO GET.

WE BELIEVE A NUMBER OF UNINTENDED, BUT NONETHELESS, REAL INEQUITIES, COSTS, AND ADMINISTRATIVE PROBLEMS WILL RESULT UNDER THE SUBCOMMITTEE'S PROPOSAL. SOME INDIVIDUALS WILL BE

OVERCOMPENSATED WHILE OTHERS WILL RECEIVE SMALLER PAYMENTS.

FOR EXAMPLE, CONSIDER THREE INDIVIDUALS WHO WERE ERRONEOUSLY COVERED UNDER CSRS OR CSRS-OFFSET, AND WHO SHOULD HAVE BEEN FERS. DURING THE CSRS OR CSRS-OFFSET EMPLOYMENT, ONE CONTRIBUTED 1% TO TSP AND PUT IT ALL IN THE C FUND. THE SECOND CONTRIBUTED 5% TO TSP AND PUT IT ALL IN THE G FUND. THE THIRD INDIVIDUAL DID NOT PARTICIPATE IN TSP AT ALL.

UNDER THE SUBCOMMITTEE PAYMENT PROPOSAL, THE PERSON WHO CONTRIBUTED ONLY 1% TO TSP, BUT PUT ALL IT IN THE C FUND, WILL RECEIVE THE LARGEST PAYMENT BECAUSE THEIR AGENCY PAYMENT IS NOT SUBJECT TO A CAP, AND BECAUSE EARNINGS WILL BE COMPUTED SOLELY ON THE BASIS OF C FUND PERFORMANCE.

IRONICALLY, THE SECOND INDIVIDUAL, WHO CONTRIBUTED THE MOST TO HIS OR HER OWN FUTURE RETIREMENT BY MAKING THE 5% TSP CONTRIBUTIONS, WILL RECEIVE THE SMALLEST AGENCY PAYMENT. EVEN THOUGH AVERAGE FERS TSP CONTRIBUTIONS EXCEED 5%, THE AGENCY PAYMENT WILL BE LIMITED TO 5%, BECAUSE THAT AMOUNT

PLUS THE EMPLOYEES EARLIER CONTRIBUTIONS HIT THE 10% LIMIT. FURTHER, SINCE THE EMPLOYEE HAD A HISTORY UNDER THE G FUND, EARNINGS ON THE AGENCY PAYMENT WILL ALSO BE PAID AT THAT LOWER RATE.

THE THIRD INDIVIDUAL WILL RECEIVE A PAYMENT IN BETWEEN THE OTHER TWO. SINCE NO TSP CONTRIBUTIONS WERE MADE, THE PAYMENT WILL NOT BE SUBJECT TO A CAP. SINCE THERE IS NO INVESTMENT HISTORY, EARNINGS ON THE PAYMENT WILL BE COMPUTED BASED ON THE COMPOSITE, AVERAGE FUND EARNINGS, SUBSTANTIALLY HIGHER THAN THE G FUND RATE, BUT LOWER THAN THE C FUND RATE.

THERE IS ANOTHER FUNDAMENTAL DIFFERENCE BETWEEN THE TWO PROPOSALS IN THE AREA OF FUNDING. THE ADMINISTRATION'S PLAN IS SIMPLE. PRIOR EMPLOYEE RETIREMENT CONTRIBUTIONS HELD IN THE RETIREMENT FUND ARE REALLOCATED AS REQUIRED. AFTER DOING SO, IF THERE IS ANY SHORTAGE, IT IS NOT COLLECTED FROM EITHER THE EMPLOYEE OR AGENCY, BUT INSTEAD COMES FROM THE RETIREMENT FUND.

UNDER THE SUBCOMMITTEE PROPOSAL, MORE COMPLEX ACTIONS ARE REQUIRED. IN ESSENCE, OPM WOULD BE OBLIGATED TO DETERMINE AGENCY CULPABILITY, AND ASSIGN PAYMENT OBLIGATIONS IN EACH CASE TO ONE OR MORE AGENCIES BASED UPON ITS FINDINGS. IN MANY CASES, THERE WOULD STILL BE OBLIGATIONS REMAINING WHICH WOULD HAVE TO BE COMPUTED ON A YEAR-BY-YEAR BASIS. THE OBLIGATION MIGHT EXIST REGARDLESS OF THE COVERAGE ELECTION EXERCISED, AND WOULD HAVE TO BE PAID. FOR EXAMPLE, BECAUSE CSRS DEDUCTIONS APPLY ONLY TO AN EMPLOYEE'S BASIC PAY, UNDER THE SUBCOMMITTEE'S PROPOSAL, IN UNUSUAL CASES SOME INDIVIDUALS COULD OWE SUBSTANTIAL SOCIAL SECURITY TAXES, WHETHER CONVERTED TO FERS OR TO CSRS OFFSET.

THE BOTTOM LINE IS THAT UNDER EACH PROPOSAL, THE GOVERNMENT WILL SHOULDER COSTS, COVERING PERIODS SUBSTANTIALLY IN THE PAST UNDER LONG-EXPIRED AND EXPENDED APPROPRIATIONS. BY USING THE CIVIL SERVICE RETIREMENT AND DISABILITY FUND, IN THE ADMINISTRATION'S PROPOSAL, AS THE SOURCE OF CERTAIN SPECIFIED PAYMENTS, WE BELIEVE THAT OUR EFFORTS WOULD BE BETTER DIRECTED AT CORRECTING PROBLEMS RATHER THAN ALLOCATING COST BURDENS.

THE THIRD FUNDAMENTAL DIFFERENCE IS IN FUNDING THE ADMINISTRATIVE COSTS OF CORRECTING ERRORS. THE ADMINISTRATION PROPOSAL PROVIDES FOR COSTS TO BE PAID FROM THE CIVIL SERVICE RETIREMENT FUND. IT ALSO AUTHORIZES OPM TO SPEND MONEY FROM THAT FUND TO ADMINISTER THE ACT. THE SUBCOMMITTEE PROPOSAL INCLUDES A PROVISION WHICH WOULD EXPLICITLY LIST THE COVERAGE CORRECTION PROGRAM AS ONE TOWARD WHICH OPM COULD DIVERT FUNDS FROM OTHER NEEDS UNDER ITS EXISTING APPROPRIATION.

WE DO NOT HAVE SURPLUS FUNDS AVAILABLE WHICH CAN BE DIRECTED TOWARDS THAT END WITHOUT ADVERSELY AFFECTING OUR ABILITY TO PERFORM OTHER ESSENTIAL NEEDS. SIMPLY PUT, ENACTMENT OF THE SUBCOMMITTEE PROPOSAL WILL PUT OPM IN THE UNTENABLE POSITION OF HAVING TO CHOOSE WHAT OTHER OBLIGATIONS IT WILL NOT BE ABLE TO FULFILL. TO FULFILL ALL OF OUR OBLIGATIONS, THERE MUST BE AN APPROPRIATE FUNDING MECHANISM, AS CONTAINED IN THE ADMINISTRATION'S PROPOSAL.

WE WERE CONCERNED WITH, AND DISCUSSED AT THE STAFF LEVEL, A SUBSTANTIAL NUMBER OF TECHNICAL PROVISIONS IN PRIOR VERSIONS

OF THE SUBCOMMITTEE PROPOSAL. SOME OF THESE WERE MINOR AND WOULD HAVE HAD INADVERTENT RESULTS. OTHERS WERE MAJOR, SUCH AS THE FAILURE TO MAKE EXPLICIT PROVISIONS FOR CASES WHERE INDIVIDUALS HAVE RETIRED OR DIED. HOWEVER, SINCE WE HAVE JUST RECEIVED THE FINAL VERSION OF THE BILL, WE HAVE NOT YET HAD AN OPPORTUNITY TO FULLY ANALYZE IT. THUS, I AM NOT IN A POSITION TO DISCUSS ALL DETAILS OF THE FINAL PROPOSAL AT THIS TIME.

IN SUMMARY, THE SUBCOMMITTEE PROPOSAL IS MORE EXPENSIVE THAN THE ADMINISTRATION PROPOSAL. IT IS ADMINISTRATIVELY MORE UNWIELDY. FINALLY, IT ASSUMES MANY DIFFICULT PROBLEMS CAN BE SOLVED ADMINISTRATIVELY, EVEN THOUGH SOME OF THOSE DIFFICULT PROBLEMS CLEARLY INVOLVE STATUTORY CONFLICTS OR REQUIRE LEGISLATIVE ACTION.

WE BELIEVE THE ADMINISTRATION'S PROPOSAL HAS NONE OF THOSE PROBLEMS, AND ADDRESSES ALL OF THE OBJECTIVES FOR CORRECTIVE LEGISLATION. WE WOULD URGE THE SUBCOMMITTEE TO CONSIDER THE ADMINISTRATION'S PROPOSAL AS AN APPROPRIATE VEHICLE TO ADDRESS THESE VERY REAL PROBLEMS.

I HOPE THIS INFORMATION HAS BEEN HELPFUL AND I WILL BE GLAD TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Mr. MICA. Thank you, Mr. Flynn. A couple of quick questions. We don't have an exact scoring of the bill from congressional budget office, but we believe that OPM has estimated the total cost of this to the Federal Government as somewhere around—what $150 million?

Mr. FLYNN. Well, you have, of course, the CBO estimate on the administration's proposal which is about $10 million over 5 years. In an effort to do some ballpark estimating, the other day in discussion, we came to that figure essentially this way. And if I could do this real quickly, Mr. Chairman.

While we don't know how many people are affected, if you assume, for a moment, that 10,000 were——

Mr. MICA. OK.

Mr. FLYNN. And that half of them chose to remain in the Federal Employees Retirement System——

Mr. MICA. That gives us five.

Mr. FLYNN. And that the composite payment to the Thrift Investment Board on behalf of these individuals averaged somewhere in the neighborhood of $20,000 per person—that would come to about $100 million. Now that is a very high level, very gross estimate, Mr. Chairman—but it was an attempt to put some parameters on this issue in terms of the subcommittee's proposal and the amount of payment that would be required.

Mr. MICA. You stated your opposition to the single payment proposal that we made and, in fact, stated that you felt folks would be doubly compensated—can you explain how you feel they'd be doubly compensated under our proposal?

Mr. FLYNN. Let me try and do that, Mr. Chairman. But let me first take the payment and talk about the individual components that it's designed to represent.

If I understand the subcommittee's proposal correctly, the payment consists of four elements. The first element is the contributions that the individual employee would have made had he or she known that they were in the Federal Employees Retirement System. The second component is the government match on those contributions. The third component is the earnings on the employee's contribution and the fourth component is the earnings on the government's match to those contributions.

When we're talking about this payment, the most problematic part of the payment is the payment that represents the expected employee makeup contributions. As I said earlier, existing law already provides a mechanism for the government match to be deposited to the individual's benefit in the Thrift Savings account and lost earnings on that government match. What the difference revolves around is the employee's makeup contribution, and if I might, just for a moment, there are many employees who are given makeup contribution opportunities for reasons other than being placed in the wrong retirement system.

Currently, those individuals are able to do makeup contributions subject to the elective deferral limitation that existed for the year in which those contributions are being allocated. And because that ability exists, and because the subcommittee's proposal would, in effect, counteract that by giving the employee an amount of money that approximated what that would be, you have a situation where

individuals were already paid that money at one point in time or another. And for whatever reason, and for obviously understandable reasons, chose to do something with it that represented a personal decision of theirs. Some may have spent it, some may have saved it, some may have done other things. But to come in on hindsight and make an amount payable to the individual to replicate money that he or she has already made, is in effect double compensation. And this is an issue that was looked at very carefully by the Congress in 1990 when it set up its current error correction procedures and decided that making a payment to an individual didn't seem to be appropriate as a matter of equity for the government.

Mr. MICA. Well, you estimated the cost of your proposal to be about $10 million, and the cost of ours to be about $100 million. So, somehow I guess the employee is picking up 90 percent of the cost, or there is not any payment from the government to the employee to makeup for 90 percent of the difference—or am I missing something here?

Mr. FLYNN. Well, Mr. Chairman, I think that first you have to look at the options that an employee gets.

Mr. MICA. You want them to pay it or us to pay it? Or just don't pay it.

Mr. FLYNN. Well, there are two issues, Mr. Chairman.

Mr. MICA. OK.

Mr. FLYNN. First, I think that the administration believes that it is appropriate for makeup contributions to be made by the employee under the provisions of existing law. The second component of that issue has to do with the lost earnings that would be associated with those makeup contributions by the employee. The administration's proposal does not contain a mechanism to deal with that issue and in that respect, Mr. Chairman, the subcommittee's proposal does. I would say, however, that to the degree that is regarded, that there is a consensus on that as an issue that needs to be addressed, there are, I believe, other more effective, clearer ways to deal with that in the context of the administration's proposal.

