THE SOCIAL SECURITY BENEFITS FORMULA AND THE WINDFALL ELIMINATION PROVISION: AN EQUITABLE APPROACH TO ADDRESSING 'WINDFALL' BENEFITS

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I.   INTRODUCTION

Joan Piacquadio, at the time a 73-year-old widow, testified before the Subcommittee on Social Security, Pensions, and Family Policy in 2007 about the hardship that she had suffered by operation of the Windfall Elimination Provision (WEP).[1] During her 50-year career as a registered nurse, Joan worked for 25 years in her local public school system.[2] While Joan's testimony does not provide precise details, it is clear that some portion of her service for the public school system constituted noncovered employment[3] – employment for which Joan received earnings that were not subject to Social Security taxes.[4] Unfortunately for Joan, an employment record that reflected noncovered employment subjected her to application of a controversial provision of the Social Security Act – the WEP.[5] By operation of the WEP, Joan qualified for a Social Security benefit of $167 per month ($2,004 per year) after a 50-year career.[6] Forced to work well into her elder years to make ends meet, Joan only retired after her heart failed at age 73 and she underwent a triple-bypass surgery.[7]

Certain federal, state, and local government employees do not pay into the Social Security system, but rather, pay into alternative government pension plans.[8] For purposes of the Social Security Act, where a worker pays into an alternative government pension plan, the worker's employment constitutes noncovered employment.[9] Even if a worker's employment record reflects significant periods of noncovered employment, the worker may still qualify for Social Security coverage

1. *Government Pension Offset (GPO) and Windfall Elimination Provision (WEP): Policies Affecting Pensions from Work Not Covered by Social Security: Hearing Before Subcomm. On Soc. Sec., Pensions, and Family Planning*, 110th Cong. 49 (2007) [hereinafter *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family Planning*].

2. *Id.*

3. *Id.*

4. 42 U.S.C. § 410(a)(7) (2008).

5. *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family Planning*, *supra* note 1, at 49; 42 U.S.C. § 415(a)(7)(A) (2006).

6. *Id.*

7. *Id.*

8. 42 U.S.C. § 410(a)(5), (7).

9. *Id.*

because she satisfies the minimum requirement of 10 years (40 quarters) of earnings in Social Security covered employment.[10] However, an employment record that reflects both covered and noncovered employment presents a challenge to equitable application of the Social Security Act. To determine the benefits to which a worker is entitled, the Social Security Act first employs an averaging provision that considers 35 years of covered employment.[11] Where an individual's employment record does not reflect 35 years of covered employment, the averaging provision compresses the worker's average earnings.[12] Effectively, a lifetime high-income worker who held both covered and noncovered employment appears to be a lifetime low-income worker by operation of the averaging provision.[13] The second step in determining a worker's Social Security benefits entails application of a progressive benefits formula to the workers average earnings.[14] By operation of the averaging provision and the progressive benefit formula, a high-income worker who held both covered and noncovered employment received a higher than statutorily intended replacement rate (the ratio of benefits to average earnings) prior to 1983.[15] In an effort to downward-adjust Social Security benefits for workers who held both covered and noncovered employment, Congress enacted the WEP in 1983.[16]

According to the Government Accountability Office, in 2007, the Social Security system covered approximately 96 percent of the American workforce; the remaining four percent of noncovered workers were predominantly public employees.[17] The four percent of the American workforce that does not pay into the Social Security system consists of approximately 6.8 million state and local government workers, and half a million federal government workers.[18] Thus, more than seven million federal, state, and local government employees can potentially be subject to the WEP, and the type of hardship, which Joan Piacquadio experienced.

Reducing the Social Security benefits of over one million retired federal, state, and local government employees,[19] the WEP is an extremely controversial component of the Social Security Act that has elicited a variety of criticisms from scholars and opponents.[20] For example, critics charge that the WEP, due to its

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10. 42 U.S.C. § 414(a)(2) (2006); 42 U.S.C. § 413(a)(2)(A)(ii) (2006); 42 U.S.C. § 415(a)(7)(D).

11. 42 U.S.C. § 415(b)(1)(A); 42 U.S.C. § 415(b)(2)(A)(i); 42 U.S.C. § 415(b)(2)(B)(i).

12. *See* discussion *infra* Part 2.D: Effect of Noncovered Employment Under the Social Security Benefits Formula.

13. *Id.*

14. 42 U.S.C. § 415(a)(1)(A).

15. *See* discussion *infra* Part 2.D: Effect of Noncovered Employment Under the Social Security Benefits Formula.

16. *See* discussion *infra* Part 2.E: Towards Enactment of the WEP.

17. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-248T, SOCIAL SECURITY: ISSUES REGARDING THE COVERAGE OF PUBLIC EMPLOYEES: STATEMENT OF BARBARA D. BOVBJERG, DIRECTOR EDUCATION, WORKFORCE, AND INCOME SECURITY 1 (2007).

