



**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Parts 831 and 842**

**RIN 3206-AN90**

**High-3 Calculation for Privatized Senate Restaurant Civil Service Retirement System and Federal Employees' Retirement System Employees and Annuitants**

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) proposes this rule to allow for the continuation of civil service retirement coverage for career Senate Restaurants employees of the Architect of the Capitol, who became employees of a private contractor under a food services contract on September 16, 2008, and career civilian employees of the United States permanently assigned to the food services operations of the House of Representatives after those operations were transferred to a private contractor on January 2, 1987.

**DATES:** Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by docket number and/or Regulatory Information Number (RIN) and title, by either of the following methods:

- *Electronic:* Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public

is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

- *Email:* [Comboxinternet@opm.gov](mailto:Comboxinternet@opm.gov). Include Docket No. or RIN in the subject line of the email.

**FOR FURTHER INFORMATION CONTACT:** Jane Bancroft, (202) 606-0299.

## **SUPPLEMENTARY INFORMATION:**

### **Introduction**

OPM proposes this rule to implement the provisions of Pub. L. 110-279, 122 Stat. 2604 (2008) (codified at 2 U.S.C. 2051), as amended by Pub. L. No. 116-21, S. 1436 (2019), which allowed United States (Senate) Restaurants employees the ability to elect to retain Civil Service Retirement System (CSRS) and Federal Employees Retirement System (FERS) coverage after the Architect of the Capitol transferred its food services functions to a private contractor. In 2019, Congress amended 2 U.S.C. 2051 by requiring that the basic pay paid by the food services contractor must be treated as “basic pay” for purposes of retirement provisions. As a result, OPM is proposing this rule to comply with the Congressional mandate requiring that OPM promulgate regulations reflecting these provisions. OPM is also correcting an oversight related to its publication of rules implementing the provisions of sec. 111 of Pub. L. 99-500, 100 Stat. 1783-348 (1986). The enactment of these provisions similarly allowed House of Representatives (House) food services employees to elect to retain CSRS and FERS retirement coverage when the House transferred its food services functions to a private contractor. OPM’s regulations implementing these provisions were published at 53 FR 10055 (1988) and were promulgated under 5 CFR 831.202. Although OPM’s regulations provided rules associated with affected former House food services employees covered under CSRS, OPM did not properly publish

regulations associated with affected former House food services employees under FERS. Because this rule proposes to amend OPM's preexisting House food services regulations at 5 CFR 831.202 to include affected former Senate Restaurants employees as a population subject to this regulation, and because OPM is proposing equivalent regulations affecting former Senate Restaurants employees covered under FERS at 5 CFR 842.110, OPM is proposing to correct this oversight by including affected former House food services employees as a population that is subject to the regulations promulgated under 5 CFR 842.110.

### **Background**

On October 18, 1986, Congress enacted Pub. L. 99-500 which allowed food service employees for the House of Representatives to elect to retain coverage under CSRS and FERS prior to becoming employees of a private contractor after the food services operations for the House was transferred to a private contract on January 3, 1987. Section 111(c)(1) of this Act provided that OPM must publish regulations to implement these provisions. As a result, on February 19, 1987, OPM published interim regulations associated with this Act at 52 FR 5069 (1987) (promulgated under 5 CFR 831.307). OPM did not receive comments on this interim rule, and on March 29, 1988, it issued a final rule adopting its interim rule (53 FR 10055 (1988)). While OPM's rule promulgated regulations related to former House food services employees covered under CSRS, it did not provide equivalent regulations for former House food services employees covered under FERS.

Similarly, on September 16, 2008, Senate Restaurants employees of the Architect of the Capitol became employees of a private corporation after the food services operations for the Senate Restaurants were transferred to a private contract. Prior to this transfer, Congress enacted Pub. L. 110-279, 122 Stat. 2604 (2008)(codified at 2 USC 2051), which allowed Senate

Restaurants employees to elect to retain coverage under CSRS and FERS upon transfer. Unlike the 1987 House food service employee provisions, however, the Senate Restaurants employees' provisions capped the rate of basic pay of affected Senate Restaurants employees at the rates of basic pay they were paid by the Architect of the Capitol prior to transfer to the private contract in 2008.

However, on June 12, 2019, Congress enacted technical corrections to the 2008 Act related to Senate Restaurants employees, removing language from 2 USC 2051(c)(2)(A)(ii) that required OPM to cap the basic pay at the rate employees received prior to transfer in 2008. See Pub. L. No. 116-21, S. 1436 (2019). The 2019 provisions required OPM to begin treating the payments made by the food service contractor as "basic pay" for purposes of retirement provisions.