Mr. MICA. How?

Mr. FLYNN. Well, for example, Mr. Chairman, assuming that employees were continued to be expected to make a decision about makeup contributions one could—using mechanisms that are already in place for calculating lost earnings on the government's match—calculate lost earnings on those employee makeup contributions, as well.

Mr. MICA. Isn't there some cost involved in that, too?

Mr. FLYNN. Pardon me, sir.

Mr. MICA. Isn't there some cost involved in that approach?

Mr. FLYNN. Yes, sir, there is.

Mr. MICA. How much? So they're supposed to just get this, I mean, this isn't part of the proposal. This is goodwill and, hopefully, we can help you sometime in the future?

Mr. FLYNN. No, sir, Mr. Chairman, as I said——

Mr. MICA. It's not in your proposal.

Mr. FLYNN. It's not in our proposal. But it is something as I've indicated all along to the degree that there are aspects of the ad-

ministration's proposal that need clarity, that need further discussion and resolution—those are certainly areas that we want to continue to work with members of the subcommittee and others on.

Mr. MICA. Well, you know, we're trying to make these folks whole as best we can in the most conscientious fashion. We've tried to model what the private sector would do in an instance like this. Then assign the responsibility and have the agencies absorb the cost—which we think is a reasonable approach. Now let's see, my next question would deal with absorbing the cost and you don't like our proposal that has the agency pick that up? Right? That was No. 3—allocation of payment?

Mr. FLYNN. Yes, sir, that's correct.

Mr. MICA. Elaborate.

Mr. FLYNN. Well——

Mr. MICA. Who should pay it?

Mr. FLYNN. Well, Mr. Chairman——

Mr. MICA. My colleague, I think, is going to introduce an amendment that we take it out of the Retirement Disability Trust Fund.

Mr. FLYNN. The administration's proposal, as you know, Mr. Chairman, assumed that any additional cost associated with correction of these errors would come from the Retirement and Disability Fund. To the degree that the administration's proposal changes or is changed, we want to make sure that we understood the implications from a financing standpoint. But we don't think that allocating these costs among agencies necessarily advances the solution for individual employees.

Mr. MICA. So we take it out of the Retirement Disability Trust Fund, which we've already taken $380 billion and we have a $540 billion unfunded liability. So what we do is just shift it into that—I guess $10 million doesn't mean much or $100 million if we just plunk it in there—right? Just continue our shell game of accounting and bookkeeping—it's just a little error or two, I guess. What do you think, Ed?

Mr. FLYNN. Mr. Chairman, I think that it is important that we continue to accurately disclose the financial results of the Retirement and Disability Fund. That's been the subject of hearings before this subcommittee in the past.

Mr. MICA. I have your report which gave me those figures——

Mr. FLYNN. Exactly.

Mr. MICA [continuing]. Unless there's something new——

Mr. FLYNN. As you know, Mr. Chairman, the unfunded liability of the Retirement and Disability Fund in 1 year alone reflecting new economic assumptions adopted by the Board of Actuaries of the Retirement and Disability Fund, saw the unfunded liability decrease in the last year by over $20 billion. So these are all important issues, Mr. Chairman, but in the context of the Retirement and Disability Fund—in the context of its outlays over a 75- or 80-year period, while they remain important issues to consider, they're not significant issues from the standpoint of the system's financing.

Mr. MICA. OK. Thank you. I'm just trying to find a solution. I'll go along with the will of 34 others and 100 in the Senate and the administration. I yield to the ranking member.

Mr. CUMMINGS. Let me make sure I understand something here. One of you, I take it you were talking about the four parts of the

payment. The first part would be what the employee would have contributed. You have objections to the government paying that—is that right?

Mr. FLYNN. That's correct.

Mr. CUMMINGS. You would prefer to see that the employee make that contribution. Am I right?

Mr. FLYNN. As all employees now do, irrespective of the source of the error. Yes, sir.

Mr. CUMMINGS. OK. Now, you talked about former employees who had similar problems, but not because of this circumstance.

Mr. FLYNN. Right.

Mr. CUMMINGS. Can you give me an idea of maybe what is the most common situation so I can have an understanding of that? I know you're trying to make sure we move more toward equity and parity and I just want to make sure I understand what—you know, those circumstances—kind of circumstances might be.

Mr. FLYNN. Well, the type of circumstances that can occur are—an agency for example, through administrative error fails to notify an employee and in fact takes actions that don't give an employee an opportunity to elect to participate in the Thrift Savings Program, and if he or she is a FERS employee, don't make the agency's requisite contributions on the basis of that decision. Those individuals, notwithstanding the fact that they were correctly placed in the right retirement system have not been given the information they need to make a decision about investing, so they're given a makeup contribution opportunity.

Another type of example, Mr. Cummings, would be where someone perhaps was removed by a government agency, appealed that removal and was subsequently reinstated. The back pay or the period of time during which they were not employed by the Federal Government which is then reversed, gives them an opportunity to do makeup contributions under existing law. Those are the types of things that can occur.

Mr. CUMMINGS. Now I take it that the other three elements of the payment government-matched earnings on the employee contribution, earnings on the government match—do you have a problem with those? That is the government paying those?

Mr. FLYNN. Mr. Cummings, let me just talk about the three individually. Current law would require a government match and lost earnings on the government match based on an employee's decision about doing makeup contributions.

Mr. CUMMINGS. OK and under that circumstance, the employee would be making the contribution?

Mr. FLYNN. Exactly.

Mr. CUMMINGS. OK, go ahead.

Mr. FLYNN. Current law does not provide a mechanism to provide lost earnings on the employee's makeup contributions.

Mr. CUMMINGS. OK.

Mr. FLYNN. And as I've said, that is something that others have asked us about that we've tried to be helpful on in terms of looking at a way in which something like that might be made available on the basis of an employee's choice to do makeup contributions.

Mr. CUMMINGS. OK. But that's one that it seems to me if the government had made a mistake—let's assume that the employee makes the contribution.

Mr. FLYNN. Right.

Mr. CUMMINGS [continuing]. Does the makeup contribution.

Mr. FLYNN. Right.

Mr. CUMMINGS. It seems to me that would one that it is the earnings—lost earnings—on the employee's contribution if the government has made an error. It just seems to me that person should be able to get those funds—that lost earnings.

Mr. FLYNN. Mr. Cummings, I don't fault the logic in your reasoning at all. It is not part of the administration's current proposal, but it is an issue that we have discussed with others who are interested in this.

Mr. CUMMINGS. OK. You know, there's going to be an amendment to allow someone to file a damage claim. You're familiar with that—right?

Mr. FLYNN. Yes sir, I am.

Mr. CUMMINGS. I can almost guess what your answer is going to be based upon what you've already said, but what—how do you feel about that?

Mr. FLYNN. Mr. Cummings, the administration's proposal already includes in it provisions for reimbursing individual employees for out-of-pocket expenses that they've incurred as a result of an error imposed on them by the government. We think that reimbursement for those out-of-pocket expenses and the creation of retirement coverage that guarantees income security in retirement years is appropriate. In terms of assigning fault and liability and providing for pain and suffering and tort payments, my view of that, Mr. Chairman, is that that's not something that we could deal effectively with administratively. And I think what we're trying to do here is to recognize that people have been harmed. And none of us anywhere wanted to create that harm, but to provide a series of payments to individuals in recognition of that strikes me as certainly different than how we have ever approached similar issues in the past and raises all kinds of questions of equity and how you calculate the amount and things of that nature. I find it very problematic, sir.

Mr. CUMMINGS. So if the person comes in and say they've lost their house or—I mean we had some very—you were here for that testimony weren't you?

Mr. FLYNN. Yes, I was, sir. Right.

Mr. CUMMINGS. And they've suffered these losses, had a lot of mental anguish, had to go to the doctor, psychiatrist, psychologist or whatever. And can show that because of the government's error, there is a direct causal relationship because of the government's error, then you would find it—you would have a problem with them getting damages for that?

Mr. FLYNN. Mr. Cummings, one of the things that we do in the retirement and insurance service everyday is make judgments about disability retirements from the Federal Government. And I know looking at those types of cases, the very difficult issues we have to decide there. These are more difficult than that by a factor

of at least 10 and I fail to see how we could deal with this administratively.

Mr. CUMMINGS. Just two more questions. Have we taken steps to try to reduce or eliminate the future retirement errors?

Mr. FLYNN. Yes, we have, Mr. Cummings. Two things that I would mention with respect to that. First of all, the overwhelming majority of these occurred at the instant of the transition from the Civil Service to the Federal Employees Retirement System in 1987. Virtually all of the errors that will occur today will occur following the reappointment of someone who had prior service. So the number of errors today are inconsequential in terms of what actually occurred 10 years ago.

The other thing that I would say, Mr. Chairman, is that both bills, to the degree that they can be made workable, provide a mechanism for dealing with errors as they are discovered prospectively so that you don't get into this long, drawn-out issue of wondering what will happen when an error is discovered. And I think that's a good thing. Ms. Norton talked about the fact that we want to try and find ways in which we can rectify situations that occur in the future and I think both bills attempt to do that though in somewhat different ways.

Mr. CUMMINGS. So you're saying that we now can identify those areas immediately, or before they happen? Is that what you just said?

Mr. FLYNN. I'm sorry. If I left you with that impression, it was a mistaken impression. First, the absolute number of errors is essentially insignificant today, because fewer and fewer people are coming back to the government with prior Civil Service Retirement System service.

Second, even when they do occur, and I think no system is errorless, the bills that we have under consideration provide a mechanism to detect those errors and correct them right away.

Mr. CUMMINGS. Alright, thank you very much.

Mr. MICA. I'd like to yield half of the remaining time to Ms. Norton and then we'll get the other half——

Ms. NORTON. Thank you, Mr. Chairman.

Mr. MICA. I know you have another obligation. We're going to recess at 11 a.m.

Ms. NORTON. Let me just go very quickly. First, Mr. Chairman, if I may, I'd like to acknowledge and welcome youngsters in grades 7–12 from School Without Walls here in the District who are here as a part of a program I have established called D.C. Students in the Capital to make sure that young people from the District get to see how the Congress operates.

Mr. MICA. Welcome.

Ms. NORTON. I just want to make sure I understand. I just have two very essentially short, minor questions. If this money isn't taken from the Civil Service retirement or from some similar source, we will be doing something that is rarely, if ever, done—taking such money from agency budgets. Is that not the case?

Mr. FLYNN. That's my understanding, Ms. Norton, yes.

Ms. NORTON. So if someone files a discrimination complaint, if someone files a Tort Claims Act and is successful—those funds

come out of a more general fund and are not taken from agency budgets?

Mr. FLYNN. I'm not an expert in this area, but that's my understanding, yes ma'am.

Ms. NORTON. Now the reason for that would be to try not to visit these—the prior sins—on nonaffected employees. Is that not correct?

Mr. FLYNN. That's my understanding, yes ma'am.

Ms. NORTON. And we could have unintended and unprepared for consequences such as RIFs or other consequences on agencies for which they had no reason to prepare if these funds had precipitously come out of their own budgets. Is that not true?

Mr. FLYNN. Certainly that's the case, Ms. Norton. This is something that agencies are not planning for in their appropriation.

Ms. NORTON. Thank you. I understand your concern about the make whole payments for employee contributions, as well. Of course, the Thrift Savings Plan assumes small payments in bites that the employee can absorb to be made on a periodic basis. Does it not?

Mr. FLYNN. Yes it does.

Ms. NORTON. Now, you speak about the fact—you speak about the government having made it possible for agencies—for employees to make this up. Does this mean that an employee can make contributions on an arrangement that the employee makes with the system?

Mr. FLYNN. Yes, Ms. Norton. I think the Thrift Investment Board is in the best position to answer that. But very generally arrangements can be made to—and just as a quick example——

Ms. NORTON. In the amount of money for example and the rest——

Mr. CUMMINGS. The amount of money can be less. If an error occurred, for example for 2 years, you have four times that period during which to makeup those contributions.

Ms. NORTON. You mandate the amount of time they have?

Mr. FLYNN. I don't mandate it.

Ms. NORTON. No, you the system, mandates the amount of time or can the employee as with almost any debt including the IRS, if I may say so, make a personal arrangement with respect to how this money will be paid?

Mr. FLYNN. Yes ma'am, they can be subject to the overall time period during which the money can be paid back.

Ms. NORTON. Yes, which brings me to my next question. If somebody is retiring very shortly, then aren't you putting the employee in a financially impossible position?

Mr. FLYNN. Well, Ms. Norton, only if that employee decides that he or she wants to be in the Federal Employees Retirement System——

Ms. NORTON. Of course.