18. *Id.*

19. U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4.

20. ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION. PROVISION (WEP) 6 (2010); *See* Discussion *infra* Part 3: WEP: The Problems.

regressive structure, disproportionately affects low-income workers.[21] Another problem surrounding the WEP involves the administrative challenge of enforcing the provision, as a disparity presently exists in the degree to which the SSA enforces the WEP against federal retirees, as compared to state and local retirees.[22] Finally, SSA efforts to communicate with the public about the provision are insufficient, resulting in public misperception and resentment,[23] as well as significant hardship when workers mistakenly fail to account for the provision's effects.[24]

Recognizing the considerable problems underlying the WEP, legislators have consistently sought to modify, replace, or repeal the WEP. During the previous decade and a half, Senators and Representatives have introduced at least 35 bills before Congress addressing the WEP.[25] Suggestive of Congressional interest in reliving public servants from the potential hardships stemming from the WEP, one bill has received as many as 337 cosponsors in the House of Representatives.[26] Together, the bills represent four distinct legislative proposals: (1) the Social Security Fairness Act,[27] (2) the WEP Relief Act (2004 and later),[28] (3) the WEP Relief Act (pre-2004),[29] and (4) the Public Servant Retirement Protection Act.

This Article begins in Part II by explaining the rationale behind the WEP. Part II explains the policy underlying the Social Security system, the operation of the Social Security benefits formula, the effect of noncovered employment, and the operation of the WEP. Next, in Part III, this Article examines the WEP's underlying problems, which include structural and administrative issues that disproportionately

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21. Jeffery R. Brown & Scott Weisbenner, *The Distributional Effects of the Social Security Windfall Elimination Provision*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH 8-13 (Sept. 2008), http://www.nber.org/programs/ag/rrc/08-05%20Brown%20Weisbenner%20FINAL.pdf (last visited Jan. 15, 2012).

22. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4-7.

23. Brown & Weisbenner, *supra* note 21, at 19; ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) 19 (2010).

24. *Id.* at 6.

25. H.R. 1332, 112th Cong. (2011); H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); S. 113, 112th Cong. (2011); S. 2010, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); H.R. 1221, 111th Cong. (2009); H.R. 2145, 111th Cong. (2009); S. 490, 111th Cong. (2009); S. 484, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); H.R. 726, 110th Cong. (2007); H.R. 2772, 110th Cong. (2007); S. 206, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); H.R. 1690, 109th Cong. (2005); H.R. 1714, 109th Cong. (2005); H.R. Res. 987, 109th Cong. (2006); S. 619, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); H.R. 2011, 108th Cong. (2003); H.R. 2611, 108th Cong. (2003); H.R. 4234, 108th Cong. (2004); H.R. 4391, 108th Cong. (2004); H.R. Res. 523, 108th Cong. (2004); S. 349, 108th Cong. (2003); S. 1011, 108th Cong. (2003); S. 2455, 108th Cong. (2004); H.R. 1073, 107th Cong. (2001); H.R. 2638, 107th Cong. (2001); S. 1523, 107th Cong. (2001); S. 2521, 107th Cong. (2002); H.R. 860, 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

26. H.R. 82, 110th Cong. (2008).

27. H.R. 1332, 112th Cong. (2011); S. 2010, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); S. 484, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); S. 206, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); S. 619, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); S. 349, 108th Cong. (2003); H.R. 2638, 107th Cong. (2001); S. 1523, 107th Cong. (2001).

28. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004).

29. H.R. 2011, 108th Cong. (2003); S. 1011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); S. 2521, 107th Cong. (2002); H.R. 860, 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

impact low-income workers. Moreover, Part III examines the public misperception and resentment surrounding the WEP, and deficiencies in the Social Security Administration's efforts to communicate the rational underlying the provision to the public. Part IV considers the considerable legislative effort over the past decade and a half to modify, replace, or repeal the WEP, providing an explanation and analysis of each bill. Finally, building on the concepts developed in each of the previous sections, Part V presents an alternative approach to eliminating the "'windfall'" benefits that accrue to noncovered workers. The alternative approach balances the fundamental tenants of the Social Security system – a progressive benefits structure and the earned right nature of benefits. As such, the approach ensures equitable benefits to noncovered workers.

II.   THE SOCIAL SECURITY BENEFITS FORMULA AND THE WEP

A.   *Social Security: Purpose and Principles*

In 1935, at the height of the Great Depression, Congress answered President Roosevelt's call to protect the American workforce against the "hazards and vicissitudes of life,"[30] by enacting the Social Security Act of 1935 – an act originally intended to raise the general welfare by providing federal old-age benefits and by enabling the states to provide family aid and unemployment compensation.[31] Through subsequent amendment, the Social Security Act has expanded, providing old-age, disability, and survivors' insurance to insured workers, as well as their dependents – presently the Social Security system covers approximately 96 percent of the American workforce.[32] Although Congress designed the system to extend protection to retiring workers and their families, the Social Security benefits formula does not replace 100 percent of a worker's preretirement income, but rather, provides a safety net by replacing a percentage of preretirement income.[33] Given the decision to only replace a percentage of preretirement income, the system requires a progressive benefit structure – low-income workers receive benefits representing a greater percentage of preretirement income than their high-income counterparts – to provide, an adequate standard of living for retiring low-income workers.[34] Thus, the Social Security system redistributes income from high-income workers to workers with low lifetime earnings, and even transfers income based on family structure and lifespan.[35] Despite the progressivity of the Social Security benefits formula, a fundamental principle of the Social Security system is that entitlement to benefits through the

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30. President Franklin D. Roosevelt, Message to Congress Reviewing the Broad Objectives and Accomplishment of the Administration (June 8, 1934).

31. H. R. REP. NO. 615 (1935).

32. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 3-4.

