

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR PARTS 831, 839, 841, and 846

RIN 3206-AJ38

### Corrections of Retirement Coverage Errors Under the Federal Erroneous Retirement Coverage Corrections Act

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management is amending its regulations to include new rules for correcting certain retirement coverage errors. We are amending the regulations to implement the provisions of the Federal Erroneous Retirement Coverage Corrections Act (the FERCCA), title II of Public Law 106-265. The regulations will allow agencies and OPM to correct affected retirement coverage errors.

**DATES:** This interim rule is effective March 19, 2001. We must receive your comments by April 18, 2001.

**ADDRESSES:** Send comments on this interim rule to Mary Ellen Wilson, Director, Retirement Policy Center, Office of Personnel Management, Washington, DC 20415-3200. You may also submit comments by sending electronic mail (E-mail) to: [commbox@opm.gov](mailto:commbox@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** Cynthia Reinhold, 202-606-0299.

#### SUPPLEMENTARY INFORMATION:

#### Introduction

The Office of Personnel Management (OPM) is amending parts 831, 841, and 846 of title 5, Code of Federal Regulations, and adding a new part 839, to implement the Federal Erroneous Retirement Coverage Corrections Act (FERCCA), title II of Public Law 106-265, which was enacted on September 19, 2000. The law provides a set of remedies to correct substantive retirement coverage errors. The law requires OPM to issue implementing regulations.

#### Background

Participation in the Civil Service Retirement System (CSRS), the Civil Service Retirement System Offset (CSRS Offset) plan, the Federal Employees' Retirement System (FERS), and the Thrift Savings Plan (TSP) is governed by title 5 of the United States Code. Social Security coverage for benefit purposes is governed by section 210 of the Social Security Act. Sections 3101(a) and 3111(a) of the Internal Revenue Code of

1986 govern the collection and payment of Social Security taxes. Coverage under these Federal retirement plans and Social Security is mandatory for employees who meet the statutory requirements. Prior to passage of this legislation, neither OPM, the Treasury Department, nor the Federal Retirement Thrift Investment Board had the statutory authority to waive the rules for retirement plan or Social Security participation. When errors in retirement coverage occurred, correction was mandatory. The employee was "forced," retroactively, into a different retirement plan. The mandatory retroactive correction of a retirement coverage error can place an employee in a difficult financial situation with regard to retirement planning.

Retirement coverage errors that prevent an employee from saving for retirement are usually the most damaging because it is extremely difficult to make up the lost opportunity to save. These are primarily errors that cause an employee to believe that he or she is covered by CSRS rather than FERS. The FERS basic benefit is a little over half that of the CSRS benefit. To obtain retirement income under FERS that is similar to CSRS, the employee needs to save for retirement in the TSP or elsewhere. Because of the error, the employee may not have contributed to the TSP, believing that CSRS benefits were enough to meet retirement needs. If the error is undiscovered for a long period, the employee is forced to begin saving during the years after the error is corrected. In the absence of the error, the employee could have saved for retirement over his or her entire career.

#### The FERCCA's Provisions

*The retirement coverage error must have lasted for at least 3 years of service after December 1986.* January 1, 1987, is the date that FERS took effect. From 1984 through 1986, there was no TSP. Accordingly, employees did not become disadvantaged with respect to the TSP until FERS began. The 3-year yardstick parallels the TSP's 3-year vesting rule applicable to most FERS participants.

*The FERCCA provides a choice between retirement plans in many situations.* Most individuals with a qualifying retirement coverage error have the opportunity to choose their retirement coverage under the FERCCA. The availability of a choice between retirement plans applies to individuals:

- With newly discovered retirement coverage errors,
- With an error that was discovered and corrected in the past,
- Who have retired from Federal service, or

- Who are survivors of an individual with a retirement coverage error.

For an individual who is erroneously put in CSRS and belonged in FERS, the choice is between CSRS Offset or FERS. CSRS Offset coverage is for an employee mandatorily covered by Social Security and CSRS, and provides, through combined CSRS and Social Security benefits, a benefit that is at least equivalent to, if not more than, CSRS. While working, the individual earns retirement credits under the CSRS formula and also adds to any Social Security benefits already earned, increasing career earnings under Social Security and, as a result, the Social Security benefit. At retirement, OPM computes the CSRS Offset benefit under the same rules that apply to other CSRS retirees. At age 62 (when the individual becomes eligible for Social Security benefits), OPM reduces, or offsets, the CSRS retirement benefit. This reduction is based on the value of the Social Security benefit earned during CSRS Offset service. For a person erroneously put in CSRS, CSRS Offset provides the benefit the person could reasonably have expected to receive without requiring a change in retirement saving behavior.

The FERCCA disqualifies certain separated employees from making a choice between retirement plans. Separated employees whose retirement coverage error was previously discovered and corrected to FERS and later took a refund of FERS deductions or a distribution from the TSP, are not eligible to elect between FERS and CSRS Offset. Their coverage will remain FERS for the period of service affected by the retirement coverage error.

Some individuals do not have a choice about their retirement coverage. If an individual should have had Social Security coverage during Federal employment, then he or she must have Social Security coverage in addition to Federal retirement coverage. In these cases, the FERCCA does not provide a choice about Social Security coverage. If an individual was incorrectly placed in CSRS rather than CSRS Offset, then the retirement coverage must be corrected to CSRS Offset. Likewise, if an individual was incorrectly placed in CSRS Offset instead of CSRS, then the retirement coverage must be corrected to CSRS. Although the individual cannot choose to keep Social Security coverage, the Social Security Administration will allow credit for all but the last 3 years before the retirement coverage was corrected.

In addition, an employee who was erroneously excluded from retirement coverage under CSRS, CSRS Offset, or

FERS does not have an option under the FERCCA to remain excluded from retirement coverage.

*Errors where the employee is erroneously placed in FERS.* In 1993, OPM published interim rules at 5 CFR 846.204(b)(2), for deemed elections of FERS coverage. These rules permit an employee erroneously in FERS during a time when the employee should have had an opportunity to elect FERS, the option of keeping the erroneous FERS coverage. The FERCCA does not affect these regulations. Those who had the opportunity to elect coverage under OPM's existing regulations at § 846.204(b)(2) may not have another election opportunity based on the same retirement coverage error. In addition, OPM's regulation provides a choice between retirement plans regardless of the length of the error. The FERCCA also allows a choice in this situation regardless of the length of the error. However, the new provisions in subparts H and L of the new part 839 apply only if the error lasted for at least 3 years of service after December 31, 1986.

*Lost earnings on employee make-up contributions to the TSP.* The FERCCA provides lost earnings on make-up employee TSP contributions under certain circumstances. Employees who choose to make-up missed contributions to the TSP continue to be entitled to lost earnings on the make-up agency contributions they receive as a result of an agency error.

*Financial relief from costs associated with correcting a retirement coverage error.* Under the FERCCA, individuals newly discovered to be in the wrong retirement plan are not responsible for paying any additional employee retirement deductions needed to correct a retirement coverage error. The FERCCA requires that any amount that should have been withheld as Social Security tax but was erroneously withheld as CSRS deductions must be treated as withheld Social Security tax. All the amounts required as Social Security tax, but wrongly treated as CSRS deductions during the error, are kept by the Government to the credit of Social Security.

The Internal Revenue Code's 3-year statute of limitations on retroactive taxes applies to Social Security tax amounts that were not withheld during the period of the error. This means that, for an employee erroneously in CSRS, any Social Security taxes that should have been withheld from pay that was subject to Social Security taxes but not CSRS deductions (such as overtime or awards), must be collected from the employee, but not for periods beyond

the 3-year statute. However, OPM has the authority under the FERCCA to reimburse an employee for payments of Social Security taxes that were not withheld because of a retirement coverage error.

*Reimbursement for certain expenses related to the error.* The FERCCA allows OPM to reimburse certain expenses related to a retirement coverage error. Claimed losses related to forgone contributions and earnings in the TSP (except for lost earnings on employee make-up contributions to the TSP payable under subpart J of the new part 839) or other investment opportunities are not reimbursable under the FERCCA. The payments, if approved, are made from the Civil Service Retirement and Disability Fund.

In addition, OPM may waive repayment of settlements employees received after suing for damages from a coverage error. If an employee has settled a dispute over having been forced retroactively into FERS, the employee generally should not keep the amount received and regain CSRS Offset benefits under the FERCCA. However, if the employee can show that getting CSRS Offset coverage does not fully compensate him or her, the FERCCA authorizes OPM to allow the CSRS Offset election with partial or no repayment of the settlement.

*Credit for service that was not subject to retirement deductions.* Individuals may have civilian service that was not subject to retirement deductions (nondeduction service), and perhaps military service, performed before the error in retirement coverage. The amount of the deposit for nondeduction and military service depends on the individual's retirement coverage. Under FERS deposit rules, the deposit is 1.3 percent of basic pay for civilian service or 3 percent for military service, plus interest. Under CSRS rules, the deposit for both civilian and military service is 7 percent of basic pay, plus interest. Therefore, a retirement coverage error can cause a significant increase in the deposit an individual expected to pay for nondeduction and military service.