Mr. FLYNN. Both the subcommittee's proposal and the administration's proposal would give that employee the choice of being in the CSRS Offset system which for someone approaching retirement would be their best choice.

Ms. NORTON. How about Thrift Savings?

Mr. FLYNN. Well if you look at the two systems, the Civil Service Retirement System and its hybrid offset compared to the Federal Employees Retirement System and its three components of Social Security, the Defined Benefit and the Thrift Savings—provide benefits that are anticipated to be——

Ms. NORTON. I understand.

Mr. FLYNN [continuing]. Comparable to one another.

Ms. NORTON. All right. Let me finally say, as to the new system, I hear what you're saying and I accept the notion that certainly a mammoth error of this kind would not occur again because we don't expect this kind of wholesale changeover. But I'm going to ask the chairman if we can have a hearing on whatever system they now have in place to assure ourselves that while we might not have large numbers of people like this, that what they do have in place would, in fact, keep any reoccurrence of anything like this problem from occurring even on the basis of one or two people. Because the anxiety cause is extraordinary. Thank you, Mr. Chairman.

Mr. MICA. Thank you and we will consider that request. I'd like to yield now to Mrs. Morella for any quick questions. I think she's also going to depart.

Mrs. MORELLA. Yes indeed, and thanks Mr. Chairman. I want to thank you for holding this hearing on legislation to remedy retirement and enrollment errors between January 1984 to January 1987. And as you all know, I first heard about this from a constituent of mine, who is here present, Barry Schrum, who's suffered enormously because he was placed in the wrong system. I won't go through other remarks about all of the background which I'd like to have included in the record, but Mr. Chairman, although this legislative hearing should have taken place months ago, I'm glad that we are here today examining the two proposals before us. Again, I want to thank you, Chairman Mica and your staff for your hard work in drafting legislation to remedy this complicated situation and I want to thank OPM for their work, as well.

You know as we look at the two plans before us, we must look at several components first. How does a plan treat individuals who have already been affected. In other words, those who have discovered the error, such as Barry Schrum. What relief beyond simply a retirement fix is available? Several of the employees who've endured such anguish deserve compensation for their pain and suffering, as well, and I intend to offer an amendment that will insure that individuals have the right to pursue any individual damage claims they may have.

Second, how does a plan treat Federal employees who have not yet discovered the error. Third, how does the plan affect the agencies involved? And fourth, how does it treat annuitants and survivors? So I think today's discussion may help to move that forward and have the markup of this important legislation. I know you've covered a number of these ideas already, but I do remain concerned about OPM's make whole provisions. So my question to you, Mr. Flynn, is can you explain why a remedy for retirees and survivors needs to be legislated? Why can't we get regulations that work?

Mr. FLYNN. Mrs. Morella, I know that we had provided the subcommittee with our views as to why that was required and I won't

go into that in detail. The point that I would make is that particularly with retirees and survivors, we're dealing with individuals who are now getting a stream of payments—in some cases from three different agencies. And in order to provide them with the choices that the administration's bill proposed, or the choices that are contained in the subcommittee's bill and for them to elect a choice, will require some legislative action among the paying agencies to insure that we don't get into a situation where an overpayment is created by one agency or an underpayment by another. The point that I would want to make here is that these are matters that are directed by law for the Social Security system, the Office of Personnel Management in its administration of the Civil Service Retirement and Disability Fund, the TSP and others. And because those payment mechanisms are prescribed by law, things that adjust them also need to be prescribed by law. And I don't think that we can move simply administratively in that area. I think that they are doable and workable, but I think that we ought to incorporate them into whatever law moves forward now, as opposed to moving forward on employees in one case and then perhaps waiting until later for legislation to catch up for retirees and survivors.

Mrs. MORELLA. Just makes it more complicated to talk about it being cemented in law when it seems like regulations could move it along much more expeditiously and smoothly, but—I guess——

Mr. FLYNN. Absolutely, Mrs. Morella, if we could—we would. I mean—from OPM's standpoint—there is nothing, once we agree upon a set of procedures to deal with individuals irrespective of their status, that would cause us to object to move forward in a regulatory manner. It's just that our view of this is that law would be required and so we'd like to move out of this as quickly as possible.

Mrs. MORELLA. Right. Thank you, Mr. Flynn. Thank you, Mr. Chairman.

Mr. MICA. Thank you and I excuse you. I guess the other Members are coming back at their set time for 11:40 and we will resume with our second panel at that time and then we'll have a markup right after that. So I'll excuse you.

Mr. Flynn, just in closing, a couple of quick questions. You said the agency budgets don't reflect or have the capacity to budget this cost. I'm wondering if, in fact, out of just sort of normal operational budget and payroll accounts, we couldn't accommodate this. Is there not enough flexibility? What's our total payroll—$80 billion?

Mr. FLYNN. Mr. Chairman, I believe what I said was that agencies don't contemplate these kinds of payments today. Not that they couldn't.

Mr. MICA. And we're talking about maybe a one-time shot to resolve this, so probably we could absorb this in two fiscal years or maybe $50 million a year. We have an $80 billion payroll budget and a $25 billion postal, a total of $105 billion. We have, what, a 5-percent turnover rate per year with our employees?

Mr. FLYNN. If I could make two points on that, Mr. Chairman?

Mr. MICA. Yes.

Mr. FLYNN. The first point would be that I don't consider myself an expert on the administration of agency budgets generally. I do know that some agencies have expressed concern about the possi-

bility of being faced with these payments when they didn't have the opportunity to budget.

Mr. MICA. Have any of them expressed concern in writing?

Mr. FLYNN. Not that I'm aware of at this point, Mr. Chairman.

Mr. MICA. I'd like to get a copy of any expressed concern that they have read of our proposal and can't meet that. I'd like to know what the agencies are. But you're saying you're not knowledgeable enough about their payroll and budgets to assume—or estimate—whether they can absorb this cost over a 1- or 2-year period.

Mr. FLYNN. Those, Mr. Chairman, those——

Mr. MICA. $50 million out of a $100 billion budget.

Mr. FLYNN. Well, as I said, those matters are primarily a discussion that goes on between OMB and——

Mr. MICA. The administration's pretty hard-fixed in that they really don't want a make whole solution. They want to make a 10 percent whole—toward whole—and good intentions for the future approach.

Mr. FLYNN. Mr. Chairman, I think the administration is committed to a make whole proposal and I think the administration's proposal reflects that.

Mr. MICA. Well, if——

Mr. FLYNN. There are, as I've said, some areas where perhaps some additional discussion and resolution is needed, but I think——

Mr. MICA. If we had a secretary who now was earning $30,000 a year. We'll say maybe she set aside 7 percent per year and over a, say, 6-year period, she would have to come up with more than $10,000 to really make her whole if she participated in a thrift savings——

Mr. FLYNN. You know, Mr. Chairman, that's not the end of the story. In order to preserve that benefit and to make it comparable to the benefit that secretary in the example you cite—comparable to the CSRS Offset benefit that is included as a matter of choice in both proposals—not only would you have to makeup that payment but on an ongoing prospective basis would continue to pay 6.2 percent toward her Social Security benefit, eight-tenths of 1 percent toward her Federal Employees Retirement System defined benefit, and probably would require prospectively to contribute somewhere in the neighborhood of 7 to 8 to 9 percent in order to accumulate a TSP benefit that approximates the Offset benefit. So I do think that there are significant elements of make whole in the administration's proposal, and I think it is if you'll look at it, not an unreasonable proposal, but one that can be as I said if there are some areas that people want to deal with where we can work and see if we can't resolve them. But there are some fundamental issues that I think are significant departures between the two bills. And this idea of doubly-compensating an individual is one of them.

Mr. MICA. Again, I still have to differ with your definition of doubly compensating. These folks were placed in error by the agency. Is that their fault?

Mr. FLYNN. No, sir, it's not their fault.

Mr. MICA. We have some other provisions in the bill. For example, giving them 6 months to make a decision.

Mr. FLYNN. Right.

Mr. MICA. Do you think that's adequate?

Mr. FLYNN. I think that's adequate. I think actually it mirrors the provisions in the administration's proposal.

Mr. MICA. Do you have any language that you would propose to deal with the rest of the problem as far as making folks whole? Your proposal really doesn't make folks whole and you said we need to deal with this larger question in some other way. Do you have any language that you can provide us with?

Mr. FLYNN. We have, Mr. Chairman, looked at that issue. I would be more than willing to sit down with the staff and at your request provide some perspective and perhaps even language on this matter that would deal with that issue.

Mr. MICA. Are there any other suggestions for modifications or changes. We're going to do a markup here this afternoon and try to keep this ball rolling. Do you have anything we should incorporate that you've seen after reviewing this that you haven't brought to our attention?

Mr. FLYNN. I think we have covered the entire gamut ranging from the fundamental to the technical. I think that task could be made easier, Mr. Chairman, if we were to use as a foundation for that the administration's proposal because it does cover, for example, retirees, survivors, and former employees now as part of legislative language. I see no reason why we couldn't come to an early conclusion, but I think it would necessitate sort of shifting the foundation in order to do that.

Mr. MICA. And I think you're aware of a couple of the amendments we're going to entertain today. I guess you've already stated your opinion on what Mr. Cummings has proposed and Mrs. Morella has another proposal that allows for some redress. You have no problem with those amendments?

Mr. FLYNN. Beyond what I said——

Mr. MICA. Yes.

Mr. FLYNN [continuing]. In response to the questions.

Mr. MICA. Right. Well, I would like to see in writing your specific language for the rest of this story, as Paul Harvey says, and we are open to working with the administration and certainly to work with the Senate to try to move this forward. I think we're going to be able to do that either with this bill, or tack it on something else and get it done. It has been around and a problem for some number of years now. We started on this—I think it was early last summer—and have tried to bring it to a conclusion.

So we do look forward to working with you. We thank you for your testimony today and your participation. And there being no further questions, you're excused. Thank you.

Mr. FLYNN. Thank you, Mr. Chairman.

Mr. MICA. We will—it's now, what, 10 after? We will recess for 30 minutes—that should give folks a chance to get a cup of coffee. We should reconvene at 11:40. Thank you.

[Recess.]

Mr. MICA. I'm going to call the Subcommittee on Civil Service back to order. We should be joined by our other members shortly. We have permission from the other side to proceed.

We have our second panel today and we have three panelists. Roger Mehle, Executive Director of the Federal Retirement Thrift

Investment Board. We've got Mr. Thomas O'Rourke, partner at Shaw, Bransford and O'Rourke, and Mr. Daniel F. Geisler, president of American Foreign Service Association.

Welcome, gentlemen. I don't think you've testified before. You recall, we do swear our witnesses in. This is an investigation, an Oversight Committee of Congress, and if you would please stand, I'll administer the oath.

[Witnesses sworn.]

Mr. MICA. The other custom that we have here is that we'll be glad to allow you to inject in the record any lengthy statement. We try to get the oral statements and keep them down to 5 minutes, if we can, and we'll put the timer on today. So with that, I'd like to first recognize Roger Mehle with the Federal Retirement Thrift Board. Welcome and you're recognized, sir.

STATEMENT OF ROGER MEHLE, EXECUTIVE DIRECTOR, FEDERAL RETIREMENT THRIFT INVESTMENT BOARD; THOMAS O'ROURKE, PARTNER, SHAW, BRANSFORD & O'ROURKE; AND DANIEL GEISLER, PRESIDENT, AMERICAN FOREIGN SERVICE ASSOCIATION

Mr. MEHLE. Thank you, Mr. Chairman. Good morning. As you said, my name is Roger Mehle, and I'm the Executive Director of the Federal Retirement Thrift Investment Board. As such, I'm the managing fiduciary of the Thrift Savings Plan for Federal employees. I've been invited to present the Board's views on your draft legislation this morning.

The proposed legislation addresses the longstanding problem of retirement system misclassification, of what the Board understands may be thousands of Federal employees. Unfortunately upon discovery of these classification errors, the only legal avenue for agencies is to reclassify the affected individuals into the correct system, often entailing serious financial consequences for those about to separate from Federal service.

The Board first addressed the issue of coverage errors in April 1989 when it proposed legislation to authorize Federal agency payment to employees for earnings lost by agency failure to permit timely TSP employee contributions. At that time, the Board observed that allowing FERS employees misclassified to the CSRS for several years to remain as such might be an equitable and practical solution to their predicament, although beyond the Board's purview to propose.

In that regard, Mr. Chairman, both your proposed legislation and that of the administration wisely provide complete and equitable relief for such errors by allowing the affected employees to elect coverage under a retirement system virtually identical to CSRS—that is, CSRS Offset. Since all such employees had much earlier, by law, already been offered and rejected FERS coverage, practically all should opt for the retirement coverage to which they always thought they were entitled. Both proposals, however, also permit employees misclassified as CSRS to select FERS coverage, thereby triggering makeup contributions and lost earnings procedures.