For those reasons, OPM is issuing this proposed rule to ensure Pub. L. 110-279 and Pub. L. 116-21 are fully implemented. Additionally, it is correcting its oversight in not publishing regulations related to former House food services employees covered under FERS in accordance with Pub. L. 99-500.

### **Employee Deductions**

As employees of a private contractor, House food services and Senate Restaurants employees are covered under Social Security. Therefore, for those employees covered under CSRS, retirement deductions for the Civil Service Retirement and Disability Fund are reduced so that the total contribution to the Old-Age, Survivors and Disability Insurance (OASDI) portion of Social Security and the Civil Service Retirement and Disability Fund does not exceed what affected individuals would be contributing as Congressional employees. For calendar year 2019, the employee deduction rate for CSRS Offset Congressional employees is 1.8 percent of

basic pay. FERS-covered employees continue to have OASDI taxes as well as the FERS employee deduction for Congressional employees withheld from basic pay.

**Regulatory Impact Analysis:**

OPM has examined the impact of this rule as required by Executive Order 12866 and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). This rule is not a “significant regulatory action,” under Executive Order 12866.

**Reducing Regulation and Controlling Regulatory Costs:**

This rule is not an EO 13771 regulatory action because this rule is not significant under E.O. 12866.

**Regulatory Flexibility Act:**

The Office of Personnel Management certifies that this rule will not have a significant economic impact on a substantial number of small entities.

**Federalism**

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

**Civil Justice Reform**

This regulation meets the applicable standard set forth in Executive Order 12988.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Congressional Review Act**

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

#### **Paperwork Reduction Act**

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

#### **List of Subjects**

##### **5 CFR Part 831**

Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

##### **5 CFR Part 842**

Air traffic controllers, Alimony, Firefighters, Law enforcement officers, Pensions, Retirement.

Office of Personnel Management

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Regulatory Affairs.

For the reasons stated in the preamble, the Office of Personnel Management proposes to amend 5 CFR parts 831 and 842 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 Sec. 1313(b)(5) of Pub. L. 107-296, 116 Stat. 2135; 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 Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105-33, 111 Stat. 251; Sec. 831.201(g) also issued under Secs. 7(b) and (e) of Pub. L. 105-274, 112 Stat. 2419; Sec. 831.201(i) also issued under Secs. 3 and 7(c) of Pub. L. 105-274, 112 Stat. 2419; Sec. 831.202 also issued under Sec. 111 of Pub. L. 99-500, 100 Stat. 1783, and Sec. 111 of Pub. L. 99-591, 100 Stat. 3341-348, and also Sec. 1 of Pub. L. 110-279, 122 Stat. 2602, as amended by Sec. 1(a) of Pub. L. 116-21, 133 Stat. 903; Sec. 831.204 also issued under Sec. 102(e) of Pub. L.

104-8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104-134, 110 Stat. 1321; Sec. 831.205 also issued under Sec. 2207 of Pub. L. 106-265, 114 Stat. 784; Sec. 831.206 also issued under Sec. 1622(b) of Pub. L. 104-106, 110 Stat. 515; Sec. 831.301 also issued under Sec. 2203 of Pub. L. 106-265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and Sec. 2203 of Pub. L. 106-235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337, and under Sec. 1(3), E.O. 11228, 3 CFR 1965-1965 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 Sec. 11004(c)(2) of Pub. L. 103-66, 107 Stat. 412; Sec. 831.682 also issued under Sec. 201(d) of Pub. L. 99-251, 100 Stat. 23; Sec. 831.912 also issued under Sec. 636 of Appendix C to Pub. L. 106-554, 114 Stat. 2763A-164; Subpart P also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110-161, 121 Stat. 2042; Subpart Q also issued under 5 U.S.C. 8336a; Subpart V also issued under 5 U.S.C. 8343a and Sec. 6001 of Pub. L. 100-203, 101 Stat. 1330-275; Sec. 831.2203 also issued under Sec. 7001(a)(4) of Pub. Law 101-508, 104 Stat. 1388-328.

### **Subpart B--Coverage**

2. Amend § 831.202 by revising the section heading and paragraphs (a), (b)(1) and (3), and adding paragraphs (e) and (f) to read as follows:

#### **§ 831.202 Continuation of coverage for food service employees of the House of Representatives and the Senate Restaurants.**

(a) Congressional employees who were covered by the Civil Service Retirement System and provide food service operations for the House of Representatives or the Senate Restaurants can elect to continue their retirement coverage under subchapter III of chapter 83 of title 5, United States Code, when such food service operations are transferred to a private contractor. These regulations also apply to any successor contractors.