If a retirement coverage error led to a deposit being erroneously computed under FERS rules, when it should have been computed under CSRS rules, the FERCCA allows credit for the service without actual payment of the deposit. The balance of the deposit owed at retirement forms the basis for an actuarial reduction in the retirement or survivor benefit. The deposit is considered paid by a life-time reduction in the benefit. This provision applies to all deposits that are computed under CSRS rules rather than FERS rules

because of a retirement coverage error, regardless of the length of the error.

### Analysis

Section 831.205 requires that any future placement in CSRS will have to be approved by OPM in situations where a CSRS employee has had a break in CSRS service of more than 1 year.

Sections 831.301 and 831.303 provide a new method for payment of certain deposits for civilian and military service. The FERCCA permits credit for certain types of service that are not subject to retirement deductions without actual payment of a service credit deposit. The deposit requirement may be satisfied instead by an actuarial reduction in the annuity that continues for the life of the retiree or survivor. This alternative is also available to individuals whose errors lasted for less than 3 years of service. It applies to individuals who owed a FERS deposit, and because of a retirement coverage error, learn that the deposit must be computed under CSRS rather than FERS rules.

A new part 839 is established in question-and-answer format.

Section 841.604 is amended to allow OPM to pay interest to individuals who overpaid the amount of a service credit deposit because of a retirement coverage error. Interest is payable only if the error lasted for at least 3 years of service after December 31, 1986.

Section 846.204(b)(2) is amended to clarify that this section (concerning deemed elections of FERS coverage) applies only to errors lasting for less than 3 years of service. If the error lasted for at least 3 years of service, then it is corrected in accordance with the newly established part 839.

### Waiver of General Notice of Proposed Rulemaking

Under section 553(b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making these rules effective in less than 30 days. These regulations will affect the operation of all Federal agencies on and after March 19, 2001. Publication of a general notice of proposed rulemaking would be contrary to the public interest because it would delay the intended relief provided to individuals harmed by a retirement coverage error.

### Regulatory Flexibility Act

I certify that this rule will not have a significant economic impact on a substantial number of small entities because the rule only affects Federal employees, agencies, and benefits

payments to retired Federal employees and their survivors.

#### Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

#### List of Subjects

##### 5 CFR Part 831

Administrative practice and procedure, Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

##### 5 CFR Part 839

Administrative practice and procedure, Annuities, Claims, Employment, Employment taxes, Government employees, Pensions, Reporting and recordkeeping requirements, Retirement, Social Security.

##### 5 CFR Part 841

Administrative practice and procedure, Air traffic controllers, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

##### 5 CFR Part 846

Administrative practice and procedure, Air traffic controllers, Firefighters, Government employees, Law enforcement officers, Pensions, Retirement.

Office of Personnel Management.

**Steven R. Cohen,**

*Acting Director.*

For the reasons stated in the preamble, the Office of Personnel Management amends 5 CFR parts 831, 841, and 846 and adds part 839, as follows:

#### PART 831—RETIREMENT

1. The authority citation for part 831 is revised to read as follows:

**Authority:** 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C. 8336(d)(2) and section 7001 of Pub. L. 105–174, 112 Stat. 58; Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); Sec. 831.201(g) also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 831.201(g) also

issued under sections 7(b) and 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 831.205 also issued under section 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.301 also issued under section 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and section 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337; Sec. 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp. p. 317; Sec. 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); Secs. 831.663 and 831.664 also issued under section 11004 (c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under section 201(d) of Pub. L. 99–251, 100 Stat. 23; subpart V also issued under 5 U.S.C. 8343a and section 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

#### Subpart B—Coverage

2. Add § 831.205 to subpart B to read as follows:

##### § 831.205 CSRS coverage determinations to be approved by OPM.

If an agency determines that an employee is CSRS-covered, the agency must submit its determination to OPM for written approval. This requirement does not apply if the employee has been employed in Federal service with CSRS coverage within the preceding 365 days.

#### Subpart C—Credit for Service

3. Amend § 831.301 to revise paragraph (a)(3)(ii) and the first sentence of paragraph (b)(3) to read as follows:

##### § 831.301 Military service.

(a) \* \* \*

(3) \* \* \*

(ii) For an employee, Member, or survivor who is entitled, or upon application would be entitled, to monthly old-age or survivors benefits under section 202 of the Social Security Act (41 U.S.C. 402) based on the individual's wages or self-employment income, the employee, Member, or survivor has completed a deposit in accordance with subpart U of this part, or the annuity has been reduced under § 831.303(d), for each full period of such military service performed after December 1956. If a deposit has not been completed or the annuity has not been reduced under § 831.303(d), periods of military service performed after December 31, 1956 (other than periods of military service covered by military leave with pay from a civilian position), are excluded from credit from

and after the first day of the month in which the individual (or survivor) becomes entitled, or upon proper application would be entitled, to Social Security benefits under section 202. Military service performed prior to January 1957 is included in the computation of the annuity regardless of whether a deposit is made for service after December 31, 1956.

\* \* \* \* \*

(b) \* \* \*

(3) The employee, Member, or survivor has completed a deposit in an amount equal to 7 percent of his or her basic pay under section 204 of title 37, United States Code, (plus interest, if any) or the annuity has been reduced under § 831.303(d), for each full period of such military service performed after December 1956. \* \* \*

\* \* \* \* \*

4. Amend § 831.303 to add paragraph (d) to read as follows:

##### § 831.303 Civilian service.

\* \* \* \* \*

(d)(1) *Civilian and military service of an individual affected by an erroneous retirement coverage determination.* An employee or survivor who owed a deposit under section 8411(c)(1)(B) or 8411(f) of title 5, United States Code (FERS rules) for:

(i) Civilian service that was not subject to retirement deductions, or  
(ii) Military service performed after December 31, 1956, will receive credit for the service without payment of the deposit if, because of an erroneous retirement coverage determination, the service is subsequently credited under chapter 83 of title 5, United States Code (CSRS rules).

(2)(i) The beginning monthly rate of annuity payable to a retiree whose annuity includes service credited under paragraph (d)(1) of this section and service creditable under CSRS rules that would not be creditable under FERS rules is reduced by an amount equal to the CSRS deposit owed, or unpaid balance thereof, divided by the present value factor for the retiree's age (in full years) at the time of retirement. The result is rounded to the next highest dollar amount, and is the monthly actuarial reduction amount.

(ii)(A) The beginning monthly rate of annuity payable to a survivor whose annuity includes service credited under paragraph (d)(1) of this section is reduced by an amount equal to the CSRS deposit owed, or unpaid balance thereof, divided by the present value factor for the survivor's age (in full years) at the time of death. The result is rounded to the next highest dollar

amount, and is the monthly actuarial reduction amount.

(B) The survivor annuity is not reduced if the employee annuity was reduced under paragraph (d)(2)(i) of this section.

(3) For the purpose of paragraph (d)(2) of this section, the terms "present value factor" and "time of retirement" have the same meaning as in § 831.2202 of this chapter.

5. Add part 839 to read as follows:

**PART 839—CORRECTION OF RETIREMENT COVERAGE ERRORS UNDER THE FEDERAL ERRONEOUS RETIREMENT COVERAGE CORRECTIONS ACT**

**Subpart A—General Provisions**

Sec.

839.101 What is the Federal Erroneous Retirement Coverage Corrections Act?

839.102 Definitions.

**Subpart B—Eligibility**

**General Provisions**

839.201 Do these rules apply to me?

**Election Opportunity**

839.211 If these rules apply to me because I had a qualifying retirement coverage error, can I choose which retirement plan I want to be in?

839.212 May I make a retirement coverage election if I received a refund of my retirement deductions after I was corrected to FERS?

839.213 May I make a retirement coverage election if I withdrew all or part of my TSP account after I was corrected to FERS?

839.214 Am I disqualified from making an election of retirement coverage under the FERCCA if I withdrew my TSP account after I retired under FERS?

839.215 May I make a retirement coverage election under the FERCCA if I received a payment as settlement of my claim for losses because of a qualifying retirement coverage error?

**Previous Election Opportunity**

839.221 If my qualifying retirement coverage error was that I was put into FERS by mistake and then, after the error was discovered, I chose my current retirement coverage, can I now make another election?

**Court-Ordered Benefits for Former Spouses**

839.231 Can I make an election if my former spouse is entitled to a portion of my retirement benefits by qualifying court order?

839.232 If a deceased employee's survivors include both a current spouse and a former spouse, or spouses who are eligible for survivor annuities, must all of them consent to an election of FERS?

**Elections**

839.241 Am I eligible to make an election under the FERCCA if I had a qualifying

retirement coverage error and none of the conditions mentioned in 839.212 through 839.232 apply to me?