To implement this otherwise presumably unlikely selection, your proposal would create special new error correction provisions re-

quiring new Board regulations and procedures to implement. So that I may contrast your proposal with it, I should briefly describe existing error correction law and its rationale.

There are two statutory requirements upon which TSP correction procedures, including the calculation of lost earnings, are now based. First, while employee makeup contributions to the TSP are permitted, employing agencies are to make no payment of lost earnings on those contributions. The reasoning is that because the agency failed to deduct TSP contributions from the employee's pay, he or she had the use of the money and the agency therefore should not equitably be required to reimburse the employee for putative opportunity losses.

Second, if an employee had not made a previous investment choice, lost earnings are to be calculated at the G-fund rate. Otherwise, the employee's investment choices of record are to be used to calculate lost earnings. The reasoning is that the G-fund will always provide a positive return. Moreover, permitting an employee to hypothesize choices among the funds with the benefit of hindsight would give an unwarranted benefit relative to other TSP contributors.

Your proposal, Mr. Chairman, would mandate an option radically different from existing law. Most notably, misclassified employees would no longer makeup their own missed contributions. Instead, agencies would be required to pay an amount equal to a kind of proxy for missed employee contributions, as well as missed agency contributions, together with much differently calculated lost earnings on the whole. As a matter of longstanding practice, the Thrift Investment Board takes no position on the appropriateness of benefit levels available under the various Federal retirement programs, including the benefit levels of the TSP. These are matters for the Congress and the administration to debate and conclude.

In my testimony for the record, however, I've pointed out some presumably unintended consequences of your proposal, as well as significant and unsustainable administrative burdens that your proposal would impose on the Board. I will reiterate only one aspect of the former, but all of the latter at this time.

Employing agencies would certainly want the authority the proposal gives them to retrieve excess employer contributions and associated earnings from the TSP. However, the administrative costs borne by all participants would increase by any such amounts that are removed from the TSP. A cogent argument may be made that such amounts are legally vested in the present TSP participants. A purported statutory removal of them, other than prospectively, may well give rise to a challenge of unconstitutional taking.

There are practical limitations on the Board's ability to implement the error correction procedures of your proposal, both within the manner and within the time it apparently contemplates. First, the Board is currently halfway through a complete redesign of its entire computer software system. The existing system is to be replaced by a state-of-the-art design to permit daily valuation of participant accounts, investment in two additional funds and considerably improved service to participants. The resources of the Board and its recordkeeper, the National Finance Center of the U.S. Department of Agriculture, not devoted to the new system design and

to limited maintenance of the current system are committed to the well-known exigency of making it year 2000-compliant. The Board, therefore, would not program or run the calculation of lost earnings called for by your proposal on the mainframe computers at the National Finance Center. To do so would jeopardize both our current system integrity and our timetable for year 2000 compliance and new system rollout.

Instead, the Board would procure contractor support to create a personal computer-based program for agency use, although an interface to the TSP system will also have to be created to recognize a kind of contribution not now known to the Board's system or to those of employing agencies, namely employer contributions for an employee. These efforts will realistically take a year from the date of enactment of the proposal.

The Board, moreover, is not in a position to perform the new lost earnings calculations itself, nor is its recordkeeper. The potentially thousands of payroll and personnel records needed to do so, to say nothing of the myriad individual circumstances of misclassified employees, dictate that such calculations be accomplished by the employing agencies, although with Board-furnished guidance and software.

Mr. Chairman, that concludes my remarks and I'd be happy to answer any questions.

[The prepared statement of Mr. Mehle follows:]

STATEMENT OF THE HONORABLE ROGER W. MEHLE
EXECUTIVE DIRECTOR
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL SERVICE
FEBRUARY 24, 1998

Good morning, Mr. Chairman and members of the Subcommittee.

My name is Roger Mehle, and I am the Executive Director of the Federal Retirement Thrift Investment Board. As such, I am the managing fiduciary of the Thrift Savings Plan (TSP) for Federal employees. I have been invited to present the Board's views on your draft legislation, Mr. Chairman, entitled the "Federal Retirement Coverage Corrections Act"; the Administration has submitted a draft proposal to Congress as well, the "Retirement Coverage Error Correction Act of 1997".

I thank you for this opportunity, and for the tireless commitment you and your staff have made to solving the thorny problem of retirement system misclassification. Although retirement system coverage issues fall within the jurisdiction of the U.S. Office of Personnel Management (OPM), coverage errors and their correction can have significant consequences for individual TSP accounts and for the TSP's administrative efficiency.

Background

The proposed legislation addresses the longstanding problem of retirement system misclassification of what the Board understands may be thousands of Federal employees. Typically, these employees were initially told on hiring by their employing agencies that they were statutorily covered by the Civil Service Retirement System, or CSRS, only to discover -- in the most egregious cases, on the eve of separation years later -- that an error had been made in that determination.

Unfortunately, upon discovery of the error, the only legal avenue for agencies has been to reclassify these hapless individuals into the correct system, usually the Federal Employees' Retirement System, or FERS. The reclassified employees often found themselves having saved little or nothing in the TSP, an essential source of adequate retirement income for most FERS employees, but not for CSRS employees, whose basic annuity entitlement is much higher.

While make-up contributions can be deposited to the TSP by a reclassified employee from his or her future paychecks, both the amount of the employee's remaining active service and his or her financial position may act as limits on the sums that can be accumulated before separation, compared with what the employee might have saved if correctly classified at the beginning of his or her Federal service.

Early Board Action on Retirement System Coverage Errors

The Board first addressed the issue of coverage errors in April 1989, when it proposed legislation to authorize Federal agency payment to employees for earnings lost by agency failure to permit timely TSP employee contributions -- for whatever reason, including misclassification. The need for the legislation had its genesis in a determination by the Comptroller General that there was "no statutory basis for agencies to pay . . . earnings lost due to [an] agency's delay in making contributions to [TSP] accounts." Comp. Gen. Dec., B-231205, Feb. 3, 1989.

In the letter transmitting its 1989 legislative proposal to Congress, the Board pointed out that the proposal would not furnish an administrative remedy for the consequences of a long-standing retirement system coverage error. Francis X. Cavanaugh Letter to the Honorable Jim Wright, Apr. 12, 1989, at 3. However, the Board observed that allowing employees misclassified to the CSRS for several years to remain as such "might be an equitable and practical solution" to their predicament, although beyond the Board's purview to propose. Id.

The Board's legislative draft was introduced on a bipartisan basis, and, as amended, was signed into law by President Bush in July 1990. Since then, the lost earnings provisions have routinely provided administrative relief to thousands of TSP participants for a variety of employing agency contribution errors -- with the notable exception of a lengthy misclassification of those about to leave Federal service.

Present Proposals in General

In that regard, Mr. Chairman, I note that both your proposed legislation and that of the Administration wisely provide complete and equitable relief for such errors -- by allowing the affected employees to elect coverage under a retirement system virtually equivalent to CSRS, CSRS-Offset, rather than unilaterally subjecting them to FERS.

Since all such employees had much earlier, by law, already been offered FERS coverage, practically all should opt for the retirement coverage to which they always thought they were entitled and from which they had declined to switch. (This assumes that their decision not be influenced by any newly legislated inducements to choose FERS coverage.) Affected employees would obtain immediate and complete relief in accordance with their expectations; the enactment of complicated, novel, and time-consuming TSP error correction and lost earnings procedures just for them would be obviated.

Both proposals, however, also permit employees misclassified as CSRS to select FERS coverage, thereby triggering make-up contributions and lost earnings procedures. As I noted, in the absence of some new inducement to do so, few misclassified employees would intuitively be expected to choose FERS over CSRS-Offset. In those cases, however, the Administration's proposal would simply apply existing error correction law and related Board regulations to the employees, while your proposal would create special new error correction provisions for them, requiring new Board regulations and procedures to implement.

At this point, I should briefly describe existing error correction law and its rationale, so that I may contrast your proposal with it.

Existing Error Correction Law and Its Rationale

TSP correction procedures, including the calculation of lost earnings, are now based on two statutory requirements:

- First, while employee make-up contributions to the TSP are permitted, employing agencies make no payment of lost earnings thereon (as distinguished from agency payment of lost earnings on Agency Automatic (1%) and applicable Agency Matching Contributions). 5 U.S.C. § 8432a(a)(2). This was an explicit provision of the 1990 legislation.

  The reasoning is that, because the agency failed to deduct TSP contributions from the employee's pay, albeit erroneously, he or she had the use of the money -- whether for spending or saving -- and the agency therefore should not equitably be required to reimburse the employee for putative "opportunity losses" (if any) on such amounts.

- Second, if an employee had not made a previous investment choice, lost earnings on Agency Automatic (1%) and Agency Matching Contributions are to be calculated at the Government Securities Investment (G) Fund rate. Cf. 5 U.S.C. § 8438(c)(2). Otherwise, the employee's investment choice(s) of record are to be used to calculate lost earnings.

  The reasoning is that (a) unlike the other two TSP funds (the Common Stock Index Investment (C) Fund and the Fixed Income Index Investment (F) Fund), the G Fund will always provide a positive return; and (b) permitting an employee to hypothesize choices among the funds with the benefit of hindsight into their investment performance would give him or her an unwarranted benefit relative to other TSP contributors.

The Board's regulations are consistent with these sensible provisions of law. Agencies must immediately deposit missed Agency Automatic (1%) Contributions for FERS employees, together with the information necessary for the Board to calculate lost earnings attributable to them. 5 C.F.R. § 1606.5(a)(1). FERS (and CSRS) employees are permitted to make up the full amount of any missed employee contributions by deductions from their future pay. Id. § 1605.2(c). For FERS employees who do so, Agency Matching Contributions, with associated lost earnings, are concomitantly deposited to their accounts. Id. § 1605.2(c)(7). Lost earnings on agency contributions are calculated based on the employee's investment elections on file; in cases where an employee has not filed an election, lost earnings are calculated at the G Fund rate. Id. § 1606.11(c).

The Mica Proposal Generally (as it pertains to the TSP)

Your proposal, Mr. Chairman, would mandate an option for FERS employees misclassified to CSRS (for longer than one year) radically different from existing law. Most notably, agencies would be required to pay not only Agency Automatic (1%) Contributions immediately into such employees' TSP accounts, as now required, but also an amount equal to a kind of proxy for missed employee contributions and related Agency Matching Contributions, together with much differently calculated lost earnings on the whole.

Thus, under your bill, misclassified employees would no longer make up their own missed contributions. While shifting the source of such contributions from employee to employer, your proposal would stipulate the amounts that misclassified employees would receive, based on periodic average contribution rates to the TSP of all other participants during the past. Further, the periodic past investment choices (as determined from payroll deduction) of all other participants would dictate the misclassified employees' lost earnings, unless they had previously invested in the TSP.

Limited Board Purview

As a matter of longstanding practice, the Board takes no position on the appropriateness of benefit levels available under the various Federal retirement programs, including the benefit levels of the TSP. These are matters for the Congress and the Administration to debate and conclude; the Board is neither chartered nor staffed to analyze, advocate, or oppose them. Once benefits relating to the TSP are legislated, the Board fiduciaries carry out their statutory responsibility to administer them solely in the interests of the participants and beneficiaries.

Given this narrow focus, the Board cannot weigh the merits of the unique treatment you have proposed for misclassified employees who choose to stay in FERS against the the Administration's view that such persons should be subject to existing law. I would, however, like to point out some presumably unintended consequences if your proposal were enacted, as well as significant and unsustainable administrative burdens your proposal would impose upon the Board.

Presumably Unintended Consequences of the Mica Bill

Employees misclassified to CSRS would no doubt welcome agency-paid "employee" contributions, even though artificially contrived, with generous lost earnings (for those who made no contributions to the TSP); they could obtain sizable TSP account balances having made no out-of-pocket contributions, a profoundly different notion from the original TSP design. However, other FERS employees who were required to make their own contributions over the years to acquire similar balances, and to assume investment risk to do so, will very probably resent this apparent windfall to their colleagues. Even among the misclassified employees, those who chose in the past, say, a modest G Fund contribution, thereby establishing an investment election, may be chagrined to learn that ignoring the TSP altogether would have substantially improved their lost earnings rate of return.

Further, employing agencies, inasmuch as they would have to finance the amounts now required to be paid by employees, together with earnings thereon, would certainly want the authority the Mica proposal gives them to retrieve "excess" employer contributions and associated earnings from the TSP. However, under existing TSP regulations (which have the force of law), "excess" employer contributions over one year old and associated earnings are forfeited to the Plan to defray TSP administrative expenses. Thus, the administrative costs borne by all participants would increase by the amount of any "excess" employer contributions and associated earnings that are removed from the TSP. A cogent argument may be made that such amounts are legally vested in the present TSP participants; a purported statutory removal of such amounts from them (other than prospectively) may well give rise to a challenge of unconstitutional taking.