33. Francine Lipman & James E. Williamson, *Social Security Benefits 101*, 53 ORANGE COUNTY LAW 30, 31 (2011).

34. *Id.*

35. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 3.

system represents an "'earned right.'"[36] As such, the benefits to which a retiring worker is entitled reflect contributions, which the worker, and her employer, paid in Social Security taxes.[37]

B.   Social Security: Eligibility Basics

Under Title II of the Social Security Act, a worker's eligibility for Social Security benefits based on her own work record depends upon two requirements. First, the worker must receive sufficient taxable earnings in Social Security covered employment for 10 years (40 quarters).[38] Beginning in 1978, the Social Security Administration (SSA) indexed the amount of taxable earnings required for a quarter of coverage to wage growth;[39] in 2013, the amount of taxable earnings required for a quarter of coverage is $1,160.[40] Upon earning 40 credits for social security covered employment, the worker becomes a fully insured individual;[41] however, the worker is not eligible to receive Social Security benefits until she attains retirement age.

Retirement age varies according to the date on which a worker attains early retirement age and whether a worker elects to retire at early retirement age, full retirement age, or a deferred retirement age. For the purposes of old-age insurance benefits, early retirement age means age 62.[42] A worker first becomes eligible to receive Social Security benefits upon attaining early retirement age;[43] however, Title II provides for a reduction of a worker's primary insurance amount (PIA) – the monthly benefit payable to the worker at full retirement age – if a worker elects to receive Social Security benefits at early retirement age.[44] Specifically, a worker reaching early retirement age on or before December 31, 2016 that elects to receive Social Security benefits upon attaining early retirement age receives a 25 percent reduction in PIA gradually increasing to a 30 percent reduction in PIA for workers attaining early retirement age on or after January 1, 2022.[45] For a worker attaining early retirement age before January 1, 2017, full retirement age means age 66;[46] by

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36. *Penalty for Public Service: Do the Social Security Government Pension Offset and Windfall Elimination Provision Unfairly Discriminate Against Employees and Retirees?: Hearing Before the Senate Committee on Governmental Affairs*, 108th Cong. 13 (2003) [hereinafter *Hearing: Penalty for Public Service*] (statement of Jo Anne B. Barnhart, Commissioner of Social Security).

37. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 3.

38. 42 U.S.C. § 414(a)(2) (2006); 42 U.S.C. § 413(a)(2)(A)(ii) (2006).

39. 42 U.S.C. § 413(d)(2).

40. Social Security Administration: Fact Sheet: 2013 Social Security Changes, available at www.ssa.gov/pressoffice/factsheetscolafacts2013.html; Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011) (setting forth 2012 limit of $1,130).

41. 42 U.S.C. § 414(a).

42. 42 U.S.C. § 416(l)(2) (2006).

43. 42 U.S.C. § 402(a)(2) (2006); 42 U.S.C. § 415(a)(3)(B) (2006).

44. 42 U.S.C. § 402(q)(1).

45. 42 U.S.C. § 402(q)(1), (9); 42 U.S.C. § 416(l)(1)(D).

46. 42 U.S.C. § 416(l)(1)(C); For workers attaining early retirement age on or after January 1, 2022, full retirement age means age 67. 42 U.S.C. § 416(l)(1)(E). The statute provides for incremental increases in full

definition, PIA is 100 percent for workers electing to receive Social Security benefits at full retirement age. Finally, workers may elect to defer retirement age to age 70 receiving annual deferred retirement credits to PIA of 8 percent up to 132 percent of PIA.[47]

C.   The Social Security Benefits Formula

The monthly benefit to which a worker is entitled upon attaining full retirement age is the worker's PIA.[48] The SSA determines a worker's PIA by first calculating the workers average indexed monthly earnings (AIME).[49] For a worker attaining age 21 after 1950, the formula for AIME considers the worker's annual earnings in Social Security covered employment between the calendar year after which the worker reaches age 21 and the calendar year in which the worker reaches early retirement age.[50] Title II then provides for wage indexing - based on the national average wage index - of annual earnings for each covered year of employment to account for wage growth during the period in consideration.[51] From the 40 years of wage indexed annual earnings in consideration, the formula for AIME disregards annual earnings for the worker's five lowest-paid years of earnings.[52] Thus, AIME is concerned with a worker's 35 highest earning years in Social Security covered employment. Finally, the SSA derives AIME by totaling annual earnings from the worker's 35 highest-earning years, and dividing the sum by 420 – the number of months in 35 years.[53]

$$\text{AIME} = \frac{Salary_{Year\ 1} + Salary_{Year\ 2} \ldots + Salary_{Year\ 35}}{35\ years * 12\ months\ (or\ 420\ months)}$$

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retirement age for workers attaining early retirement age between January 1, 2016 and December 31, 2021. 42 U.S.C. § 416(l)(1)(D), (3)(B).