839.242 Do these rules apply to me if I had multiple errors?

**Subpart C—Employer Responsibility to Notify Employees**

839.301 What should I do if I am not sure whether I am or was in the wrong retirement plan?

839.302 Will my employer give me a written explanation?

839.303 Is my employer required to find employees with a retirement coverage error?

839.304 What if my employer does not notify me?

**Subpart D—Retirement Coverage Elections for Errors That Were Not Previously Corrected**

**Erroneous CSRS or CSRS Offset**

839.401 What can I elect if I was put in CSRS or CSRS Offset by mistake?

**Erroneous FERS**

839.411 What can I elect if I was put in FERS by mistake?

**Subpart E—Retirement Coverage Elections for Errors That Were Previously Corrected**

**Moved Out of CSRS or CSRS Offset**

839.501 What can I elect if my employer moved me out of CSRS or CSRS Offset?

**Moved Out of FERS**

839.511 What can I elect under the FERCCA if my employer put me into FERS by mistake and then I was not allowed to remain in FERS when the error was discovered?

**Subpart F—Making an Election**

**General Provisions**

839.601 How do I make an election?

839.602 What if I don't make an election?

839.603 Can I later change my election?

839.604 When is my election effective?

**Time Limits**

839.611 What are the time limits for making an election?

839.612 Can I make a belated election?

**FERS Elections**

839.621 Can I cancel my FERS election if I was in the wrong retirement plan at the time I elected FERS coverage and I have an election opportunity under the FERCCA?

839.622 Can I cancel my FERS election if my qualifying retirement coverage error was previously corrected and I now have an election opportunity under the FERCCA?

839.623 If I decide to keep the FERS election in effect, may I change the effective date of the FERS election?

**Subpart G—Errors That Don't Permit an Election**

839.701 Is it correct that even though I had a qualifying retirement coverage error under the FERCCA, I may not have a choice of retirement coverage?

839.702 How do these rules apply to me if I don't have an election right under the FERCCA, but I did have a qualifying retirement coverage error?

**Subpart H—Adjusting Retirement Deductions and Contributions**

**Employee Retirement Deductions**

839.801 Do I owe more money if I had a qualifying retirement coverage error and the employee retirement deductions for the new retirement plan are more than what I already paid?

839.802 If I was in CSRS during my qualifying retirement coverage error, paid in more than I would have paid as a CSRS Offset, Social Security-Only, or FERS employee and end up retroactively in one of those retirement plans, will I get a refund of the excess I had withheld from my pay?

839.803 If I am like the person in the previous question, but the amount I paid as deductions under CSRS is more than the amount of combined retirement deductions and Social Security taxes due for my new retirement coverage, will I get a refund of the excess?

839.804 If my qualifying retirement coverage error occurred while I was a reemployed annuitant, and I am later corrected retroactively to a different retirement plan, will I have to pay any additional amount for retirement deductions?

**Employer Retirement Contributions**

839.811 Does my employer owe more money if I had a qualifying retirement coverage error and the employer retirement contributions for my new retirement plan are more than what was already paid?

839.812 Will my employer get a refund if I had a qualifying retirement coverage error and the employer retirement contributions for my new retirement plan are less than what was already paid?

**Records Correction**

839.821 Who is responsible for correcting my records?

839.822 Which employer is responsible for submitting the employee and employer retirement deductions and contributions and correcting my records if I had different employers?

**Subpart I—Social Security Taxes**

839.901 When will my employer begin withholding Social Security taxes if I was erroneously in CSRS during my qualifying retirement coverage error and my corrected coverage will now require me to pay Social Security taxes?

839.902 Will my CSRS retirement deductions be used to pay the Social Security taxes for the period of the qualifying retirement coverage error if I was erroneously placed in CSRS and did not pay Social Security taxes?

839.903 What happens to the Social Security taxes I erroneously paid when my employer corrects my retirement coverage to CSRS?

**Subpart J—Lost Earnings for Certain Make-up Contributions to the TSP**

- 839.1001 Does the FERCCA allow me to increase my TSP account if I was in CSRS during my qualifying retirement coverage error and my correct coverage will be FERS?
- 839.1002 Will OPM compute the lost earnings if my qualifying retirement coverage error was previously corrected and I made TSP make-up contributions?
- 839.1003 How will OPM compute the amount of lost earnings?
- 839.1004 Are lost earnings payable if I separated or if the employee died?

**Subpart K—Effect of Election****General Provisions**

- 839.1101 How are my retirement benefits computed if I elect CSRS or CSRS Offset under this part?
- 839.1102 How are my retirement benefits computed if I elect FERS under this part?
- 839.1103 If my qualifying retirement coverage error started when I should have been placed under FERS automatically, but my agency put me in CSRS because I had some past service, will I get a CSRS component in my FERS annuity for the service before the error if I elect FERS?

**Retirees and Survivors**

- 839.1111 If I elect to change my retirement coverage under the FERCCA, can I change the election I originally made at retirement for survivor benefits?
- 839.1112 If I elect to change my retirement coverage under the FERCCA, can I retroactively revoke the waiver of military retired pay I made at retirement?
- 839.1113 If I elect to change my retirement coverage under the FERCCA, can I change my decision about making a deposit or redeposit for civilian or military service?
- 839.1114 Will OPM actuarially reduce my benefit if I elect to change my retirement coverage under these rules?
- 839.1115 What is an actuarial reduction?
- 839.1116 If, because of the change in my retirement coverage, I will owe larger deposits for military and civilian service credit, will I have to pay the additional deposit due or will OPM actuarially reduce my annuity?
- 839.1117 If I elect to change my retirement coverage under the FERCCA, can I get a refund of the service credit deposit I made and receive the actuarial reduction instead?
- 839.1118 Will my annuity be actuarially reduced because I had Government contributions in my TSP account?
- 839.1119 How is the actuarial reduction for TSP computed?

**Survivor Benefits**

- 839.1121 What is the Actuarial Reduction for the Basic Employee Death Benefit (BEDB)?
- 839.1122 Does receipt of a one-time payment of retirement contributions as a death benefit prevent me from electing CSRS Offset?

**Subpart L—Discretionary Actions by OPM**

- 839.1201 If I took legal action against my employer because of a qualifying retirement coverage error, can OPM reimburse me for expenses related to my legal actions?
- 839.1202 Can OPM waive repayment of a monetary award I received as resolution of the harm caused me by a qualifying retirement coverage error?
- 839.1203 Can OPM compensate me for my losses if I did not take any legal action against my employer, but did incur some expenses because of a qualifying retirement coverage error?
- 839.1204 On what basis will OPM review claims under this subpart?
- 839.1205 Does the Director of OPM review the claims?
- 839.1206 How do I submit a claim under this subpart?

**Subpart M—Appeal Rights**

- 839.1301 What if my employer determines my error is not subject to these rules?
- 839.1302 What types of decisions can I appeal?
- 839.1303 Are there any types of decisions that I cannot appeal?
- 839.1304 Is there anything else I can do if I am not satisfied with the way my error was corrected?

**Authority:** Title II, Pub. L. 106–265, 114 Stat. 770.

**Subpart A—General Provisions**

- 839.101 What is the Federal Erroneous Retirement Coverage Corrections Act?
- (a) The Federal Erroneous Retirement Coverage Corrections Act (FERCCA) is Title II of Public Law 106–265, enacted September 19, 2000. The FERCCA addresses the problems created when employees are in the wrong retirement plan for an extended period.
- (b) Generally, you must be in the wrong retirement plan for at least 3 years of service after December 31, 1986, before the FERCCA applies to you. Depending on the type of error, the FERCCA provides:
- (1) A choice between retirement plans,
  - (2) New rules for crediting civilian and military service that was not subject to retirement deductions,
  - (3) Payment of lost earnings on employee make-up contributions to the Thrift Savings Plan, and
  - (4) Payment of certain out-of-pocket expenses that are a direct result of a retirement coverage error.

**839.102 Definitions.**

*Agency* means an executive agency as defined in section 105 of title 5, United States Code; a legislative branch agency; a judicial branch agency; and the U.S. Postal Service and Postal Rate Commission.

*Agency automatic (1%) contributions* means contributions made to a FERS

participant's Thrift Savings Plan account by his or her employing agency under 5 U.S.C. 8432(c)(1) or (c)(3).

*Agency matching contributions* means contributions made to a FERS participant's Thrift Savings Plan account by his or her employing agency under 5 U.S.C. 8432(c)(2).

*Annuitant* means the same as *Retiree*.

*Basic Employee Death Benefit or BEDB* means the FERS survivor benefit payable as a lump sum or over 36 months, described in § 843.309 of this chapter.

*Board* means the Federal Retirement Thrift Investment Board established under 5 U.S.C. 8472.

*CSRS* means the Civil Service Retirement System, as described in subchapter III of chapter 83 of title 5, United States Code.

*CSRS component* means the part of a FERS retirement benefit that is computed under CSRS provisions (see § 846.304 of this chapter).

*CSRS Offset* means the Civil Service Retirement System Offset plan, which is for employees whose service is subject to CSRS deductions and Social Security taxes, as described in 5 U.S.C. 8349.

*Employee* means an employee or Member individual as defined in section 8331(1) and (2) or 8401(11) and (20) of title 5, United States Code. Employee includes an individual who has applied for retirement benefits, but not separated from service.

*Employee retirement deductions* means the amount that is deducted from basic pay under section 8334(a) of title 5, United States Code, for CSRS employees; or section 8334(k) of title 5, United States Code, for CSRS Offset employees; or the portion of the normal cost of FERS coverage that is deducted from an employee's basic pay under section 8422(a) of title 5, United States Code.