TSP Administrative Burdens from the Mica Bill

To the extent that Congress and the Administration agree on the form and amount of TSP payments to those who are the subject of retirement coverage errors, the Board can, in principle, accept any funds remitted by employing agencies for the account of particular individuals. There are, however, practical limitations on the Board's ability to implement the error correction procedures of the Mica proposal, both in the manner and within the time it apparently contemplates.

First, the Board is currently halfway through a complete redesign of its entire computer software system. The existing system, created under crushing deadlines in 1986 and 1987, is to be replaced by a state-of-the-art design by American Management Systems, Inc., that will permit daily valuation of participant accounts, investment in two additional funds, and greatly improved service to participants. Not only Board staff, but also personnel of our record keeper, the National Finance Center of the U.S. Department of Agriculture, are deeply involved in the redesign effort, now scheduled for completion in April 2000. The resources of the National Finance Center not devoted to the new system design and to limited maintenance of the current system are committed to the exigency of making our current system year-2000 compliant.

The Board therefore would not program or run the calculation of lost earnings called for by your proposal, which is completely different from the calculations that implement current law, on the mainframe computers at the National Finance Center. To do so would jeopardize both our current system integrity and our timetable for year-2000 compliance and new system roll-out.

Instead, the Board would procure contractor support to create a personal computer-based program for agency use. The creation of such a program is certainly feasible, but it will take months for the Board and the contractor to analyze the requirements, design, write, and test the program, distribute it to the hundreds of Federal agencies, and train them in its use. An interface to the TSP system will also have to be created, since the system does not now recognize the novel concept of "employee" make-up contributions and earnings paid by the employer, nor are employee statements designed to reflect such a concept. This effort will realistically take a year from the date of enactment of the Mica proposal, not the six months the proposal apparently contemplates (in paragraph 205(e)).

The Board, moreover, is not in a position, as apparently contemplated by the Mica bill (in paragraphs 102(c)(3) and (4)), to perform the new lost earnings calculations itself, nor is its record keeper. The potentially thousands of payroll and personnel records needed to do so, to say nothing of the myriad individual circumstances of misclassified employees, dictate that such calculations be accomplished by the employing agencies, although with Board-furnished guidance and software. This accords with current agency statutory responsibility for the calculation and correctness of amounts submitted for their employees to the TSP. (As noted, the current TSP lost earnings software, which was developed, revised, and debugged over a period of years, employs a completely different calculation basis and methodology from that of the Mica proposal, to which it cannot be adapted.)

Other Technical Issues

My staff has discussed certain technical issues with Subcommittee staff, particularly related to limits on the availability of historical data on TSP contributions and investments. We appreciate the flexibility demonstrated by the staff and their willingness to make reasonable adjustments concerning these matters. We look forward to working with them as this legislation progresses.

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Thank you, Mr. Chairman, that concludes my remarks. I would be pleased to answer any questions you or the members of your Subcommittee may have.

Mr. MICA. Thank you, and we will withhold questions until all the withnesses have testified on this.

Next, I recognize Mr. Thomas O'Rourke, Partner at Shaw, Bransford & O'Rourke. You're recognized, sir. Welcome.

Mr. O'ROURKE. Thank you very much, Mr. Chairman, and thank you members of the subcommittee for inviting me here today.

Mr. Chairman, I've submitted a detailed statement which I had intended to read.

Mr. MICA. Without objection. That will be made part of the record.

Mr. O'ROURKE. I do not wish to repeat what is already in the record, but what I would like to do is address some comments that Mr. Flynn made in his testimony. Two matters in particular.

The first is there's a statement to the effect, I believe, Mr. Flynn stated that individuals will be doubly compensated if they are entitled to certain types of relief. As I understand the argument, the employees had the use of the money and they chose not to put it in the TSP or couldn't put it in the TSP. I respectfully disagree with that analysis. It's my understanding that all of the members of the panel have been given a copy of a one-page document with page 16 at the bottom. This is a document—this is an excerpt from a handout that I routinely give the Federal employees when I'm talking to them about the tax aspects of investing in the Thrift Savings Plan.

I've taken a very simple example. I've assumed we have an individual who decides they're going to invest $2,500 a year and that they are going to earn 10 percent per year. And they have a choice—they can either invest it in a taxable account or they can invest it in the Thrift Savings Plan. The tax difference is just phenomenal. If you take a look at year 10, after 10 years, the individual would have contributed a total of $25,000. If that amount had been invested in a taxable account, he or she would have $27,654 in the account. Now that taxable account assumes that when they earn the $2,500, they've got to pay tax on it.

Second, when they earn that 10 percent annual return, they've got to pay tax on that. So one-third of what they earn is never being invested because it goes to pay taxes. If the individual had participated in TSP and had gotten matching contributions, at the end of 10 years they would have had almost $107,000. They would have four times what they have. So to say that they have been doubly compensated is simply wrong.

Now in Mr. Flynn's remarks, he addressed the various factors that are taken into account. One of the things that was totally ignored were the tax consequences. These people have to pay taxes on these dollars. They don't have them available simply to put in the Thrift Savings Plan. They are not being doubly compensated.

The other issue I would like to address is the issue of damage claims. In the last year and a half, I've talked to more than 50 Federal employees. The conversation many times starts with an individual who's crying. I've had people relate to me situations where they've had heart attacks. I've had one individual who had a nervous breakdown and the Department of Labor determined that the nervous breakdown was caused by the stress resulting from the erroneous retirement classification. I've had people relate to me prob-

lems in their marriages. They've suffered real pain. The committee heard firsthand what that pain was last year in July.

I submit that the Federal Government has always recognized that if it harms an innocent individual, it will compensate that individual. It will compensate them through the Federal Tort Claims Act. That imposes no burden on OPM. The Federal Tort Claims Act has been in existence for many, many years. An individual files a claim with the agency if it has merit, the claim is approved. If it doesn't have merit and there's a disagreement, the individual has a right to go into court. OPM doesn't need to be involved in that. An independent third-party is judging the validity of these claims. People just can't say—I'm hurt, therefore open the Federal Treasury and compensate me. They have to prove their claim. The committee bill provides a mechanism from preventing unjust compensation. They have to give back any compensation that would otherwise be provided under this bill.

One thing I would like to mention is that if the OPM proposal is adopted, or if some feature of it is adopted, I would request that any individuals who opt to go back into CSRS Offset be permitted to leave their funds in the Thrift Savings Plan and take advantage of any earnings they gave. Certainly they've got to give back the agency contributions, but at least allow them some minimal mitigation of their damages.

Finally, I would like to—there's been some discussion about the cost of who should bear the burden of this. I'm not at all knowledgeable in that. The only point that I would like to make is that the innocent individual—the person who's been the victim of the harm—should not be the one that bears the cost. I thank you very much for giving me this opportunity to appear and I'll be happy to answer any questions that the committee may have.

[The prepared statement of Mr. O'Rourke follows:]

STATEMENT OF THOMAS J. O'ROURKE
SHAW, BRANSFORD, & O'ROURKE
WASHINGTON, D.C.

at a hearing of the

CIVIL SERVICE SUBCOMMITTEE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES

ON

LEGISLATION TO CORRECT ERRONEOUS ENROLLMENTS IN FEDERAL RETIREMENT SYSTEMS

February 24, 1997

Mr. Chairman and members of the subcommittee:

Thank you for the opportunity to appear today to present my views on various proposals to correct erroneous enrollments in the Federal Retirement Systems.

I am an attorney affiliated with the Washington, D.C. law firm of Shaw, Bransford, & O'Rourke. In my law practice, I regularly represent both private sector businesses and individuals and employees of the federal government in tax, pension, and estate issues. I am currently representing a number of federal employees who were improperly placed in the Civil Service Retirement System ("CSRS") and later involuntarily transferred to the Federal Employees Retirement

System ("FERS").

I first learned of this problem in the late summer or early autumn of 1996 when I was contacted by Mr. Alan White and Mr.Barry Schrum, two gentlemen who testified before this Subcommittee in July, 1997. Since that time I have been contacted by approximately 50 federal employees who have told me that they were erroneously placed in the wrong federal retirement system. All of the persons who have contacted me were incorrectly placed in the CSRS and have subsequently been transferred into the FERS.

The losses described to me relate to the fact that a FERS participant will receive a significantly smaller annuity than a person who participates in CSRS. Thus, it is more important for a FERS participant to contribute to the Thrift Savings Plan ("TSP") to assure an adequate retirement income. Employees who have been placed in the wrong retirement system have been deprived of the opportunity to intelligently plan for retirement.

I have had extensive discussions with the federal employees who have contacted me and with officials in a number of federal agencies. The affected employees describe a feeling of anguish and frustration. They want to fix the problem created by the erroneous classification, but they can't seem to find anybody who knows how to help them. The emotional toll on them has been significant.

Two clients have suffered heart attacks, one has had a nervous breakdown and which was determined to be caused by the stress induced by this problem by the Department of Labor, and several have described problems in their marriages

Agency personnel have for the most part been sympathetic, but they also have expressed frustration. They have studied the problem, but have come to the conclusion that existing laws do not permit them to grant a true, make whole remedy.

The only way to effectively resolve the problems created by an erroneous retirement classification is through legislation that clearly specifies what actions agencies may or must take to compensate employees who have suffered harm through no fault of their own. Any remedy that is enacted should also refrain from causing further harm.

I have been given the opportunity to review two separate draft legislative proposals, one prepared by the Office of Personnel Management ("OPM") in the autumn of 1997 and a draft bill prepared by the staff of this subcommittee. Both proposals take positive steps to address the problems caused by an erroneous retirement classification. In my view, the draft prepared by the staff of the Subcommittee is preferable to the OPM proposal.

A common feature of both proposals is to allow affected individuals to elect

coverage under the CSRS Offset program. I believe this feature should be included in any legislation that is ultimately enacted. It allows individuals who were erroneously placed in the CSRS (the situation with all of the individuals who have contacted me) to select retirement coverage that provides essentially the same retirement benefits they thought they would earn before they learned of the classification error.

THE OPM PROPOSAL

The OPM proposal is a commendable effort and will resolve many problems. If an employee has been improperly placed in the CSRS and has not been notified of the error, the OPM proposal allows the individual to remain in essentially the same system as the employee had chosen.

The OPM proposal is not fair to an individual who has been notified of the retirement classification error, removed from CSRS, and taken steps to mitigate the loss caused by the erroneous retirement classification. This proposal does not make such an employee whole, and it creates the possibility that the individual will be punished further.

When an individual received notice that he or she was improperly placed in the CSRS and was to be transferred to FERS, it would have been prudent for the employee to make the maximum possible contributions to the TSP. Most of the

individuals I represent have made make up contributions to the extent their individual financial circumstances and the applicable statutory limits permit. The OPM proposal will punish these individuals who acted in good faith to minimize the loss resulting from their agency's error.

Under OPM's proposal, an employee who has been improperly placed in the CSRS will be given the option of switching into the CSRS Offset or remaining in FERS. Regardless of which option the employee elects, he/she will suffer significant financial harm.

An employee who elects to remain in FERS, will forever lose the earnings on contributions that could have been made during the period of improper classification. If the employee elects to be covered by CSRS Offset, he or she must withdraw any contributions made to the TSP in excess of 5% per year and must also return any agency matching contributions. When the employee withdraws these excess contributions from the TSP, he or she will incur liability for income tax and penalties. Thus, under the OPM proposal, no matter which option the individual elects, he or she will be penalized and will incur an additional financial loss.

I have prepared a letter commenting on the OPM proposal that illustrates in greater detail how an affected individual may be adversely affected by the OPM proposal. A copy of this letter has been sent to OPM and has also been provided to

the Subcommittee's staff.

THE SUBCOMMITTEE'S PROPOSAL

The Subcommittee's proposed legislation also offers affected individuals the opportunity to elect to be covered by CSRS Offset or to switch to FERS. As stated earlier, the option to elect CSRS Offset coverage is a desirable option because it allows an affected individual to receive benefits substantially equivalent to the benefits they thought they earned prior to being notified of the classification error.

Unlike the OPM proposal, the Subcommittee's proposal attempts to make an affected individual whole and does not impose any additional financial burden. If an individual did make make up contributions to the TSP after being notified of the classification error, he or she may simply leave these contributions (and all accrued earnings) in his or her TSP account. While the individual will forfeit any agency contributions, these contributions will be returned directly to the agency. No taxable distribution will be made to the individual and no tax or penalty will be payable.