(b) \* \* \*

(1)(i) Be a Congressional employee (as defined in section 2107 of title 5, United States Code), other than an employee of the Architect of the Capitol, engaged in providing food service operations for the House of Representatives under the administrative control of the Architect of the Capitol, or

(ii) Be a Senate Restaurants employee who is an employee of the Architect of the Capitol on July 17, 2008;

\* \* \* \* \*

(3) Elect to remain covered under civil service retirement provisions no later than the day before the date on which the food service operations transfer from the House of Representatives or the Senate Restaurants to a private contractor; and

\* \* \* \* \*

(e) Beginning with annuity payments commencing on or after [EFFECTIVE DATE OF FINAL RULE], the rate of basic pay paid by a Contractor (defined by 2 USC 2051(a)(2)) to a covered former Senate Restaurants Employee (defined by 2 USC 2051(a)(1)) for any period of continuous service performed as an employee of the contract shall be deemed to be basic pay for purposes of 5 USC 8331(3) and (4).

(f) The agency contributions and employee deductions that must be paid in accordance with 5 USC 8423 and 2 USC 2051(c)(6)(A)(ii) for the period on or after June 12, 2019, until [EFFECTIVE DATE OF FINAL RULE] must be treated in accordance with § 831.111 of this title.

**PART 842 – FEDERAL EMPLOYEES RETIREMENT SYSTEM-BASIC ANNUITY**

3. The authority citation for part 842 is revised to read as follows:

**Authority:**

5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and Sec. 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under Sec. 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.109 also issued under Sec. 1622(b) of Pub. L. 104–106, 110 Stat. 515; Sec. 842.110 also issued under Sec. 111 of Pub. L. 99-500, 100 Stat. 1783, and Sec. 111 of Pub. L. 99-591, 100 Stat. 3341-348, and also Sec. 1 of Pub. L. 110-279, 122 Stat. 2602, as amended by Sec. 1(a) of Pub. L. 116-21, 133 Stat. 903; Sec. 842.208 also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.304 and 842.305 also issued under Sec. 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under Sec. 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under Sec. 4005 of Pub. L. 101–239, 103 Stat. 2106 and Sec. 7001 of Pub. L. 101–508, 104 Stat. 1388; Subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under Sec. 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also

issued under Sec. 226(c)(2) of Pub. L. 108–176, 117 Stat. 2529; Subpart J also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042.

### **Subpart A—Coverage**

4. Add § 842.110 to read as follows:

#### **§ 842.110 Continuation of coverage for food service employees of the House of Representatives or the Senate Restaurants.**

(a) *Election.* Congressional employees who were covered by FERS and provide food service operations for the House of Representatives or the Senate Restaurants can elect to continue their FERS retirement coverage when such food service operations are transferred to a private contractor. These regulations also apply to any successor contractors.

(b) *Eligibility requirements.* To be eligible for continuation of retirement coverage, an employee must:

(1)(i) Be a Congressional employee (as defined in sec. 2107 of title 5, United States Code), other than an employee of the Architect of the Capitol, engaged in providing food service operations for the House of Representatives under the administrative control of the Architect of the Capitol; or

(ii) Be a Senate Restaurants employee who is an employee of the Architect of the Capitol on July 17, 2008;

(2) Be subject to FERS;

(3) Elect to remain covered under FERS retirement provisions no later than the day before the date on which the food service operations transfer from the House of Representatives or the Senate Restaurants to a private contractor; and

(4) Become employed to provide food services under contract without a break in service.

A “break in service” means a separation from employment of at least three calendar days.

(c) *Employee deductions.* An employee who elects to continue coverage under FERS is deemed to consent to deductions from his or her basic pay for the Civil Service Retirement and Disability Fund in the amount determined in accordance with 5 USC 8422. The employer providing the food services under contract must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund the amounts deducted from an employee's pay.

(d) *Employer contributions.* The employer providing food services under contract must, in accordance with procedures established by OPM, pay into the Civil Service Retirement and Disability Fund amounts equal to any agency contributions under 5 USC 8423 that would be required if the individual were a Congressional employee covered by the Federal Employees Retirement System.

(e) *Basic pay of covered former Senate Restaurants Employees.* Beginning with annuity payments commencing on or after [EFFECTIVE DATE OF FINAL RULE], the rate of basic pay paid by a Contractor (defined by 2 USC 2051(a)(2)) to a covered former Senate Restaurants Employee (defined by 2 USC 2051(a)(1)) for any period of continuous service performed as an employee of the contract shall be deemed to be basic pay for purposes of 5 USC 8401(3)-(4).

(f) *Retroactive agency contributions and employee deductions related to covered former Senate Restaurants Employees.* The agency contributions and employee deductions that must be paid in accordance with 5 USC 8423 and 2 USC 2051(c)(6)(A)(ii) for the period on or after June 12, 2019, until [EFFECTIVE DATE OF FINAL RULE] must be treated in accordance with § 841.505 of this title.

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