*Employer* means, with respect to an employee, that individual's employing agency.

*Employer retirement contributions* means the employer share of retirement contributions that are required payments to the Fund under sections 8334(a) and 8423(a) of title 5, United States Code.

*Former spouse* means a living person who was married to you for at least 9 months.

*FERCCA* means the Federal Erroneous Retirement Coverage Corrections Act.

*FERS* means the Federal Employees' Retirement System, as described in chapter 84 of title 5, United States Code.

*Fund* means the Civil Service Retirement and Disability Fund described in section 8348 of title 5, United States Code.

*Government contributions* means agency automatic (1%) contributions and agency matching contributions.

*Lost earnings* means earnings that you would have received had your make-up contributions to the Thrift Savings Fund been made during the period of the error when they should have otherwise been made.

*Make-up contributions* means employee contributions to the Thrift Savings Plan that should have been deducted from a participant's basic pay earlier, but were not due to an employing agency error.

*MSPB* means the Merit Systems Protection Board described in chapter 12 of title 5, United States Code.

*OPM* means the Office of Personnel Management.

*Present value factor* has the same meaning as in § 831.2202 or § 842.702 of this chapter, as applicable.

*Previously corrected* means a retirement coverage error that has been properly corrected before March 19, 2001.

*Qualifying court order* has the same meaning as in § 846.702 of this chapter, referring to court orders that affect CSRS or FERS payments following a divorce or legal separation.

*Qualifying retirement coverage error* means an erroneous decision by an employee or agent of the Government as to whether Government service is CSRS covered, CSRS Offset covered, FERS covered, or Social Security-Only covered that remained in effect for at least 3 years of service after December 31, 1986.

*Reemployed annuitant* means a CSRS or FERS retiree who is reemployed under conditions that do not terminate the CSRS or FERS annuity. (See part 837 of this chapter for additional information on reemployed annuitants.)

*Retiree* means a former employee or Member who is receiving, or meets the statutory age and service requirements for, an annuity under either CSRS or FERS. This includes individuals who meet the statutory requirements for benefits and chose to postpone the beginning date of the annuity under § 842.204(c) or § 842.212(b)(1)(ii) of this chapter (pertaining to FERS MRA+10 and FERS deferred benefits). Retiree does not include a current spouse, former spouse, child, or person with an insurable interest receiving a survivor annuity. An individual who has left Federal service after completing 5 years of service but has not reached the age at which annuity payments may begin is considered a "separated employee" rather than a retiree.

*Retirement coverage* means participation in CSRS, CSRS Offset,

FERS, or Social Security-Only. Retirement coverage is shown on the Notification of Personnel Action (Standard Form 50) or other similar record of personnel actions.

*Retirement plan* means the same as *retirement coverage*.

*Separated employee* means a former employee or Member who has separated from service and who has not met all the requirements for retirement under CSRS or FERS.

*Social Security coverage* means service as a Federal employee that is employment under section 210 of the Social Security Act (42 U.S.C. 410) and is subject to Social Security taxes.

*Social Security-Only* means coverage under Social Security without concurrent coverage under CSRS, CSRS Offset, or FERS.

*Social Security taxes* means the Old Age, Survivors, and Disability Insurance taxes imposed on employees under section 3101(a) of the Internal Revenue Code of 1986 (31 U.S.C. 3101(a)) and on employers under section 3111(a) of the Internal Revenue Code of 1986 (31 U.S.C. 3111(a)).

*Survivor* means a person entitled to benefits under chapter 83 or 84 of title 5, United States Code, based on the service of a deceased employee, separated employee, or retiree.

*Thrift Savings Plan or TSP* means the Federal Retirement Thrift Savings Plan established by the Federal Employees' Retirement System Act of 1986, Pub. L. 99-335, 100 Stat. 514, which has been codified, as amended, primarily at 5 U.S.C. 8351 and 8401-8479.

## Subpart B—Eligibility

### General Provisions

#### 839.201 Do these rules apply to me?

(a) These rules apply to employees who had a qualifying retirement coverage error. For all purposes, a qualifying retirement coverage error must have lasted for at least 3 years of Federal service after December 31, 1986, as stated in the definitions section (§ 839.102). It does not matter whether you have left Federal service, retired, or have been reemployed as an annuitant, as long as you had a qualifying retirement coverage error. In addition, the survivor of an employee, separated employee, or retiree who had a qualifying retirement coverage error is also covered by these rules.

(b) An error that lasted less than 3 years of Federal service after December 31, 1986, is not qualifying under the rules in this part.

(c) For errors lasting less than 3 years that involve erroneous placement in

FERS during a period that the employee was eligible to elect FERS, see § 846.204(b) of this chapter for guidance.

### Election Opportunity

#### § 839.211 If these rules apply to me because I had a qualifying retirement coverage error, can I choose which retirement plan I want to be in?

The FERCCA does not provide an election opportunity in all situations where there was a qualifying retirement coverage error. Even if your error is one that provides an election opportunity under the FERCCA, certain events may disqualify you from making an election under the FERCCA. If you had a qualifying retirement coverage error, your eligibility to choose your retirement plan may be affected by the situations described in the next seven questions.

#### § 839.212 May I make a retirement coverage election if I received a refund of my retirement deductions after I was corrected to FERS?

If your qualifying retirement coverage error was previously corrected to FERS and you then received a refund of your FERS retirement deductions, you are not allowed to elect retirement plan coverage under the FERCCA.

#### § 839.213 May I make a retirement coverage election if I withdrew all or part of my TSP account after I was corrected to FERS?

(a) You may not make a retirement coverage election if your qualifying retirement coverage error was previously corrected to FERS, and you later received one of the following TSP withdrawals:

- (1) A TSP annuity after separation from service, but before receiving a FERS annuity; or
- (2) A single payment or monthly payments after separation from service; or
- (3) An age-based in-service withdrawal.

(b) If you received an automatic cashout of your TSP account after you separated (because your account balance was \$3,500 or less), or if you received a financial hardship in-service withdrawal, you may make a retirement coverage election.

#### § 839.214 Am I disqualified from making an election of retirement coverage under the FERCCA if I withdrew my TSP account after I retired under FERS?

No, you may make an election of retirement coverage under the FERCCA if you made a TSP withdrawal as a retiree.

**§ 839.215 May I make a retirement coverage election under the FERCCA if I received a payment as settlement of my claim for losses because of a qualifying retirement coverage error?**

You can make a retirement coverage election under the FERCCA if OPM waives repayment of the entire amount under § 839.1202. If OPM does not waive the entire repayment, you must pay back the amount that OPM did not waive.

**Previous Election Opportunity**

**§ 839.221 If my qualifying retirement coverage error was that I was put into FERS by mistake and then, after the error was discovered, I chose my current retirement coverage, can I now make another election?**

No, OPM regulations allow certain employees who were put in FERS in error to choose between remaining in FERS or being covered under their automatic retirement coverage. (See § 846.204(b)(2) of this chapter). If you already had this opportunity to choose your retirement coverage; then you may not make an election of retirement coverage based on the same error under these rules.

**Court-Ordered Benefits for Former Spouses**

**§ 839.231 Can I make an election if my former spouse is entitled to a portion of my retirement benefits by qualifying court order?**

Yes, but if you want to elect FERS you need your former spouse's consent to the election. If you are subject to a qualifying court order and want to elect FERS, the requirements in § 846.722 of this chapter (Former Spouse's Consent to an Election of FERS Coverage) apply to you.

**§ 839.232 If a deceased employee's survivors include both a current spouse and a former spouse, or spouses, who are eligible for survivor annuities, must all of them consent to an election of FERS?**

If the employee dies before making an election of retirement coverage under the FERCCA, all eligible potential survivors, that is, both the current and any former spouses, must consent to an election of FERS coverage. If they do not all consent, the election cannot be made.

**Elections**

**§ 839.241 Am I eligible to make an election under the FERCCA if I had a qualifying retirement coverage error and none of the conditions mentioned in § 839.212 through § 839.232 apply to me?**

If you were in CSRS or CSRS Offset and should have been in FERS or Social Security-Only, or if you were in FERS and should have been in CSRS, CSRS

Offset, or Social Security-Only, then you have an election opportunity. This is summarized in the following chart:

You are or were in:	And you belong in:
CSRS or CSRS Offset.	FERS.
CSRS or CSRS Offset.	Social Security-Only.
FERS .....	Social Security-Only.
FERS .....	CSRS.
FERS .....	CSRS Offset.

**§ 839.242 Do these rules apply to me if I had multiple errors?**

You must be in the wrong retirement plan for at least 3 years of Federal service after December 31, 1986. You need not be in the same wrong retirement plan during the entire 3-year period. If you had more than one type of erroneous retirement coverage, then you will have a retirement plan election under these rules if one of the errors is of a type that qualifies you for an election.

**Subpart C—Employer Responsibility to Notify Employees**

**§ 839.301 What should I do if I am not sure whether I am or was in the wrong retirement plan?**

(a) If you are an employee, your employer has your personnel records and will review them to determine whether an error has been made. Therefore, you should notify your employer's human resources office if you believe an error has been made in your case. Notify your current employer even if you believe the error occurred while you were employed at another agency.