47. 42 U.S.C. § 402(w)(1), (2), (6)(D). (The 8 percent annual credit applies to individuals attaining early retirement age in calendar years after 2004. The statute provides for alternative deferred retirement credits for individuals attaining early retirement age on or before 2004.) 42 U.S.C. § 402(w)(6)(A)-(D). In determining the deferred retirement credit to which an individual is entitled, the Social Security Act considers the number of increment months for such individuals. Increment months include the number of elapsed months from the month in which the individual reaches retirement age to the month before the month in which the individual reaches age 70. 42 U.S.C. § 402(w)(2)(A), (B)(i)-(iii). If the individual reaches early retirement age before January 1, 2017, then the individual will attain full retirement age at 66 years of age. 42 U.S.C. § 416(l)(1)(C). Thus, for such an individual, the statute is concerned with up to 48 increment months. 42 U.S.C. § 402(w)(2)(A), (B)(i)-(iii). To determine the deferred retirement credit, the statute instructs the SSA to derive the product an individual's total increment months multiplied by two-thirds of one percent (for an individual reaching early retirement age after 2004. If the individual defers retirement until age 70, she will receive the maximum deferred retirement credit - 132 percent of PIA (48 * ((2/3) * .01)). As noted above, for workers attaining early retirement age after January 1, 2022, full retirement age means age 67. 42 U.S.C. § 416(l)(1)(E). Thus, for such an individual, the statue will consider a maximum of 36 increment months. 42 U.S.C. § 402(w)(2)(A), (B)(i)-(iii). If a worker reaches early retirement age after January 1, 2022, and defers retirement until age 70, she will receive the maximum deferred retirement credit for such an individual – 124 percent of PIA (36 * ((2/3) * .01)).

48. 42 U.S.C. § 415(a)(1)(A) (2006).

49. *Id.*

50. 42 U.S.C. § 415(b)(1)(A).

51. 42 U.S.C. § 415(b)(3)(A).

52. 42 U.S.C. § 415(b)(2)(A)(i), (b)(2)(B)(i).

53. 42 U.S.C. § 415(b)(1).

Once the SSA has computed a worker's AIME, Title II requires the SSA to apply a formula to AIME to derive the worker's PIA.[54] The formula separates AIME into three brackets, which are delineated by dollar amounts – the dollar amounts separating each bracket are known colloquially as "bendpoints."[55] Title II provides for wage indexing of the bendpoints, based on the national average wage index, to insure that the PIA reflects increases in the standard of living for successive generations of retirees.[56] For a worker who first becomes eligible to receive Social Security benefits in 2012 – that is, a worker who attains early retirement age (62) in 2012 – the bendpoints are $767 and $4,624 ($791 and $4,768 in 2013).[57] Thus, the brackets of AIME are as follows: the first bracket includes AIME up to $767 (the first bendpoint); the second bracket includes AIME between $768 and $4,624 (the second bendpoint); and the third bracket includes AIME from $4,625 to the social security taxable earning ceiling. As with other elements of the AIME and PIA equations, Title II provides for wage indexing of maximum taxable earnings,[58] resulting in a taxable earning ceiling of $110,100 in 2012 ($113,700 in 2013),[59] and a maximum AIME of $8,199 ($8,539 in 2013)[60] for a worker attaining early retirement age in 2012.[61] The formula for PIA applies a different percentage

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54. 42 U.S.C. § 415(a)(1)(A).

55. 42 U.S.C. § 415(a)(1)(A)(i)-(iii), (a)(B)(i); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

56. 42 U.S.C. § 415(a)(B)(ii); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

57. Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

58. 42 U.S.C. § 415(e)(1). The bendpoints for a covered worker who attains early retirement in 2013 are $791 and $4,768. Social Security Administration, Primary Insurance Amount, available at www.ssa.gov/OACT/COLA/piaformula.html.

59. Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,114, 66,115 (Oct. 25, 2011). The maximum taxable earnings ceiling for 2013 is $113,700. Social Security Administration: Fact Sheet: 2013 Social Security Changes, available at www.ssa.gov/pressoffice/factsheetscolafacts2013.html.

60. The maximum AIME for a working retiring in 2013 is $8,539. *Id.*

61. For purposes of the Internal Revenue Code, maximum taxable earnings equals the Social Security Act's contribution and benefit base. 26 U.S.C. § 3121(a)(1) (2006). Calculating the contribution and benefit base under the Social Security Act is complex. For example, where a worker received earnings in Social Security covered employment after 1981, the contribution and benefits base equals the product of $29,700 and the quotient obtained by dividing the national average index for the calendar year preceding a year in which the Commissioner of Social Security increases benefits due to a cost of live increase by the national average wage index for the calendar year 1992. 42 U.S.C. § 430(c) (2006). The initial dollar value that the SSA multiples by the above ratio varies based on the year in which a worker received earnings from employment. 42 U.S.C. § 430(b), (c). Given the calculation for the contribution and benefit base, maximum taxable earnings vary from year to year, and have generally increased with inflation. *See, Maximum Taxable Earnings (1937 – 2012)* SOCIAL SECURITY ONLINE, http://www.ssa.gov/planners/maxtax.htm (last visited Mar. 10, 2012) for a list of the dollar values representing maximum taxable earnings from 1937 to 2012. To determine AIME for a worker who receives maximum taxable earnings during each of 35 years in covered employment, the Social Security Act requires the SSA to multiply earnings in a given year by the quotient obtained by dividing the national average wage index for the calendar year in which a worker attains 60 years of age by the national average wage index for the year in which the worker received the earnings. 42 U.S.C. § 415(b)(3)(A)(i), (ii). If one performs this calculation for maximum taxable earnings from calendar years 1978 to 2012, and divides by 35 years of employment, one finds that the worker received average annual earnings of $98,388. To avoid adding a layer of complexity, anytime this Article refers to maximum taxable earnings, it will assume average annual wage indexed earnings of $98,388. Note that technically, the value for a worker who earned maximum taxable earnings will be above or below this value in most calendar years.