This provision represents a reasonable compromise. It does not allow a person who elects to be covered by CSRS Offset to retain the benefit of agency contributions. It also does not expose them to a tax penalty by forcing them to withdraw contributions they made to the TSP when they were notified that they had

been placed in the wrong retirement system.

The Subcommittee's proposal also includes a reasonable and objective mechanism to make an affected employee whole for any contributions that could have been made to the TSP during the period of improper classification. The make whole mechanism in section 102(c) of the draft bill prevents an affected individual from using hindsight to make TSP investment decisions. It also removes the financial burden of paying for the costs of correcting the classification error from the innocent employee to the agency that created the problem.

I do, however, disagree with the provision in the Subcommittee's proposal that requires an employee to make any contributions to the OASDI portion of the Social Security Trust Fund. The Tax Code clearly specifies that an employer who fails to withhold and pay taxes into the Social Security Trust Fund bears the burden of correcting this error. The federal government should bear the same burden that it imposes on any other employer.

Neither the OPM proposal nor the Subcommittee's draft bill includes provisions designed to compensate affected employees for all of the harm they have sustained as a result of an erroneous classification. Such losses include not only emotional stress, but economic losses sustained by employees who followed their agency's advice in trying to correct the classification problem (e.g., the cost

incurred in selling a home in an effort to raise funds to make up contributions to the TSP).

I recognize that the present proposals can not practically resolve every problem caused by retirement classification errors. The proposed bill should, however, clearly specify that affected individuals do have the right to pursue any individual damage claims they may have under such existing procedures as the Federal Tort Claims Act or the Back Pay Act. If they are successful in proving a claim, they should be allowed to recover all costs of pursuing the claim, including attorneys' fees, court and other costs, and expert witness fees in accordance with existing standards. Procedures for resolving such claims have been in existence for many years. These statutes include administrative claims procedures, and judicial precedent is available to guide agencies in resolving any claim that may be made. If an affected individual does successfully pursue a claim, the Subcommittee's proposal properly includes a mechanism for preventing an employee from being unjustly enriched.

This Subcommittee has heard or will hear testimony about the cost of correcting the erroneous retirement classification problem. While the cost of any legislation is a significant consideration, any cost incurred in correcting the problem should not be borne by the innocent employee who is the victim of the mistake.

Thank you for permitting me to address the Subcommittee on this matter of great importance to many federal employees. I will be pleased to answer any questions that the Subcommittee may have.

Mr. MICA. Thank you, and we will defer questions.

Mr. Dan Geisler with the American Foreign Service Association. Welcome, and you're recognized, sir.

Mr. GEISLER. Thank you, Mr. Chairman and members of the subcommittee. As the chairman said, my name is Dan Geisler and I'm the president of the American Foreign Service Association, known as AFSA. We're a professional organization representing 23,000 active duty and retired Foreign Service officers and specialists; and we're the bargaining agent for Foreign Service personnel in 5 U.S. Government agencies.

My reason for being here is very straightforward. I am here to express my appreciation to the chairman and members of the subcommittee for inclusion of the Foreign Service, in its draft bill. The Civil Service personnel are not alone in being mistakenly placed in the wrong retirement system, the Foreign Service is affected also. In fact, Mr. Chairman, I personally experienced this sort of mistake. I joined the Government in 1984 as a young engineer in the Civil Service. And 3 years later, after joining the Foreign Service, when I was abroad, I was told that I was to be placed in the new Foreign Service pension system.

In November 1987, I got my first Thrift Savings Plan statement and saw that I received no Government matching contribution. I went to the Embassy administrative people and they told me that I had been misclassified. In my case, the error was rectified and I suffered no further loss. But that is not the case with all of our people. The way this mistake is made is easy to understand if you consider the nature of the Foreign Service.

Our retirement issues are handled out of the division here in Washington by professionals who work these issues everyday. We don't have that level of expertise out in the field, in embassies and consulates, where over half of our members are serving. When the big change took place in 1987, we didn't have fax machines, e-mails, communications facilities to get information on specific cases quickly from Washington. Today, it's a bit easier to get information that we need to rectify errors, but just reclassifying people doesn't repair the damage that's been done.

For instance, last August—August 1987—we heard of one Foreign Service officer whose agency put him in the Foreign Service pension system—the new Foreign Service system—after 10 years of misclassification. So this person is now asked to make up 10 years' worth of employee contributions. Not all of our employees have enough discretionary income to enable them to make up the difference before they reach retirement age. Moreover, these employees never recover the lost earnings on their contribution. Mr. Chairman, there are several elements of the proposed legislation that AFSA believes are important.

First, we think that employees who are victims of administrative error should have real options. Clearly, retiring under the new Foreign Service pension system without a healthy Thrift Savings Plan balance is not a real option. Individuals should not be forced to remain in the old Foreign Service system with offset just because they can't afford the TSP makeup contributions in a short period of time. We believe that employees who wish to transfer should

have an equitable opportunity to catch up on the Thrift Savings Plan before they reach retirement age.

Second, Mr. Chairman, as a technical point, we believe that it's important that employees have grievance procedures in this legislation as stated in section 202—Individual Appeal Rights. May we request that the language be corrected so that in the case of the Foreign Service, the use of the Foreign Service Grievance Board will be the prescribed route.

Third, while we applaud the effort to correct inequities, we are concerned that overall costs do not have a negative impact on operations. We frankly don't know how many Foreign Service employees would be affected by this legislation. We have gone out to the field several times in the past few weeks asking people to tell us if they believe they have been misclassified. As a result of those inquiries, we have uncovered, so far, five cases where people think that they have been potentially misclassified.

Given that, and given the experience when we've canvassed our agency retirement people, we do not think that this damage will be very costly to repair. If it is projected, that there will be serious cutting into the operating accounts of the foreign affairs agencies, then we would urge that section 302, the rules of construction regarding new funding, be reconsidered.

Mr. Chairman, we think that a responsible government meets its obligations to its employees as they approach retirement age and we think that a responsible government corrects its mistakes. AFSA appreciates the efforts of the subcommittee to correct those mistakes, and we request that the Foreign Service receive the same treatment as the Civil Service in any legislation.

Thank you, Mr. Chairman for the opportunity to testify before the subcommittee.

[The prepared statement of Mr. Geisler follows:]

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Statement of Mr. Daniel F. Geisler, President
The American Foreign Service Association
Before the House Subcommittee on Civil Service

February 24, 1998

Mr. Chairman and Members of the Subcommittee:

My name is Dan Geisler, and I am the President of the American Foreign Service Association (AFSA). AFSA is the professional organization representing 23,000 active duty and retired foreign service officers and specialists. We also serve a labor function. AFSA is the recognized bargaining agent for active duty foreign service personnel in five government agencies: the State Department, the Agency for International Development, the US Information Service, the Foreign Commercial Service of the Commerce Department, and the USDA's Foreign Agricultural Service.

On behalf of AFSA and its active members, I wish to express my appreciation to the Chairman and the Members of the Committee for inclusion of the Foreign Service in the draft bill.

At an earlier hearing, the Subcommittee had the opportunity to hear the human consequences of being placed in the wrong retirement system, and then being shifted late in a person's career to what was the correct system. My testimony will not be a continuation of that litany. Your work on this bill demonstrates your understanding of

the need to correct this matter. I would just add that those in the Civil Service are not alone in this situation. It affects the Foreign Service, too.

I personally experienced just the sort of mistake this bill is designed to correct. I began my government career in 1984 as a young engineer in the Civil Service. I was 29 years old, and for me retirement was infinitely far off. I was told that the federal retirement system was undergoing change, and that I was being placed in an interim program. Three years later I was a Foreign Service Officer serving abroad. We were sent information about the new retirement program, the Foreign Service Pension System (FSPS), and I was told that I would automatically be transferred into it.

In November of 1987 I received my first bi-annual statement from the Thrift Savings Plan (TSP), and saw that I hadn't received any government matching funds. I went to the embassy's administrative office, and was told that I was still under the interim system, the FSRDS Offset plan. Fortunately for me and my family, we were able to correct the mistake before I suffered any further loss. But others have not been so lucky.

The mistake is easy to understand when you consider the nature of the Foreign Service. Retirement issues are handled by a unit in Washington staffed by professionals who deal with the details daily. Embassies abroad usually don't have a similar level of expertise. For those of us in the field, most retirement questions are referred back to Washington for an answer. Getting authoritative information on individual questions is difficult. Back in 1987 when the big changes were taking place, it was even harder -- this was before we had fax machines or email. International

phone calls were extremely expensive, and in many of our posts the connections were erratic.

Today, it may be a bit easier to get information needed to rectify a misclassification. But reclassifying doesn't repair the damage. For example, AFSA recently received communications from a Foreign Service Officer who is currently stationed abroad. In August 1997, his agency put him into the FSPS program after discovering that he had been in the wrong retirement system since January 1, 1987. The Agency will make the necessary contributions to social security and the basic benefit plan. Since TSP is an integral part of FSPS, this person's account is being credited with the 1% agency contribution, and the person will have the opportunity to make retroactive contributions with the appropriate agency match.

But this person, and others in a similar situation, is now asked to make up 10 years worth of contributions, and will lose out on the TSP growth that he would have experienced had his agency got it right the first time. Employees who don't have much discretionary income cannot be expected to immediately contribute years of foregone employee contributions, and are left with inadequate retirement coverage.

Mr. Chairman, there are several elements of the proposed legislation that AFSA believes are important to the type of case I have described.

First, AFSA agrees that employees who are victims of administrative error should have real options. Some will find that their retirement needs cannot be met by the FSPS system, and should be allowed to remain in the FSRDS or FSRDS Offset plan. Others will find their needs better met by FSPS. They should be allowed to

choose which system is best for them.

Secondly, employees who opt for the new system should be made whole. AFSA applauds the efforts made by the Subcommittee to do that. We appreciate how challenging it is to devise a equitable arrangement when we cannot know what individual employees would have done had they been placed in the right system. We recognize that under the averaging methods proposed by the Subcommittee, those on the lower end of income scales might benefit more than those in the upper end. However, the proposal seems fair since it does not allow some to benefit from 20/20 hindsight by making retroactive investment choices without risk, and since it helps those with the greatest need – our lower paid colleagues.

We support an approach which gives employees who have been the victim of administrative error reasonable options for a financially sound retirement. Clearly, retiring under the FSPS without a healthy balance in the TSP is not a reasonable option. The Subcommittee's solution allows an individual to freely choose which retirement system is best suited for them, instead of forcing them to remain in older systems if the find they cannot afford to move because of prohibitively high TSP contributions. AFSA believes that employees must have an equitable opportunity to catch up on the TSP before they reach retirement.

Thirdly, AFSA believes it is important that employees have grievance procedures in this legislation as stated in section 202, "Individual Appeal Rights." We assume that the language will be corrected so that for the Foreign Service, the use of the Foreign Service Grievance Board will be the prescribed route.

We do not know how many from the foreign service community will be affected by this legislation. We have sent messages to our members over the past few weeks asking them to advise us if they believe they are in the wrong system, while alerting them that their agency is obliged to correct any misclassification immediately if the employee points it out. So far, we have only heard of only one case. We have also taken some informal soundings with the retirement experts at the foreign service agencies we represent, and they tell us that they have seen only a few such cases over the past years. Since we do not believe that large numbers Foreign Service personnel having been placed in an incorrect system, we do not think that repairing the damage will be costly. Nonetheless, we are concerned that no adjustments will have to be made out of the appropriated funds, with no additional or supplemental appropriations permitted to implement these provisions. For the past dozen years, the international affairs accounts have had serious cuts to their funding levels. While only in FY 1998 was that trend reversed and there was increased funding, there continues to be serious gaps in the diplomatic readiness of this Nation that resulted from those many years of cuts. I am sure that many other agencies will find themselves in similar situations, and so I urge the Subcommittee to reconsider this portion of the legislation.

Mr. Chairman, we think the Subcommittee's bill is the right thing to do. A responsible government meets its obligations to its employees as they approach retirement, and this bill represents responsible government. AFSA again applauds the Subcommittee for developing this legislation, and appreciates the inclusion of the Foreign Service. Thank you for the opportunity to testify before the Subcommittee.

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Daniel F. Geisler

Dan Geisler, a member of the U.S. Foreign Service since 1985, is President of the American Foreign Service Association (AFSA). He served as AFSA's Vice President for the State Department prior to his election as President. Previously, Dan was Deputy Director of the Office of Economic Policy in the Bureau of East Asian and Pacific Affairs, where he was responsible for developing policy and programs for Asia Pacific Economic Cooperation (APEC). His foreign assignments for the State Department include tours in Malaysia, Jamaica and Zaire.