(b) If you are not currently employed by the Federal Government, you should notify OPM at: U.S. Office of Personnel Management, Retirement Operations Center, Post Office Box 45, Boyers, Pennsylvania 16017. You can also contact us by electronic mail at FERCCA@OPM.GOV. Notify OPM regardless of whether you are a retiree, survivor, or separated employee.

(c) You may also get additional information about the FERCCA and whether or not you qualify at: [www.opm.gov/benefits/correction](http://www.opm.gov/benefits/correction).

**§ 839.302 Will my employer give me a written explanation?**

(a) Your employer must provide you with written notice of the error. The notice must include an explanation of the error, your options regarding the error, and any time limits that apply.

(b) Your employer must inform you if they find that you do not have a retirement coverage error.

**§ 839.303 Is my employer required to find employees with a retirement coverage error?**

The FERCCA requires your employer to take reasonable and appropriate measures to identify individuals affected by a qualifying retirement coverage error and notify them of their rights under the law.

**§ 839.304 What if my employer does not notify me?**

(a) If your error has not previously been corrected, the 6-month time limit on making an election of retirement coverage under the FERCCA (see § 839.611(a)) does not begin to run until you are notified of the error.

(b) If your error was previously corrected, the 18-month time limit on making an election of retirement coverage ends on September 19, 2002. Employers and OPM may extend the time limit if you were prevented from making a timely election due to a cause beyond your control (see § 839.612).

**Subpart D—Retirement Coverage Elections for Errors That Were Not Previously Corrected**

**Erroneous CSRS or CSRS Offset**

**§ 839.401 What can I elect if I was put in CSRS or CSRS Offset by mistake?**

If you were placed in CSRS or CSRS Offset due to a qualifying retirement coverage error and you should have been in FERS, you may elect CSRS Offset or FERS. If you were placed in CSRS or CSRS Offset due to a qualifying retirement coverage error and you should have been in Social Security-Only, you may elect CSRS Offset or Social Security-Only. This is summarized in the following chart:

You are in:	And you belong in:	You may elect:
CSRS .....	FERS .....	CSRS Offset or FERS.
CSRS Offset CSRS .....	FERS. Social Security-Only.	CSRS Offset or Social Security-Only.
CSRS Offset	Social Security-Only.	

**Erroneous FERS**

**§ 839.411 What can I elect if I was put in FERS by mistake?**

If you were placed in FERS due to a qualifying retirement coverage error and you should have been in CSRS, you may elect FERS or CSRS. If you were placed in FERS due to a qualifying retirement coverage error and you should have been in CSRS Offset, you may elect FERS or CSRS Offset. If you were placed



in FERS due to a qualifying retirement coverage error and you should have been in Social Security-Only, you may elect FERS or Social Security-Only. This is summarized in the following chart:

You are in:	And you belong in:	You may elect:
FERS .....	CSRS .....	FERS or CSRS.
FERS .....	CSRS Offset	FERS or CSRS Offset.
FERS .....	Social Security-Only.	FERS or Social Security-Only.

#### Subpart E—Retirement Coverage Elections for Errors That Were Previously Corrected

##### Moved Out of CSRS or CSRS Offset

##### § 839.501 What can I elect if my employer moved me out of CSRS or CSRS Offset?

If you were moved out of CSRS or CSRS Offset due to a qualifying retirement coverage error and were placed in FERS, you may elect CSRS Offset or remain in FERS. If you were moved out of CSRS or CSRS Offset due to a qualifying retirement coverage error and were placed in Social Security-Only, you may elect CSRS Offset or remain in Social Security-Only. This is summarized in the following chart:

You were in:	And your coverage was previously corrected to:	You may elect:
CSRS .....	FERS .....	CSRS Offset or FERS.
CSRS Offset CSRS .....	FERS .....	CSRS Offset or Social Security-Only.
CSRS Offset	Social Security-Only..	CSRS Offset or Social Security-Only.

##### § 839.511 What can I elect under the FERCCA if my employer put me into FERS by mistake and then I was not allowed to remain in FERS when the error was discovered?

An employee who was erroneously placed in FERS during a time when the employee should have had an opportunity to elect FERS is allowed to keep the erroneous FERS coverage. If the employee was given an opportunity to remain in FERS, then the employee is disqualified from making an election of retirement coverage under the FERCCA (see § 839.221). If you were not allowed to remain in FERS and were placed in CSRS due to a qualifying retirement coverage error, you may elect FERS or remain in CSRS. If you were

not allowed to remain in FERS and were placed in CSRS Offset due to a qualifying retirement coverage error, you may elect FERS or remain in CSRS Offset. If you were not allowed to remain in FERS and were placed in Social Security-Only due to a qualifying retirement coverage error, you may elect FERS or remain in Social Security-Only. This is summarized in the following chart:

You were in:	And your coverage was previously corrected to:	You may elect:
FERS .....	CSRS .....	CSRS or FERS.
FERS .....	CSRS Offset	CSRS Offset or FERS.
FERS .....	Social Security-Only.	Social Security-Only or FERS.

#### Subpart F—Making an Election

##### General Provisions

##### § 839.601 How do I make an election?

You may make your election using the form issued by OPM. If you are an employee, your employer will provide you with this form. If you are not a current employee, OPM will provide the form.

##### § 839.602 What if I don't make an election?

(a) If your qualifying retirement coverage error was not previously corrected and you fail to make an election within the time limit under § 839.611(a), your retirement coverage is summarized in the following chart:

If you are in:	And you belong in:	You are considered to have elected:
CSRS or CSRS Offset.	FERS .....	CSRS Offset.
FERS .....	CSRS, CSRS Offset or Social Security-Only.	FERS.
CSRS or CSRS Offset.	Social Security-Only.	CSRS Offset.

(b) If your qualifying retirement coverage error was previously corrected and you fail to make an election within the time limit under § 839.611(b), you are considered to have elected to remain in your current retirement plan.

##### § 839.603 Can I later change my election?

Your election is irrevocable once your employer or OPM processes it. If you do not make a timely election, the resulting

coverage (see § 839.602) is also irrevocable.

##### § 839.604 When is my election effective?

Your election is effective on the date that the retirement coverage error first occurred. This means that your election will be retroactive, or will change your retirement coverage for a period of service in the past.

##### Time Limits

##### § 839.611 What are the time limits for making an election?

(a) If your qualifying retirement coverage error was not previously corrected, you have 6 months from the date you receive notice of the error under § 839.302 to make an election.

(b) If your qualifying retirement coverage error was previously corrected, the time limit for making an election expires on September 19, 2002.

##### § 839.612 Can I make a belated election?

(a) If you are an employee, your employer can waive the time limit for making an election if you request such a waiver in writing. The employer would have to determine that you exercised due diligence, but could not make an election within the time limit because of circumstances beyond your control.

(b) Your employer's decision not to waive the time limit under this section must be in writing and include notice of your right to request OPM to reconsider the decision.

(c) OPM can waive the time limit for separated employees, retirees, and survivors who exercised due diligence but could not make an election because of circumstances beyond their control if a request is submitted to OPM, and OPM concludes that a waiver is justified.

##### FERS Elections

##### § 839.621 Can I cancel my FERS election if I was in the wrong retirement plan at the time I elected FERS coverage and I have an election opportunity under the FERCCA?

If you were erroneously in CSRS, CSRS Offset, or Social Security-Only at the time you elected FERS and you have an election opportunity under the FERCCA, you can choose whether you want the FERS election to remain in effect. However, you may not choose whether you want your FERS election to remain in effect if you chose FERS after your employer notified you that you were put in FERS by mistake (see § 839.221).



**§ 839.622 Can I cancel my FERS election if my qualifying retirement coverage error was previously corrected and I now have an election opportunity under the FERCCA?**

Yes, your FERS coverage election does not disqualify you from making a retirement coverage election under the FERCCA. You can choose whether you want the FERS election to remain in effect. However, you may not choose whether you want your FERS election to remain in effect if you chose FERS after your employer notified you that you were put in FERS by mistake (see § 839.221).

**§ 839.623 If I decide to keep the FERS election in effect, may I change the effective date of the FERS election?**

No, If you decide to keep FERS, the original FERS election will remain unchanged.

**Subpart G—Errors That Don't Permit an Election**

**§ 839.701 Is it correct that even though I had a qualifying retirement coverage error under the FERCCA, I may not have a choice of retirement coverage?**

Under the FERCCA, the types of retirement coverage errors listed in § 839.241 trigger a right to make a retirement coverage election. The following chart summarizes the types of errors that do not trigger an election right:

You are in:	And you belong in:	Your coverage must be corrected to:
CSRS Offset	CSRS .....	CSRS.
CSRS .....	CSRS Offset	CSRS Offset.
Social Security-Only.	CSRS .....	CSRS.
Social Security-Only.	CSRS Offset	CSRS Offset.
Social Security-Only.	FERS .....	FERS.

**§ 839.702 How do these rules apply to me if I don't have an election right under the FERCCA, but I did have a qualifying retirement coverage error?**

After your retirement coverage is corrected to the proper plan, your retirement deductions will be adjusted in accordance with subpart H of this part and your Social Security taxes will be adjusted in accordance with subpart I of this part, if applicable. You may also file a claim for losses in accordance with subpart L of this part.