factor to each bracket of AIME: PIA includes 90 percent of the first bracket, 32 percent of the second bracket, and 15 percent of the third bracket.[62] Where the product of an AIME bracket multiplied by a percentage factor does not end in a multiple of $0.10, Title II provides for rounding the product down to the nearest multiple of $0.10.[63] The sum of these amounts equals PIA.[64]

$$PIA = 0.9*min(AIME, \$767) + 0.32*max(0,min(AIME, \$4,624) - \$767) + 0.15*max(0,AIME - \$4,624)$$

To illustrate application of the formulas for AIME and PIA, consider examples of a hypothetical low-income worker, average-income worker, and high-income worker. First, the low-income worker held Social Security covered employment for 35 years during which time she earned an average indexed annual wage of $9,000. The low-income worker's AIME is $750 (($9,000 * 35 years) / 420).[65] Attaining early retirement age in 2012, the low-income worker has a PIA of $675 ($750 * .9).[66] By contrast, the middle-income worker, who also worked in Social Security covered employment for 35 years, earned an average indexed wage of $45,000. As such, the middle-income worker's AIME is $3,750 (($45,000 * 35 years) / 420)[67] and, if she attains early retirement age in 2012, her PIA is $1,644.80 (($767 *.9) + (($3,750 - $767) * .32).[68] Finally, the high-income worker, who also held Social Security covered employment for 35 years, but earned an average indexed annual wage equal to the Social Security taxable earning ceiling of $98,388[69] has an 'AIME equals $8,199 (($98,388 * 35) / 420).[70] If the high-income worker attains early retirement age in 2012, his PIA will be the maximum PIA available to a worker of his birth cohort - $2,460.70 (($767 *.9) + (($4,624 - $767) * .32) + (($8,199 - $4,624) * .15).[71]

Application of Social Security benefits formula for a worker with AIME of $750

First Bracket of AIME	$750 * .9 = $675
Total PIA	$675

Application of Social Security benefits formula for a worker with AIME of $3,750

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62. 42 U.S.C. § 415(a)(1)(A)(i)-(iii).

63. 42 U.S.C. § 415(a).

64. 42 U.S.C. § 414(a)(1)(A) (2006).

65. 42 U.S.C. § 415(b).

66. 42 U.S.C. § 415(a).

67. 42 U.S.C. § 415(b).

68. 42 U.S.C. § 415(a).

69. *See* Discussion *supra* Footnote 61.

70. 42 U.S.C. § 415(b); *see Social Security Benefit Amounts*, SOCIAL SECURITY ONLINE, http://www.ssa.gov/oact/COLA/Benefits.html (last visited Mar. 10, 2012) (providing that a worker who received maximum taxable earnings over 35 years of covered employment has an AIME of $8,199 if she reaches early retirement age in 2012. This confirms the discussion from Footnote 61 ($8,199 * 12 = $98,388).

71. 42 U.S.C. § 415(a).

First Bracket of AIME	$767 * .9 = $690.3
Second Bracket of AIME	$3,750 * .32 = $954.56
Total PIA	$1,644.86 (rounded down to $1,644.80)

Application of Social Security benefits formula for a worker with AIME of $8,199

First Bracket of AIME	$767 * .9 = $690.3
Second Bracket of AIME	$3,857 * .32 = $1,234.24
Third Bracket of AIME	$3,575 * .15 = $536.25
Total PIA	$2,460.79 (rounded down to $2,460.70)

As demonstrated by the example of the high-income worker, a worker receiving maximum taxable earnings in Social Security covered employment for 35 years will have a PIA of $2,460.70, or 30 percent of the worker's AIME, if she reaches early retirement age in 2012. Comparing PIA as a percentage of AIME for the high-income worker to the same figures for the average and low-income workers provides an illustration of the progressivity of the Social Security benefits formula – a consequence of the operation of the decreasing percentage factors applicable to the increasing brackets of AIME. For example, the average-income worker receives a PIA of $1,644.80 in the above example, and collects 44 percent of his AIME. His counterpart, the low-income worker, receives a PIA of $675, or 90 percent of his AIME. Looking to the "cost/benefit advantage" accruing to the middle and low-income worker, as compared to the high-income worker, similarly illustrates the progressivity of the formula.[72] In the above example, the high-income worker receives a monthly benefit 50 percent larger than the middle-income worker and 265 percent larger than the low-income worker; however, during her employment, the high-income worker paid 119 percent more in Social Security taxes than the middle-income worker, and 993 percent more than the low-income worker.[73]

Comparison of PIA, Replacement Rates, and Employee Contributions

Worker	PIA	Replacement Rate	Employee Contributions
High-Income	$2,460.70	30 percent	$213,502
Average-Income	$1,644.80	44 percent	$97,650
Low-Income	$675	90 percent	$19,530

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72. Lipman & Williamson, *supra* note 39, at 10, 11 (2011).