Domestically he has served in the Bureau of European Affairs as Officer in Charge of Economic Affairs for Germany, Austria and Switzerland, and as staff assistant to the Assistant Secretary for Economic Affairs. Dan was a member of the Core Team of the Department's Strategic Management Initiative, and worked in the office of the U.S. Trade Representative on the North America Free Trade Agreement (NAFTA). He holds Superior and Meritorious Honor Awards from the State Department.

Prior to joining the foreign service, Dan was an engineer at the Environmental Protection Agency, where he was awarded a Group Silver Medal for negotiations with the auto industry, and a Peace Corps volunteer in Togo, West Africa. He holds a Masters Degree in civil engineering from Carnegie Mellon University, a Bachelor of Science in mathematics from St. Vincent College, and has done graduate work in both mathematics and economics.

Dan is married to the former Christiane Doucet of Beaussais, France. They have two sons.

Mr. MICA. Thank you, Mr. Geisler.

Let's see, Mr. Mehle, do you think it would be very difficult for you to calculate some of these lost investment opportunities for your board, is that correct?

Mr. MEHLE. I think doing one is not difficult, but doing thousands is.

Mr. MICA. I thought Mr. Flynn said that they would do the calculations on this.

Mr. MEHLE. Well, I didn't hear that, but the legislation, as I understand it, asks the board to do the calculation. As I said, neither we nor the National Finance Center are equipped, given the records that are required to make these calculations, in fact, to make them. The calculation, as we understand it from your proposal, is not difficult to conceptualize, but to apply it to thousands of people through their payroll and personnel records will require systemization and management in order not to confound the situation we're trying to recover from.

Mr. MICA. So would you prefer that you retain that responsibility or OPM——

Mr. MEHLE. What we are prepared——

Mr. MICA [continuing]. Take that on——

Mr. MEHLE [continuing]. To do, as I've noted in my testimony, is create a computer program that would be based on a personal computer. That computer program would be furnished to agency payroll and personnel offices, so that they might use the records which they have to run past employee records through the program in order to come up with the amount of money that should be deposited under your proposal to the employee's account in respect of lost earnings on employee contributions.

Mr. MICA. Have you taken a position on why you don't feel that the employee should be made whole?

Mr. MEHLE. Have we taken a position on——

Mr. MICA. Yes. Why don't——

Mr. MEHLE. I don't think I'd put it that way. We have taken no position on the merits, the substance of either your proposal or the proposal of the Office of Personnel Management. But we have——

Mr. MICA. You're interested in just the mechanics of getting it done?

Mr. MEHLE. We are vitally interested in the mechanics of administering the Thrift Savings Plan, which is the thrust of my concern and that thrust gets to two particular points.

One is the Thrift Savings Plan's or Thrift Investment Board's apparent charge under your proposal to calculate the lost earnings, and the other is the 6-month timeframe, which has been furnished apparently by the regulatory timetable part of the legislation, which we would be obliged furnished to operate within. As I noted in my prepared remarks and in my oral remarks as well, we are essentially up to our eyeballs, right now, in creating the new system, bringing the new system into a mode that will accomplish all of the new services that we expect for it, maintaining the current system, and making the current system year 2000 compliant.

Mr. MICA. Did you favor extending that time, the 6 months?

Mr. MEHLE. I would.

Mr. MICA. To a year?

Mr. MEHLE. I would.

Mr. MICA. OK.

Mr. O'Rourke, did I hear you say or intimate in some way that employees—who had been misplaced by an agency in the wrong retirement system—were not being doubly compensated?

Mr. O'ROURKE. Yes, sir, you did.

Mr. MICA. That was music to my ears. Thank you. No further questions.

Mr. Geisler, you were concerned that this might take too much money to make these folks whole out of operating accounts. You said you had identified only five folks who maybe fell into the category of eligibility?

Mr. GEISLER. So far, that's correct, Mr. Chairman. Well, potentially.

Mr. MICA. Potentially?

Mr. GEISLER. These are people who have identified themselves to us and say that they think that that might be the case with them.

Mr. MICA. And you don't think that could be absorbed without massive layoffs in your agency?

Mr. GEISLER. No, I agree with you on that, Mr. Chairman. It's difficult for me to imagine that this problem is so massive that it could not be corrected without firing current employees in the United States of America.

Mr. MICA. Thank you.

Mr. Cummings.

Mr. CUMMINGS. Mr. President, does that concern you—what you've just said?

Mr. GEISLER. I'm sorry.

Mr. CUMMINGS. I said does it concern you that you will be foreign service—I mean to remedy this situation you might have to lose some employees?

Mr. GEISLER. That seems to me, Mr. Cummings, a very unlikely outcome if the legislation were such that because of correcting the error in the civil service population, which is much greater, agencies had to invoke a RIF. It seems to me that would occur whether the foreign service were included or not. And so, even in that case, I would want the foreign service to be included in the legislation.

Mr. CUMMINGS. Mr. O'Rourke, I'm just fascinated with this little handout. You know, as I was just thinking it through and listening to what you were saying, I would agree with you. Based upon this, the employees would not be doubly compensated, but, I mean, would you agree that there is some, maybe not double, but there is a substantial gain if the government is paying out all that would have been paid into the system. Do you follow what I'm saying?

Mr. O'ROURKE. Yes, sir, I do.

Mr. CUMMINGS. Along with the other three components, of course, that—you know, the money that would have been earned on the government contribution, money earned on the employee contribution and the other. I mean, I'm just curious.

Mr. O'ROURKE. Yes, sir, it does result in—it really is a very difficult problem to define. And I think the subcommittee's bill does a reasonable effort. It uses an average. It uses average rates of return. It prevents individuals from using the benefit of hindsight at the government's expense.

I think that one thing that everybody does agree on is it's a mess, and we've got to come up with some sort of a solution. And the sooner some solution is enacted, the better.

Mr. CUMMINGS. On the damages question—that's a tough question. It really is. I mean, as a lawyer who's been in practice for 20 years, do you think there should be any kind of limitation on those damages.

Mr. O'ROURKE. I have no problem with that, sir. What I would like to see is some independent third party evaluate this. Proving damages is very difficult——

Mr. CUMMINGS. Right.

Mr. O'ROURKE [continuing]. And there are existing mechanisms to do that. Agencies have been doing it for years. Courts have been doing it for years. And I know, in a great deal of court reform litigation, there had been an upper level limit on damages. I know that in discrimination claims against the government, there's an upper level limit of damages. Certainly, it would not be inappropriate if there were a damage remedy to limit recovery for non-economic damages to an amount that the committee determined, and that the Congress determined was appropriate.

Mr. CUMMINGS. Mr. Geisler said something that's very interesting. He said that he looked at his—I think he looked at your statement. You looked at your statement and discovered that there was an error. That's how you discovered it. Mr. O'Rourke, if you have a situation where maybe somebody discovers an error, but they could have discovered it much earlier and brought it to the appropriate folks' attention. I'm just wondering. I mean, does that—I mean, does that play in regard to damages at all as far as you're concerned?

Mr. O'ROURKE. If I were defending the government, I certainly would make that argument, sir. In each case that I'm familiar with, what has happened is the individual was initially placed in the Civil Service Retirement System. In 1987 or 1988, they were given the option to switch, and their agency said, "you're in CSRS, you have an option to switch." They said no, we don't want to switch. In 1991, all of the agency personnel offices double checked their files and concluded that they were in the proper system.

So I think it's very difficult for an individual, who has no training in the personnel system, to have been on notice to identify those errors when the personnel people, who are charged with that, looked at it three times and couldn't determine that there was a mistake.

Mr. CUMMINGS. Yes. That's major. A major problem. Do you—the people that you represent, I mean, other than the type of circumstances you just stated, I mean, I take it others fall in other categories, too, with regard to these kind of issues?

Mr. O'ROURKE. Every single individual that I represent, sir, is a person who was originally placed in CSRS, was allowed to remain in CSRS for 8 plus years, and when the error was uncovered, they were put into deferrals. Everybody I represent falls into that category.

I did receive a call several days ago from a lady who is retired. She got a letter, I guess from OPM, telling her that her annuity would be reduced because she was put in the wrong system. And

she just described the problem to me and really didn't have any information, so I don't know the specifics.

Mr. CUMMINGS. Help me on this one: the people who come to you, I take it they've come at different points. I mean, they didn't all just come together in a group.

Mr. O'ROURKE. No.

Mr. CUMMINGS. And there's litigation going on?

Mr. O'ROURKE. Yes sir, there is.

Mr. CUMMINGS. All right. Now how would this legislation affect that litigation?

Mr. O'ROURKE. My hope is it would resolve most of the issues in the litigation. Now I was originally contacted by Barry Schrum, who's here today, and by Allen White in late 1986, and I originally agreed to represent five individuals. My name appeared in the Federal Times, and I've got phone calls from many, many people. And they stay in contact with me, but I do not represent them. There is a case that's pending in the U.S. district court here in the District of Columbia. The case is in the very preliminary stages, and no real progress has been made to date in moving that case along.

Mr. CUMMINGS. Now let me make sure I heard you right. So you said you had agreed to represent five people?

Mr. O'ROURKE. I've agreed to represent a total of seven people——

Mr. CUMMINGS. OK.

Mr. O'ROURKE [continuing]. Five of whom we currently have a case in court. The other people I, more or less, maintain a list of names, and what I've been telling all of those people is that this committee, the Congress is considering a way to fix it. If you hang in there, I think there's going to be a solution to your problems, and I do not want to undertake representing you right now.

Mr. CUMMINGS. So in a situation where there is litigation and the actions of the Congress are able to resolve most of the issues—at least one will still be hanging out there. And I guess that would be the issue of damages.

Mr. O'ROURKE. Yes, sir. At the present time, I have discussed this bill with all of my clients. For four of the seven people I represent, they said this bill, the subcommittee's bill, would resolve their concerns, would result in the dismissal of the litigation. Three of the people believe they've suffered very severe damages and they would like to be able to continue to pursue that. We have filed a claim under the Tort Claims Act. The United States has filed a motion to dismiss, and we're waiting for the court to decide, so we really don't know what's going to happen.

Mr. CUMMINGS. Last question: Are there any issues other than damages that—lets's assume that the damage piece is in the legislation and you're able to file for damages and everything. The question becomes, are there any other issues that would be still hanging out there? Do you follow me?

Mr. O'ROURKE. Yes, sir, I do.

Mr. CUMMINGS. OK.

Mr. O'ROURKE. Based on the cases, I've looked at——

Mr. CUMMINGS. Yes, based on yours.

Mr. O'ROURKE [continuing]. This legislation or OPM's legislation, if it's passed, would resolve the issues. I would disagree with OPM's result, but it would still address many of the problems.

Mr. CUMMINGS. Thank you.

Mr. MICA. Mrs. Morella.

Mrs. MORELLA. Thank you.

I guess I understand that Mr. O'Rourke, Mr. Geisler agree with the subcommittee version of the legislation. Mr. Mehle has not decided.

Mr. MEHLE. Mrs. Morella, it's not that I haven't decided. It's that we take no position.

Mrs. MORELLA. You take no position, right.

Mr. MEHLE. The Thrift Investment Board limits itself to administration of the Thrift Savings Plan. It does not speak on the question of benefit levels for Federal employees.

Mrs. MORELLA. OK, I can understand that. Now I want to pick up on some of the earlier questioning and the statement that you had made, Mr. O'Rourke, that I do agree with you that errors have been made, and they've cause suffering well beyond what retirement fix can remedy. And I'm going to be offering an amendment in this markup too, to ensure that individuals will be able to pursue additional compensation for what they have endured.

I really don't have any questions, Mr. Chairman.

Mr. MICA. Thank you. Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman.

Mr. Merly——

Mr. MEHLE. Mehle——

Ms. NORTON. Mr. Mehle, I'm sorry. Is that right, Mehle?

I understand from your testimony that you're so inundated you want the agencies to perform the calculations with a, you know, a program. I've got to ask you about the—about any assurance on the reliability of these calculations, given the testimony we've heard about how mistakes have repeatedly been made. How would you assure that agency calculations were correct and that any miscalculations were caught?

Mr. MEHLE. Well, it remains the agency's responsibility today, and presumably under the proposals of OPM and of Chairman Mica, to ensure that Federal employees' pay amounts are correctly remitted to the Thrift Savings Plan. We, in fact, have never had a role that verifies the correction of the amounts of money that agencies remit.

Ms. NORTON. Well, you indicated that you could not perform the calculations, so I presume the calculations you would otherwise be supposed to perform?

Mr. MEHLE. The calculations that the current system performs are calculations under an entirely different methodology of lost earnings. They are hard-coded into our system. The proposal of the subcommittee, or of Chairman Mica, is an entirely different approach. We cannot tack that approach on or alter our system in the circumstances that we now find ourselves, as I described. What we would do instead is create a software program that the agencies would employ. One would hope that using that software program would be straightforward, that the agencies would draw on their

payroll records, as they do right now, to drop the relevant amounts into various variable positions in the software program.