**Subpart H—Adjusting Retirement Deductions and Contributions**

**Employee Retirement Deductions**

**§ 839.801 Do I owe more money if I had a qualifying retirement coverage error and the employee retirement deductions for the new retirement plan are more than what I already paid?**

(a) No, your employer is responsible for paying any additional amount to the Fund. Your employer will not bill you for any additional retirement deductions.

(b) For qualifying retirement coverage errors corrected under this part, the rules at § 831.111(b) of this chapter (pertaining to employee options when the employer fails to withhold CSRS or CSRS Offset retirement deductions) do not apply.

**§ 839.802 If I was in CSRS during my qualifying retirement coverage error, paid into the Fund more than I would have paid as a CSRS Offset, Social Security-Only, or FERS employee, and end up retroactively in one of those retirement plans, will I get a refund of the excess I had withheld from my pay?**

CSRS Offset and FERS require employees to pay Social Security taxes in addition to retirement deductions. When you are retroactively changed under the FERCCA to CSRS Offset, FERS, or Social Security-Only, the deductions you paid in under CSRS will be used to pay both the amounts required for retirement deductions under CSRS Offset or FERS, as applicable to you, and also the Social Security taxes that you would have paid had you been in CSRS-Offset, FERS, or Social Security-Only.

**§ 839.803 If I am like the person in the previous question, but the amount I paid as deductions under CSRS is more than the amount of combined retirement deductions and Social Security taxes due for my new retirement coverage, will I get a refund of the excess?**

Yes, either OPM or your employer, as appropriate, will issue the payment in accordance with OPM instructions.

**§ 839.804 If my qualifying retirement coverage error occurred while I was a reemployed annuitant, and I am later corrected retroactively to a different retirement plan, will I have to pay any additional amount for retirement deductions?**

(a) If you (as a reemployed annuitant) were erroneously in CSRS and had retirement deductions withheld from pay, and later are corrected to CSRS Offset or FERS coverage, the amount erroneously withheld under CSRS will be used to pay the retroactive CSRS

Offset or FERS retirement deductions and Social Security taxes.

(b) If you (as a reemployed annuitant) were erroneously placed in CSRS and elected not to have retirement deductions withheld from pay, and later are corrected to CSRS Offset or FERS, your share of retroactive Social Security taxes will be treated as an overpayment of salary. If you are corrected to CSRS Offset, you may elect to have retirement deductions withheld from future salary as a reemployed annuitant and may also make a deposit to cover the retirement deductions for past service as a reemployed annuitant in accordance with § 837.503(c) of this chapter. If you are corrected to FERS, your retirement deductions under FERS will be treated as an overpayment of salary.

(c) If you (as a reemployed annuitant) were erroneously in CSRS Offset and had retirement deductions withheld from pay, and later are corrected to CSRS or FERS coverage, the amount erroneously withheld under CSRS Offset will be used to pay the retroactive CSRS or FERS retirement deductions. The employer is responsible for paying to the Fund any additional retirement deductions.

(d) If you (as a reemployed annuitant) were erroneously placed in CSRS Offset and elected not to have retirement deductions withheld from pay, and later are corrected to CSRS, you may elect to have retirement deductions withheld from future salary as a reemployed annuitant and may also make a deposit to cover the retirement deductions for past service as a reemployed annuitant in accordance with § 837.503(c) of this chapter. Your retirement deductions under CSRS will be treated as an overpayment of salary.

(e) If you (as a reemployed annuitant) were erroneously placed in CSRS Offset and elected not to have retirement deductions withheld from pay, and later are corrected to FERS, your retirement deductions under FERS will be treated as an overpayment of salary.

(f) A reemployed annuitant erroneously placed in FERS and later corrected to CSRS or CSRS Offset is considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage. The employer is responsible for paying to the Fund any additional retirement deductions under the corrected retirement coverage.

(g) If you have a salary overpayment, your employer will inform you of your rights regarding the overpayment.

(h) These rules are summarized in the following chart:

Wrong coverage is:	And retirement deductions were	And you are corrected to	Then
(1) CSRS .....	Taken .....	CSRS Offset or FERS.	<ul style="list-style-type: none"> <li>• The erroneous CSRS deductions are used to pay the retroactive CSRS Offset or FERS deductions and Social Security taxes.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary.</li> <li>• Retroactive Social Security taxes are treated as an overpayment of salary.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• Social Security taxes must be withheld from salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Retroactive Social Security taxes are treated as an overpayment of salary.</li> <li>• Retirement deductions and Social Security taxes must be withheld from salary.</li> <li>• Your retirement deductions for past service under FERS are treated as an overpayment of salary.</li> </ul>
(2) CSRS .....	Not taken .....	CSRS Offset .....	<ul style="list-style-type: none"> <li>• The erroneous CSRS deductions are used to pay the retroactive CSRS Offset or FERS deductions and Social Security taxes.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary.</li> <li>• Retroactive Social Security taxes are treated as an overpayment of salary.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• Social Security taxes must be withheld from salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Retroactive Social Security taxes are treated as an overpayment of salary.</li> <li>• Retirement deductions and Social Security taxes must be withheld from salary.</li> <li>• Your retirement deductions for past service under FERS are treated as an overpayment of salary.</li> </ul>
(3) CSRS .....	Not taken .....	FERS .....	<ul style="list-style-type: none"> <li>• The erroneous CSRS deductions are used to pay the retroactive CSRS Offset or FERS deductions and Social Security taxes.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary.</li> <li>• Retroactive Social Security taxes are treated as an overpayment of salary.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• Social Security taxes must be withheld from salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Retroactive Social Security taxes are treated as an overpayment of salary.</li> <li>• Retirement deductions and Social Security taxes must be withheld from salary.</li> <li>• Your retirement deductions for past service under FERS are treated as an overpayment of salary.</li> </ul>
(4) CSRS Offset .....	Taken .....	CSRS or FERS	<ul style="list-style-type: none"> <li>• The erroneous CSRS Offset deductions are used to pay retroactive CSRS or FERS retirement deductions.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary if correct coverage is FERS.</li> <li>• Employer must pay any additional amount of retirement deductions.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Your retirement deductions for past service under FERS will be treated as an overpayment of salary.</li> <li>• You are considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage.</li> <li>• Employer must pay any additional retirement deductions due for past service.</li> </ul>
(5) CSRS Offset .....	Not taken .....	CSRS .....	<ul style="list-style-type: none"> <li>• The erroneous CSRS Offset deductions are used to pay retroactive CSRS or FERS retirement deductions.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary if correct coverage is FERS.</li> <li>• Employer must pay any additional amount of retirement deductions.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Your retirement deductions for past service under FERS will be treated as an overpayment of salary.</li> <li>• You are considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage.</li> <li>• Employer must pay any additional retirement deductions due for past service.</li> </ul>
(6) CSRS Offset .....	Not taken .....	FERS .....	<ul style="list-style-type: none"> <li>• The erroneous CSRS Offset deductions are used to pay retroactive CSRS or FERS retirement deductions.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary if correct coverage is FERS.</li> <li>• Employer must pay any additional amount of retirement deductions.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Your retirement deductions for past service under FERS will be treated as an overpayment of salary.</li> <li>• You are considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage.</li> <li>• Employer must pay any additional retirement deductions due for past service.</li> </ul>
(7) FERS .....	Taken .....	CSRS or CSRS Offset.	<ul style="list-style-type: none"> <li>• The erroneous CSRS Offset deductions are used to pay retroactive CSRS or FERS retirement deductions.</li> <li>• Retirement deductions will continue to be withheld from salary.</li> <li>• Social Security taxes must be withheld from salary if correct coverage is FERS.</li> <li>• Employer must pay any additional amount of retirement deductions.</li> <li>• You may elect to have retirement deductions withheld from future salary.</li> <li>• You may pay a deposit to OPM for past retirement deductions.</li> <li>• Your retirement deductions for past service under FERS will be treated as an overpayment of salary.</li> <li>• You are considered to have elected retirement deductions as a reemployed annuitant under the corrected coverage.</li> <li>• Employer must pay any additional retirement deductions due for past service.</li> </ul>

### Employer Retirement Contributions

**§ 839.811 Does my employer owe more money if I had a qualifying retirement coverage error and the employer retirement contributions for my new retirement plan are more than what was already paid?**

Yes, your employer must pay any additional retirement contributions to the Fund.

**§ 839.812 Will my employer get a refund if I had a qualifying retirement coverage error and the employer retirement contributions for my new retirement plan are less than what was already paid?**

No, if you were erroneously in CSRS, CSRS Offset, or Social Security-Only, then a correction of a retirement coverage error will not reduce the employer retirement contribution owed. Also, the FERCCA states that an employer may not remove from the Fund FERS employer contributions when correcting a qualifying retirement coverage error under this part.

### Records Correction

**§ 839.821 Who is responsible for correcting my records?**

(a) Your current employer will correct your records in accordance with OPM instructions. Your employer must not delay correcting your records.