73. Calculations are based on the present FICA employee tax rate of 6.2 percent, 26 U.S.C 3101(a);

($2,460.70 / $1,644.80) * 100 = 150 percent

($2,460.70 / $675) * 100 = 365 percent

((($98,388 * 35) *.062) / (($45,000 *35) * .062)) * 100 = 219 percent

((($98,388 * 35) *.062) / (($9,000 *35) * .062)) * 100 = 1093 percent

D. *Effect of Noncovered Employment under the Social Security Benefits Formula*

The previous examples demonstrate application of the formulas for an individual's AIME and PIA to workers with 35 years of Social Security covered employment – a full employment record for purposes of the calculation for AIME.[74] However, some workers do not hold Social Security covered employment for 35 years, but rather, spend varying portions of their careers in noncovered employment. The possibility of holding employment that is not covered by the Social Security system is a consequence of the gradual process by which Congress extended coverage to the American workforce. When Congress enacted the Social Security Act in 1935, it extended coverage to most workers in commerce and industry – approximately 60 percent of the workforce at the time.[75] Congress did not originally extend Social Security coverage to federal government employees because they received pension benefits through the Civil Service Retirement System.[76]

The Social Security Amendments Act of 1983 extended mandatory Social Security coverage to federal employees hired after December 31, 1983; however, the Act did not extend Social Security coverage to federal employees who began their employment prior to the effective date.[77] Moreover, Title II of the Social Security Act permits federal employees to elect coverage under the Federal Employees Retirement Act of 1986 in lieu of the Social Security Act.[78] Additionally, in 1935, Congress did not extend Social Security coverage to state and local government employees due to concerns regarding the constitutionality of imposing a Social Security tax on state governments.[79] Subsequent legislation in 1950 permitted state and local governments that lacked a pension plan to elect coverage for their employees through the Social Security system. Additional legislation in 1954 extended the option to state and local government employees already covered by a pension plan if a majority of governmental employees within a given jurisdiction concurred in the decision.[80] The legislation originally permitted state and local government employees to terminate coverage under the Social Security system; however, the Social Security Amendments Act of 1983 prohibits states from terminating coverage agreements entered into on or after April 20,

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74. 42 U.S.C. § 415(b)(1)(A), (b)(2)(A)(i), (b)(2)(B)(i).

75. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 3.

76. Nat'l Comm'n on Soc. Sec., *Social Security in America's Future: Final Report of the National Commission on Social Security, March, 1981*, SOCIAL SECURITY ONLINE, available at http://www.ssa.gov/history/reports/80commission.html.

77. Social Security Amendments Act of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended at 42 U.S.C. 410 (2006)).

78. 42 U.S.C. § 410(a)(5)(H) (2008).

79. Nat'l Comm'n on Soc. Sec., *Social Security in America's Future: Final Report of the National Commission on Social Security, March, 1981*, SOCIAL SECURITY ONLINE, available at http://www.ssa.gov/history/reports/80commission.html.

80. Nat'l Comm'n on Soc. Sec., *Social Security in America's Future: Final Report of the National Commission on Social Security, March, 1981*, SOCIAL SECURITY ONLINE, available at http://www.ssa.gov/history/reports/80commission.html.

1983.[81] Thus, Title II excludes from the definition of Social Security covered employment the services performed by federal employees who were employed before 1984[82] or who elected coverage through the Federal Employees Retirement Act.[83] Additionally, the definition excludes services performed by state and local government employees who have not elected coverage through the Social Security system.[84] The result is logical as federal, state, and local government employees do not pay Social Security taxes on their earnings, but rather, pay into alternative pension programs.[85]

Even if a worker's employment record reflects significant periods of noncovered employment, the worker may still qualify for Social Security coverage because she satisfies the minimum requirement of 10 years (40 quarters) of earnings in Social Security covered employment.[86] Examples of workers with this type of employment record include public school teachers, who hold Social Security covered employment during the summer months, professors at public universities who previously worked at private universities, or police officers who retire early and take employment in the private sector.[87] When a worker has less than 35 years of Social Security covered employment, the SSA enters a zero value for wages in calendar years during which the worker only derived earnings through noncovered employment.[88] However, the formula for calculating AIME continues to assume that such workers held Social Security covered employment for 35 years.[89] The averaging provision in the Social Security benefits formula has the effect of decreasing a worker's average lifetime earnings for workers with both covered and noncovered employment.

To illustrate application of the Social Security benefits formula to workers who held both covered and noncovered employment, consider the hypothetical high-income worker, average-income worker, and low-income worker from the previous example. Here each worker earned the same average indexed annual salary as before - $98,388, $45,000, and $9,000 – respectively; however, each worker held Social Security covered employment for 15 years, and noncovered employment for 20 years. As the high-income worker's employment record reflects 20 years of zero earnings for purposes of calculating AIME, his AIME is reduced to $3,513.90 (($98,388 * 15) / 420).[90] Consequently, if the high-income worker attains early retirement age in 2012, she will have a PIA of $1,569.30 (($767 *.9) + (($3,513.90

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81. 42 U.S.C. § 418(f) (2006); Social Security Amendments Act of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended at 42 U.S.C. § 418) (1983).

82. 42 U.S.C. § 410(a)(5)(B)(i).

83. 42 U.S.C. § 410(a)(5)(H).

84. 42 U.S.C. § 410(a)(7).

85. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 3.

86. 42 U.S.C. § 414(a)(2) (2006); 42 U.S.C. § 413(a)(2)(A)(ii) (2006); 42 U.S.C. § 415(a)(7)(D) (2006).

87. 42 U.S.C. 410(a)(5), (7); *see also*, Brown & Weisbenner, *supra* note 21, at 1 (citing as an example a professor who worked for a public university and a private university).

88. 42 U.S.C. § 415(b)(1)(A).

89. 42 U.S.C. § 415(a)(1)(A), (a)(7)(B)(1); 42 U.S.C. § 415(b)(1).

90. 42 U.S.C. § 415(b) (the calculation ignores 42 U.S.C. § 415(b)(1)(A) which considers years of Social Security covered employment).