Ms. NORTON. Now who would check and monitor this process?

Mr. MEHLE. Check and monitor them? The agencies would check and monitor them. They would remit them to us, and they would certify, as they remitted them to us, that they were correct. This is fundamentally an agency payroll and personnel task, one which they have right now.

Ms. NORTON. Mr. Mehle, you have not alleviated my anxiety because we're talking about error correction. I hear what you are saying, but what we have—and what Mr. Geisler has described—are agencies far flung, in his case, in many parts of the world. In the case of the United States in small and large places, with more or less experience. All I want to do, as my prior line of questioning, as Ms. Flynn indicated, is to assure that we do not meet this problem in any form and to any degree ever again. Therefore, when you tell me, "well, you know, it's their responsibility to follow this software program and that's it," you leave me in a state of great anxiety. And I can't imagine that you don't leave the employees in the same state and I'd like to know what you can do to assure them that, in fact, a program, a software program that would be used governmentwide does not continue to make mistakes.

Mr. MEHLE. Well, the software programs have never made mistakes——

Ms. NORTON. Mr. Mehle, Mr. Mehle, I think I made myself clear. Programs don't make mistakes. People do. And that's who made the mistakes we are talking about here, so let's cut to the chase.

Mr. MEHLE. Right.

The software programs have never made mistakes. If we create a software program for use by the agency, it presumably would work as it was intended. And the agency payroll and personnel people would enter into the program, as called for, the agency's payroll records for the employee in question. That's what happens right now. The error that we're talking about is not an error of that kind. In fact——

Ms. NORTON. I realize that.

Mr. MEHLE. In fact, there are very few errors of that kind.

Ms. NORTON. What I'm trying to discern, because I recognize that the kind of errors that we're talking about here should be one-time occurrences.

Mr. MEHLE. One time gross mis——

Ms. NORTON. I'm trying to—I'm trying to get assurances from you, and I think Federal employees deserve the assurance, that using a software program, errors will not in fact take place. I understand they would be different errors. But imagine how somebody would feel if an error took place yet again and all I want to know is since these are going to be done by agencies themselves.

Mr. MEHLE. We can correct any error that arises as a consequence of software use. We get 6 million records a month that we operate on with our computer system. In that, we have a very small error rate, but we have errors and the errors are routinely corrected. The errors of the kind that you're talking about I have no doubt would be routinely corrected if they arose.

Ms. NORTON. Mr. Chairman, I going to ask if the Thrift Savings Plan could, in writing, assure us of how, given the fact that we're talking about a new software program, how they, I don't want to go into great detail about what they do now to correct errors. But I believe that employees would feel more assured if we knew how they would monitor and correct any errors that would arise in this program, perhaps if that could be provided for the record, I could end this concern.

Mr. MICA. We'd be glad to make the request. If you'd like to craft the question, we'll submit it.

Ms. NORTON. I'll submit the question because I'm sure——

Mr. MEHLE. I'm sure I can reach your concern adequately.

Ms. NORTON. Yes, that's all I want to make sure of, because I think you can, too. But you can imagine the nervousness that people——

Mr. MEHLE. I understand what you mean. You may visualize that this is simply going to introduce—would introduce——

Ms. NORTON. Yet another round of errors.

Mr. MEHLE [continuing]. More errors.

Ms. NORTON. Yes.

Mr. MEHLE. I cannot say that an error would never be made. It surely will. But I feel very confident that errors can be corrected and they are not nearly of the kind that we are dealing with in magnitude now.

Ms. NORTON. As long as they were corrected early—Mr. Geisler indicates that he found his own. He's obviously a highly educated man. As long as they were corrected early and the burden did not fall on the employee, I would be perfectly satisfied. I just want to know how that's going to be done.

Mr. O'Rourke, I just want to make sure that your testimony is on the record as definitively refuting the proposition that has been testified to here. Am I to understand, based on your testimony on how I've heard it, that your testimony is that not only is the employee not being doubly compensated, but that the employee is likely being vastly uncompensated and the reason for this is the tax consequences that flow from the government's error? Is that your testimony?

Mr. O'ROURKE. Yes, ma'am, it is. If—any proposal that doesn't take in account tax consequences doesn't adequately compensate the employee. Now one thing I would add that in one case, Mr. Schrum's case, we did have very extensive discussions with the Department of Energy. We determined—we hired a financial planner who determined where he would have been had no error been made, and we looked at where he was, and we made a concerted effort to try to avoid double compensation but simply put him in the position he would have been in had the error not occurred. It's possible to do. The only reason we didn't solve Mr. Schrum's case was officials in the Department of Energy questioned whether they had the authority to do it, and that's why some legislation is needed. But there is a procedure under the Thrift Savings Board regulations for agencies to set up their own appeals system, and they can look at these cases on a cases by case basis to make sure there is no double compensation.

Ms. NORTON. Finally, the court suit you have before the District of Columbia Federal District Court is a tort claims act suit?

Mr. O'ROURKE. Yes, ma'am, we filed the suit under—alleging a number of causes of action, including the Federal Tort Claims Act. And we did that based on provisions of 5 U.S.C. section 8477. I do want to acknowledge that the United States does disagree with our position and alleges the Tort Claims Act does not give the court jurisdiction.

Ms. NORTON. Is yours a class action, Mr. O'Rourke?

Mr. O'ROURKE. No, ma'am, it is not a class action. At the present time, it only includes five people and our preliminary reading was that you probably could not file a class action under the Tort Claims Act because in order for a court to have jurisdiction, an individual must first file an administrative claim. And in other types of cases, the courts have held that if there is a claim requirement, as a condition, precedent to jurisdiction, then the court will not claim the class action. Our lawsuit only affects five people.

Ms. NORTON. Thank you very much, Mr. O'Rourke. And thank you, Mr. Chairman.

Mr. MICA. Thank you. Did any other Members have any additional questions? Mr. Cummings asks unanimous consent that the schedule entitled example two, by Mr. O'Rourke, be made a part of the record. Without objection, so ordered. There being no further questions from this panel we want to thank you for your participation and for your assistance today, and we'll excuse you at this time.

Thank you.

[Whereupon, at 12:32 p.m., the subcommittee adjourned subject to the call of the Chair.]

[Additional information submitted for the hearing record follows:]

Example #2

Jim Rogers is a FERS participant who earns $50,000 per year. His combined federal/state tax rate is 33%. The tax consequences of a 10% contribution to the TSP may be reflected as follows:

Contribution (10% x $50,000)	$5,000
Tax Savings (33% x $5,000)	(1,650)
After Tax Cost Of Contribution	$3,350

Value Of Account

Contribution	$5,000
Matching Contribution	$2,500
Total	$7,500

The rate of return on the investment that cost Jim $3,350 is 124% (i.e., the increase in value of $4,150 from $3,350 to $7,500). In other words, Jim more than doubles his investment in the first year alone. This increase is guaranteed and is not dependent on the investment return of any of the funds Jim chooses to invest in.

D. The Advantages of Tax Deferred Growth.

1. Any earnings on funds invested in the TSP grow tax deferred (i.e. annual earnings on investments are not taxed until they are withdrawn). The following advantage illustrates the advantages of a tax deferred investment.

Example

A federal employee determines that he/she is going to earn and invest $2,500 per year and that this investment will earn 10% per year. The employee's combined federal/state tax rate is 33%.

Year	Total Invested	Taxable Acct.	TSP-CSRS	TSP-FERS
5	$12,500	$11,240	$ 19,289	$ 38,578
10	**$25,000**	**$27,654**	$ 53,458	**$106,916**
15	$37,500	$47,392	$101,357	$202,714
20	$50,000	$74,687	$178,494	$356,996

Chairman Mica, Members of the Subcommittee:

I am Robert M. Tobias, National President of the National Treasury Employees Union (NTEU). On behalf of the more than 150,000 employees represented by NTEU, thank you for holding this hearing today and for inviting us to participate.

It is our hope that this hearing will allow all concerned parties to finally move ahead with a solution to the dilemmas faced by those employees who have been placed in the wrong retirement program. In many cases, more than a decade has expired since the errors occurred. NTEU first brought these errors to Congress' attention, as well as to the Executive Branch's attention in early 1994. For the most part, these errors stem from Congressional passage of legislation that retroactively determined retirement placement for federal employees and left agencies with less than clear guidance on complex issues. While numerous employees represented by this Union have been determined to be in the wrong retirement program, many more have not yet been found. It is our hope that Congress, in consultation with NTEU and the other federal employee unions and organizations, as well as the Office of Personnel Management, can not only determine the appropriate solution, but implement it without further delay.

Mr. John B. Gabrielli, an IRS employee, and member of NTEU Chapter 58 from Buffalo, New York, was placed in the wrong retirement system in September of 1984 when his temporary appointment was converted to a civil service career conditional appointment. Mr. Gabrielli testified before this Subcommittee in July of 1997, asking this body to provide closure to his nightmare. In early 1993, Mr. Gabrielli was first notified by his agency that he had been incorrectly placed in the Civil Service Retirement System (CSRS) and should have been in the Federal Employees Retirement System (FERS) -- after almost ten years had elapsed. Mr. Gabrielli was transferred to the FERS program and in September of 1993, he began making contributions to the Thrift Savings Plan, a key component of the FERS program. To date, Mr. Gabrielli has not been made whole.

As you know, NTEU has been actively seeking relief for Mr. Gabrielli and others in similar situations. NTEU is aware that there are competing proposals for addressing the myriad of retirement system placement problems faced by federal employees. We are anxious to reach a final solution. However, NTEU is not interested in solving one problem while creating another. Proposals that suggest fixing the problems of the few at the expense of the whole are in no one's best interests and do not have NTEU's support.

It is our understanding that the proposal advanced by the Civil Service Subcommittee would require the agency responsible for

making the retirement error to make the affected employee whole. NTEU has a number of serious reservations concerning this approach. First, employees may have worked at several different agencies over the last decade, making it difficult to assign blame. Second, it is our further understanding that the Subcommittee's proposal does not envision additional agency appropriations for this purpose. For many, if not most federal agencies, . discretionary appropriations have already been squeezed to the point where there is no wiggle room. Saddling these agencies with additional costs of this magnitude could force some agencies to conduct reductions in force. As anxious as NTEU is to resolve this matter for our employees, we cannot support proposals that could lead to layoffs for some employees as a result of fixing retirement errors for others. We urge this Subcommittee to determine the funding necessary to make these affected employees whole and insure that it will be available to affected agencies. We look forward to working with you on this matter.

We further understand that the competing retirement error correction proposals would allow employees improperly placed in CSRS to either be placed in the FERS retirement program or in the CSRS Offset program, which for many employees offers the best of both programs. Retirement planning is a very individual choice and no two employees are likely to make the same decisions. We strongly support affected employees being given this choice.

Equally important, we believe that the final retirement error correction package must make employees whole. For those employees who have already been transferred to FERS and for those who choose to transfer to FERS, several important ingredients must be present. Employees should automatically be provided with the flat 1% of salary Thrift Savings Plan (TSP) contribution that all FERS employees receive. Moreover, procedures must be put in place to make up contributions that employees would have made to the TSP had they known they were in FERS and employees should receive agency matching contributions up to the current 5% limit as well. Eearnings and interest they would have received had they been in the correct retirement system all along must also be part of the final package. In addition, those who have already left federal service and those who have a claim for retirement benefits on another's account must be made whole. We look forward to working closely with the Subcommittee on these important matters.

Again, thank you for holding this hearing today. NTEU appreciates your commitment to insuring that all federal employees are not only placed in the correct retirement system, but made whole again in the process.

FMA

Federal Managers Association

February 23, 1998

The Honorable John L. Mica
Chair, Subcommittee on the Civil Service
Committee on Government Reform and Oversight
United States House of Representatives
2157 Rayburn House Office Bldg.
Washington, DC 20515

Dear Chairman Mica:

As your subcommittee prepares to address federal retirement error corrections, I am writing to express our appreciation and support for your outstanding leadership on this issue.

FMA believes that it is important that a fix be enacted before the scheduled "open season" later this year so that federal employees who were harmed in the mix up during the last FERS "open season" will be "made whole." FMA is particularly heartened to have learned that OPM estimates that the total cost for the fix will be only $150 million government-wide. We do not think that it is unreasonable to hold agencies accountable and to require them pay for the costs of this fix. However, we urge you and your committee to work with OPM to ensure that "making whole" harmed employees does not lead to agency RIFs.

FMA appreciates the hard work and leadership that you and your committee have provided in addressing this injustice to federal workers. We look forward to continuing our work with you on this and other matters.

With kindest regards, I am

Sincerely yours,

Michael B. Styles

Michael B. Styles
National President

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