(b) For former employees and retirees, the last employer will correct the records. For survivors, the employee's last employer will correct the records. If an employer no longer exists as an organization, and there is no successor agency, then OPM will correct the records.

**§ 839.822 Which employer is responsible for submitting the employee and employer retirement deductions and contributions and correcting my records if I had different employers?**

Your current or most recent employer will be responsible for this purpose. Even if that employer was not involved in the retirement coverage error, it must issue corrected records for the entire period of the retirement coverage error.

### Subpart I—Social Security Taxes

**§ 839.901 When will my employer begin withholding Social Security taxes if I was erroneously in CSRS during my qualifying retirement coverage error and my corrected coverage will now require me to pay Social Security taxes?**

(a) If you are in CSRS by mistake and belong in CSRS Offset, FERS, or Social Security-Only, your employer must begin withholding Social Security taxes by changing your retirement coverage to CSRS Offset. Your employer must begin

this withholding as soon as possible after the error is discovered.

(b) Your employer will correct your retirement coverage back to the date the error first occurred once you are notified of the error and have an opportunity to make any elections that you are eligible to make.

**§ 839.902 Will my CSRS retirement deductions be used to pay the Social Security taxes for the period of the qualifying retirement coverage error if I was erroneously placed in CSRS and did not pay Social Security taxes?**

(a) If your qualifying retirement coverage error was not previously corrected, the amount erroneously withheld for CSRS retirement deductions will be:

(1) Used to pay your new retirement deduction amount; and

(2) Applied toward any Social Security taxes you owe for the time you were in the wrong retirement plan.

(b) You will get Social Security credit for all the time you were erroneously covered by CSRS. Your employer will send the Social Security Administration a record of your earnings for all the years you should have had Social Security coverage.

**§ 839.903 What happens to the Social Security taxes I erroneously paid when my employer corrects my retirement coverage to CSRS?**

(a) Except for the last 3 years, the money you erroneously paid into Social Security will remain to your credit in the Social Security fund. The Social Security Administration will include all but those last 3 years in determining your eligibility for, and the amount of, future benefits.

(b) The amount you paid into Social Security for the last 3 years will be used to help pay your CSRS retirement deductions.

**Subpart J—Lost Earnings for Certain Make-up Contributions to the TSP**

**§ 839.1001 Does the FERCCA allow me to increase my TSP account if I was in CSRS during my qualifying retirement coverage error and my correct coverage will be FERS?**

The Board's error correction regulations (5 CFR 1605 of chapter VI) generally allow you to increase your TSP account through a schedule of make-up contributions to replace the missed employee contributions. In addition, the FERCCA allows certain employees who have completed a schedule of make-up contributions, or who plan to schedule make-up contributions, to receive lost earnings on those contributions under certain circumstances. Employees are (and have been) entitled to lost earnings on the make-up agency contributions they receive as a result of the correction of an agency error.

**§ 839.1002 Will OPM compute the lost earnings if my qualifying retirement coverage error was previously corrected and I made TSP make-up contributions?**

If you made contributions to the TSP after your qualifying retirement coverage error was previously corrected, OPM will compute the lost earnings on your make-up contributions to the TSP under the following circumstances:

You were in:	And were previously corrected to:	And under these rules you elect:
CSRS .....	FERS .....	FERS.
CSRS Offset	FERS .....	
Social Security-Only.	FERS .....	No election required.
Social Security-Only.	CSRS .....	
Social Security-Only.	CSRS Offset	

**§ 839.1003 How will OPM compute the amount of lost earnings?**

(a) Lost earnings will generally be computed in accordance with the

Board's lost earnings regulations (5 CFR 1606 of chapter VI). However, the FERCCA states that OPM may compute the lost earnings in an alternative manner if such a computation is not administratively feasible. The alternative manner will yield an amount that is as close as practicable to the amount computed under 5 CFR 1606 of chapter VI.

(b) Your employer is required to submit to OPM all information required to compute the amount of lost earnings.

**§ 839.1004 Are lost earnings payable if I separated or if the employee died?**

(a) Yes. If the TSP account is not withdrawn, the lost earnings are paid to the account.

(b) If there is no TSP account at the time the lost earnings are payable, you or your survivors will receive the payment directly.

**Subpart K—Effect of Election**

**General Provisions**

**§ 839.1101 How are my retirement benefits computed if I elect CSRS or CSRS Offset under this part?**

Unless otherwise stated in this part, your retirement benefit is computed as if you were properly put in CSRS or CSRS Offset on the effective date of the error. All the eligibility and benefit computation rules for CSRS or CSRS Offset apply to your retirement benefit.

**§ 839.1102 How are my retirement benefits computed if I elect FERS under this part?**

OPM will compute your retirement benefit as if you were properly put in FERS on the effective date of the error. All the eligibility and benefit computation rules for FERS apply to your retirement benefit.

**§ 839.1103 If my qualifying retirement coverage error started when I should have been placed under FERS automatically, but my agency put me in CSRS because I had some past service, will I get a CSRS component in my FERS annuity for the service before the error if I elect FERS?**

No, employees who should have been automatically placed in FERS (generally because they did not have 5 years of past service under CSRS rules) do not have a CSRS component in their future FERS benefit. All service must be treated as FERS service in this circumstance.

**Retirees and Survivors**

**§ 839.1111 If I elect to change my retirement coverage under the FERCCA, can I change the election I originally made at retirement for survivor benefits?**

(a) Yes, if you elect to change your retirement coverage under the FERCCA,

you will have an opportunity to change the election you made for survivor benefits.

(b) If you elect less than the maximum survivor benefit, your spouse's consent is necessary in accordance with § 831.614 or § 842.603(a)(1) of this chapter, as applicable.

**§ 839.1112 If I elect to change my retirement coverage under the FERCCA, can I retroactively revoke the waiver of military retired pay I made at retirement?**

Yes, you may retroactively change your decision regarding waiver of your military retired pay.

**§ 839.1113 If I elect to change my retirement coverage under the FERCCA, can I change my decision about making a deposit or redeposit for civilian or military service?**

Yes, you or your survivor will have a new opportunity to decide whether to pay any deposits or redeposits.

**§ 839.1114 Will OPM actuarially reduce my benefit if I elect to change my retirement coverage under these rules?**

Your annuity may be subject to three possible actuarial reductions under the FERCCA. These reductions may be required for an unpaid deposit (see § 831.303(d) and § 839.1116 of this chapter), for Government contributions in a TSP account (see § 839.1118), or for a previous payment of the Basic Employee Death Benefit (see § 839.1121).

**§ 839.1115 What is an actuarial reduction?**

An actuarial reduction allows you to receive benefits without having to pay an amount due in a lump sum. OPM reduces your annuity in a way that, on average, allows the Fund to recover the amount of the missing lump sum over your lifetime. The actuarial reduction becomes a permanent reduction in your benefit. The amount of the reduction depends on your age and the amount of the lump sum you would otherwise have to pay at that time. To compute an actuarial reduction, OPM divides the lump sum amount by the present value factor for your age at retirement.

**§ 839.1116 If, because of the change in my retirement coverage, I will owe larger deposits for military and civilian service credit, will I have to pay the additional deposit due or will OPM actuarially reduce my annuity?**

You can choose to pay the additional deposit amount. If you choose not to pay the deposit, OPM will actuarially reduce your annuity, as explained in § 831.303(d) of this chapter.

**§ 839.1117 If I elect to change my retirement coverage under the FERCCA, can I get a refund of the service credit deposit I made and receive the actuarial reduction instead?**

No, the FERCCA allows OPM to reduce an annuity by an actuarial reduction only for the deposit amount that remains unpaid.

**§ 839.1118 Will my annuity be actuarially reduced because I had Government contributions in my TSP account?**

Retirees and survivors of deceased employees who received a Government contribution to their TSP account after being corrected to FERS and who later elect CSRS Offset under the FERCCA are allowed to keep the Government contributions, and earnings on the Government contributions in the TSP account. Instead of adjusting the TSP account, the FERCCA requires that the CSRS-Offset annuity be reduced actuarially.

**§ 839.1119 How is the actuarial reduction for TSP computed?**

(a) The part of your TSP account on the date you retired that is Government contributions and earnings on those Government contributions forms the basis for the actuarial reduction. OPM will divide the Government contributions and earnings by the present value factor for your age (in full years) at the time you retired. OPM will then round the result to the next highest dollar amount, which will be the monthly actuarial reduction amount.

(b) If a survivor annuity is the only benefit that is payable, the present value factor for the survivor's age at the time of death is used. The survivor benefit is not reduced for TSP if the retiree's rate was reduced.

**Survivor Benefits**

**§ 839.1121 What is the Actuarial Reduction for the Basic Employee Death Benefit (BEDB)?**

If you received a BEDB under FERS and you elect CSRS Offset under these rules, you do not have to pay back the BEDB. Instead, the FERCCA requires that OPM actuarially reduce your survivor annuity. The reduction will be the amount of the BEDB divided by the present value factor for your age at the time of the employee's death. The result is rounded to the next highest dollar amount and is the monthly actuarial reduction amount. If you elected to receive the BEDB in installments rather than a lump sum, the lump-sum amount is used for the purpose of computing the actuarial reduction.