- $767) * .32).[91] For the high-income worker, the effect of noncovered employment is to shift a greater portion of her earnings into the first and second brackets of AIME, resulting in a higher benefits replacement rate (the ratio of PIA to AIME) then her counterpart with 35 years of Social Security covered employment – here, the high-income worked receives a replacement rate of 45 percent.

The effect of an employment record including noncovered employment is similar for the average-income worker. Here, the average-income worker has a reduced AIME of $1,607.10 (($45,000 * 15) / 420)[92] and a PIA of $989.10 (($767 *.9) + (($1,607.10 - $767) * .32).[93] While the average-income worker in the previous example with 35 years of Social Security covered employment received a replacement rate of 44 percent, her counterpart in the present example receives a replacement rate of 62 percent.

Finally, with an employment record that only reflects 15 years of Social Security covered employment, the low-income worker has AIME of $321.40 (($9,000 * 15) / 420)[94] and will have a PIA of $289.30 ($389.30 * .9).[95] Note here that the low-income worker in this example receives the same replacement rate as his counterpart with 35 years of Social Security covered employment; given the low-income worker's very small AIME, the percentage factor for the first bracket of AIME applies regardless of her employment record. These examples demonstrate that an employment record that includes noncovered employment alters the intended progressivity of the Social Security benefits formula by necessarily increasing benefit replacement rates for average and high-income workers. Politicians and scholars often refer to the higher replacement rates that certain workers who held both covered and noncovered employment receive under the Social Security benefits formula as 'windfall' benefits.

	AIME (worker with identical earns stemming only from 35 years of covered employment)	PIA under Social Security Benefits Formula	Replacement Rate	AIME (based only on covered earnings)	PIA (without the WEP)	Replacement Rate
High-Income Worker	$8,199	$2,460.70	30 percent	$3,513.90	$1,569.30	45 percent

91. 42 U.S.C. § 415(a) (the calculation ignores 42 U.S.C. § 415(a)(7) which reduces the replacement rate to 40 percent for workers who held noncovered employment).

92. 42 U.S.C. § 415(b) (the calculation ignores 42 U.S.C. § 415(b)(1)(A) which considers years of Social Security covered employment).

93. 42 U.S.C. § 415(a) (the calculation ignores 42 U.S.C. § 415(a)(7) which reduces the replacement rate to 40 percent for workers who held noncovered employment).

94. 42 U.S.C. § 415(b) (the calculation ignores 42 U.S.C. § 415(b)(1)(A) which considers years of Social Security covered employment).

95. 42 U.S.C. § 415(a) (the calculation ignores 42. U.S.C. § 415(a)(7) which reduces the replacement rate to 40 percent for workers who held noncovered employment).

| Average-Income Worker | $3,750 | $1,644.80 | 44 percent | $1,607.10 | $989.10 | 62 percent |
| Low-Income Worker | $750 | $675 | 90 percent | $321.40 | $289.30 | 90 percent |

E.   Towards Enactment of the WEP

The National Commission on Social Security, which Congress created in December 1977 to study the fiscal status of the Old Age, Survivors, and Disability Insurance program and to identify any inequities that affect substantial numbers of insured workers,[96] was one of the first governmental bodies to identify the problem of 'windfall' benefits accruing to individuals who held both covered and noncovered employment.[97] The Commission released its report in March 1981, proposing 88 modifications to the Social Security system.[98] Even so, the Commission concluded that the Social Security system was "sound in principle," and that the system was the "best structure of income support for the United States."[99] Among the Commission's numerous proposals, the Commission recommended that Congress eliminate the 'windfall' benefits accruing to individuals who held both covered and noncovered employment.[100] To redress the 'windfall' benefits problem, the Commission recommended a dual approach: (1) mandatory Social Security coverage for all future federal, state, and local government employees[101] and (2) a modified formula for deriving the PIA of existing federal, state, and local government employees who have future noncovered employment.[102] While the Commission concluded that in principle, Social Security coverage should extend to the entire American workforce, the Commission ultimately determined that mandatory participation in the Social Security system should *not* extend to government workers to whom government pension programs already provided coverage.[103] As the Commission's mandatory coverage proposal did not apply to existing government employees, the proposal left open the possibility of existing government employees holding future noncovered employment.[104] For these government workers, the Commission recommended a rapid phase-out of windfall benefits through a modification to the PIA formula applicable to future non-covered employment.[105] The Commission's

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96. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (1977) (codified at 42 U.S.C. § 907).

97. Nat'l Comm'n on Soc. Sec., *Social Security in America's Future: Final Report of the National Commission on Social Security, March, 1981*, SOCIAL SECURITY ONLINE, available at http://www.ssa.gov/history/reports/80commission.html.

98. *Id.* at 3 and 10.

99. *Id.*

100. *Id.* at 171.

101. *Id.*

102. *Id.* at 191.

103. *Id.* at 170.

104. *Id.* at 172.