**§ 839.1122 Does receipt of a one-time payment of retirement contributions as a death benefit prevent me from electing CSRS Offset?**

You may still elect CSRS Offset if otherwise eligible. OPM will collect the amount of the one-time death benefit from any survivor benefits that are payable.

**Subpart L—Discretionary Actions by OPM**

**§ 839.1201 If I took legal action against my employer because of a qualifying retirement coverage error, can OPM reimburse me for expenses related to my legal actions?**

(a) The FERCCA allows OPM, in its sole discretion, to reimburse you for necessary and reasonable expenses you actually incurred while pursuing a legal or administrative remedy of your qualifying retirement coverage error.

(b) Necessary and reasonable expenses include actual amounts paid for attorney fees, court costs, expert witness fees, and other litigation expenses.

(c) You may not receive reimbursement under this section if you received a monetary award that compensated you for your litigation expenses.

(d) You must support your request for reimbursement with evidence that supports your claim.

(e) In determining what is a necessary and reasonable expense, OPM will consider:

- (1) The type and amount of the expense;
- (2) The circumstances that gave rise to the expense; and
- (3) Whether the expense is directly related to litigation concerning a retirement coverage error.

**§ 839.1202 Can OPM waive repayment of a monetary award I received as resolution of the harm caused me by a qualifying retirement coverage error?**

(a) The FERCCA allows OPM, in its sole discretion, to waive repayment of all or part of a settlement payment or court-ordered payment if you can demonstrate that CSRS Offset coverage does not fully compensate you for your losses.

(b) Your request for waiver must state why you believe waiver of repayment is appropriate and include any evidence that supports your request.

**§ 839.1203 Can OPM compensate me for my losses if I did not take any legal action against my employer, but did incur some expenses because of a qualifying retirement coverage error?**

(a) The FERCCA allows OPM, in its sole discretion, to compensate you for a monetary loss that is a direct and

proximate result of your retirement coverage error.

(b) Monetary losses include payments of additional Social Security taxes, payment of additional retirement deductions, and other out-of-pocket expenses that you incurred because of a retirement coverage error.

(c) You must substantiate your claim for losses with any evidence that supports your request.

(d) OPM cannot pay you for:

- (1) Claimed losses related to forgone contributions and earnings under the TSP, other than lost earnings on make-up contributions to the TSP as provided in subpart J of this part; and
- (2) Claimed losses related to any other investment opportunities.

**§ 839.1204 On what basis will OPM review claims under this subpart?**

(a) OPM will base its decision on only the written record, including all of your submissions and other documentation in OPM's possession.

(b) At OPM's discretion, OPM may request your employer to provide an administrative report. The report may include:

- (1) A description of the retirement coverage error;
- (2) A statement as to whether a settlement or other court-ordered award was made;
- (3) The employer's recommendation for resolution of the claim; and
- (4) Any other information your employer believes OPM should consider.

(c) The burden of proof that the criteria for approving a reimbursement of expenses is on you.

**§ 839.1205 Does the Director of OPM review the claims?**

The Associate Director for Retirement and Insurance and his or her delegates have the authority to perform the Director's actions, as set out in this subpart (see section 2208 of the FERCCA).

**§ 839.1206 How do I submit a claim under this subpart?**

(a) No specific form is required. Your request must be in writing and contain the following information:

- (1) It must describe the basis for the claim and state the dollar amount you seek to receive;
- (2) It must include your name, address, and telephone number;
- (3) It must include the name, address, and telephone number of your current or last employer;
- (4) It must be signed by you; and
- (5) It must include any information you believe OPM should consider, such as cancelled checks or other evidence of amounts you paid.

(b) Send your claim to: Office of Personnel Management, Retirement and Insurance Service, ATTN: FC Section, Washington, DC 20415-3200

#### Subpart M—Appeal Rights

##### **§ 839.1301 What if my employer determines my error is not subject to these rules?**

(a) Your employer must provide you with a written decision. The decision must include the reason for the decision, and notice of your right to appeal the decision to the MSPB.

(b) If your employer determines that it cannot waive the time limit for making an election under § 839.612, the decision must inform you of your right to ask OPM to review the decision. OPM will advise you in writing of your appeal rights following its review of your employer's decision.

##### **§ 839.1302 What types of decisions can I appeal?**

(a) You can appeal to the MSPB a decision that affects your rights and interests under this part, except an OPM decision under subpart L (see § 839.1303). Some examples of decisions are:

(1) Your employer's determination that your error is not subject to these rules;

(2) Your employer's determination that you are not eligible to elect retirement coverage under these rules; and

(3) OPM's denial of your request for a waiver of the time limit for making an election.

(b) You may not seek review of a decision under any employee grievance procedures, including those established by chapter 71 of title 5, United States Code, and 5 CFR part 771.

##### **§ 839.1303 Are there any types of decisions that I cannot appeal?**

Yes, OPM's decisions under subpart L (Discretionary Actions by OPM) are final and conclusive and are not subject to administrative or judicial review.

##### **§ 839.1304 Is there anything else I can do if I am not satisfied with the way my error was corrected?**

(a) Except for claims under subpart L (see § 839.1303), and after exhausting your administrative remedies as set out

in this subpart, you may bring a claim against the Government under section 1346(b) or chapter 171 of title 28, United States Code.

(b) You may also bring a claim against the Government under any other provision of law if your claim is for amounts not otherwise provided for under these rules.

#### **PART 841—FEDERAL EMPLOYEES' RETIREMENT SYSTEM—GENERAL ADMINISTRATION**

6. The authority citation for part 841 is revised to read as follows:

**Authority:** 5 U.S.C. 8461; Sec. 841.108 also issued under 5 U.S.C. 552a; subpart D also issued under 5 U.S.C. 8423; Sec. 841.504 also issued under 5 U.S.C. 8422; Sec. 841.507 also issued under section 505 of Pub. L. 99-335; subpart J also issued under 5 U.S.C. 8469; Sec. 841.506 also issued under 5 U.S.C. 7701(b)(2); Sec. 841.508 also issued under section 505 of Pub. L. 99-335; Sec. 841.604 also issued under Title II, Pub. L. 106-265, 114 Stat. 780.

7. Amend § 841.604 to add paragraph (c) to read as follows:

##### **§ 841.604 Interest on service credit deposits.**

\* \* \* \* \*

(c) In the case of a retirement coverage error that was corrected under part 839 (pertaining to errors that lasted for at least 3 years of service after December 31, 1986) in which:

(1) A CSRS service credit deposit was made; and

(2) There is a subsequent retroactive change to FERS, the excess of the amount of the CSRS civilian or military service credit deposit over the FERS civilian or military deposit, together with interest computed under § 842.305 of this chapter, shall be paid to the employee or annuitant. In the case of a deceased employee or annuitant, payment is made to the individual entitled to lump-sum benefits under subpart B of part 843 of this chapter.

#### **PART 846—FEDERAL EMPLOYEES' RETIREMENT SYSTEM—ELECTIONS OF COVERAGE**

8. The authority citation for part 846 is revised to read as follows:

**Authority:** 5 U.S.C. 8347(a) and 8461(g) and Title III of Pub. L. 99-335, 100 Stat. 517;

Sec. 846.201(b) also issued under 5 U.S.C. 7701(b)(2) and section 153 of Pub. L. 104-134, 110 Stat. 1321; Sec. 846.201(d) also issued under section 11246(b) of Pub. L. 105-33, 111 Stat. 251; Sec. 846.201(d) also issued under section 7(e) of Pub. L. 105-274, 112 Stat. 2419; Sec. 846.202 also issued under section 301(d)(3) of Pub. L. 99-335, 100 Stat. 517; Sec. 846.204(b) also issued under Title II, Pub. L. 106-265, 114 Stat. 778; Sec. 846.726 also issued under 5 U.S.C. 1104; subpart G also issued under section 642 of Pub. L. 105-61, 111 Stat. 1272.

9. Amend § 846.204 to revise paragraph (b)(2)(i) and add paragraph (e) to read as follows:

##### **§ 846.204 Belated elections and correction of administrative errors.**

\* \* \* \* \*

(b) \* \* \*

(2)(i) *Erroneous FERS coverage for a period of less than 3 years of service.* For an employee, separated employee, or retiree whose employing agency erroneously determined that the individual was covered by FERS during the period under § 846.201 when the individual was eligible to elect FERS, and the employing agency should have placed the individual in CSRS, CSRS Offset, or Social Security-Only, under conditions that would have included an opportunity to elect FERS coverage, and the employee, separated employee, or retiree remained in FERS for less than 3 years of service, the employee, separated employee, or retiree is deemed to have elected FERS coverage and the individual will remain covered by FERS, unless the individual declines under paragraph (b)(2)(ii) of this section to be covered by FERS.

\* \* \* \* \*

(e) *Errors lasting for at least 3 years of service.* For an employee, separated employee, or retiree whose employing agency erroneously determined that the individual was covered by FERS during the period under § 846.201 of this chapter when the individual was eligible to elect FERS and the individual remained in FERS for at least 3 years of service, the error is corrected in accordance with part 839 of this chapter.

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