105. *Id.* at 191.

formula regarded all future employment, whether covered or noncovered, as Social Security covered employment.[106] To derive PIA, the Commission's formula applied the percentage factors to AIME; however, the formula added an additional step – multiply AIME by the ratio of covered to noncovered AIME to downward adjust PIA in proportion to covered employment.[107]

On December 16, 1981, President Reagan promulgated Executive Order 12335, which created the National Commission on Social Security Reform (NCSSR), a bipartisan commission tasked with "review[ing] relevant analyses of the current and long-term financial condition of the Social Security trust funds; indentify[ing] problems that may threaten the long-term solvency of such funds; [and] analyz[ing] potential solutions. . . that will both assure the financial integrity of the Social Security system and the provision of appropriate benefits."[108] The NCSSR released its report on January 20, 1983 recommending, among other more significant proposals, modifying the computation for PIA for workers who split their careers between Social Security covered employment and noncovered employment for workers first reaching early retirement age after 1983.[109] The NCSSR suggested two alternative approaches to addressing the problem of 'windfall' benefits accruing to high-income workers with short periods of Social Security covered employment.[110] To begin, the NCSSR proposed downward adjusting the PIA benefit formula for workers who held both covered and noncovered employment by applying the second percentage factor (32 percent) to the first bracket of AIME (ordinarily a replacement rate of 90 percent applies to the first bracket).[111] However, the NCSSR suggested that application of the modified formula should be limited by the size of a worker's noncovered pension – specifically, the reduction in benefits should not exceed the value of the noncovered pension.[112] Alternatively, the NCSSR proposed maintaining the present existing benefit formula, but applying the formula to both covered and noncovered employment to determine a replacement rate for covered employment based on the ratio of benefits payable to covered employment.[113] In

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106. *Id.*

107. *Id.* To date, Congress has not implemented this proposal. *See generally*, 42 U.S.C. § 415 (2006). However, During markup sessions on the Social Security Amendments Act of 1983, the Subcommittee on Social Security of the House Committee on Ways and Means considered the NCSSR's alternative approaches to addressing 'windfall' benefits, and concluded that including non-covered wages in the calculation for AIME would pose "insurmountable administrative problems. John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 3, 10 (1983). Senator Hutchison and Representative Brady have introduced a bill that employs a similar mechanism during every Congress from 2004 to 2011. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004); *See infra*, Legislative Action; This Article proposes a method of adjusting benefits for workers who held both covered and noncovered employment that achieves a similar result, but through a different mechanism. *See* Discussion *infra* Part 6 Recommendation.

108. Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 16, 1981).

109. Nat'l Comm'n on Soc. Sec. Review, *Report of the National Commission on Social Security Reform*, 46 SOC. SECURITY BULL. 3, 7 (1983).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

making its proposals, the NCSSR referenced concern for the equity of permitting 'windfall' benefits to workers who held both covered and noncovered employment, and noted that its proposals would impose a net short-range cost.[114] Accordingly, a concern for the solvency of the Social Security System did not motivate the NCSSR's proposals to address these 'windfall' benefits.

F.   WEP: Legislative History

The legislative solution to the problem of 'windfall' benefits accruing to workers who held both covered and noncovered employment – the WEP – was enacted on April 20, 1983 with passage of the Social Security Amendment Act of 1983 ("the Act").[115] Aimed at comprehensive reform of the Social Security system, the Act included numerous other notable provisions including: (1) provision for a gradual increase in full retirement age from age 65 to age 67,[116] (2) extension of mandatory coverage to all federal workers hired after 1984,[117] and (3) application of the federal income tax to a portion of certain high-income worker's Social Security benefits.[118] The legislative process began on January 26, 1983, six days after the NCSSR released its report, when Senator Robert Dole introduced S.1,[119] which included the NCSSR's recommendations regarding the WEP.[120] During February 1983, the Subcommittee on Social Security of the House Committee on Ways and Means began markup sessions on a draft bill.[121] During markup sessions, the Subcommittee considered the NCSSR's alternative approaches to addressing 'windfall' benefits, and concluded that including non-covered wages in the calculation for AIME would pose "insurmountable administrative problems."[122] Instead, the Subcommittee adopted the NCSSR's recommendation of a reduced percentage factor for the first bracket of AIME in the calculation for PIA, finding that modification of the formula would produce results generally similar to inclusion of noncovered wages in AIME.[123] However, the House Report of the full House Committee on Ways and Means set the applicable percentage factor at 61 percent[124] rather than 32 percent as recommended by the NCSSR.[125] The provision

114. *Id.*

115. Social Security Amendments Act of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended at 42 U.S.C. 216) (2006).

116. Social Security Amendments Act of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended at 42 U.S.C. 216 (2006)).

117. Social Security Amendments Act of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended at 42 U.S.C. 210 (2006)).

118. Social Security Amendments Act of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended at 26 U.S.C. 86 (2006)).

119. S. 1, 98th Cong. (1983).

120. John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 3, 8 (1983).

121. *Id.* at 10.

122. *Id.*

123. *Id.*

124. H.R. REP. No. 98-25, pt. 1, Section II Summary of Principal Provisions (1983).

125. Nat'l Comm'n on Soc. Sec. Review, *Report of the National Commission on Social Security Reform*, 46 SOC. SECURITY BULL. 3, 7 (1983).

was to become applicable to individuals reaching age 60 after December 31, 1983, and was accompanied by a guarantee that application of the provision would not result in a decrease in benefits greater than one-half of a noncovered pension.[126] The Committee's bill became H.R. 1900 and was passed in the House of Representative on March 9, 1983 incorporating these provisions.[127]

The Senate Finance Committee began markup sessions on S.1 the day H.R. 1900 passed, allowing the Committee to consider the House bill's proposed modifications.[128] In the Senate Report of March 11, 1983, the Committee adopted the NCSSR's recommendation for a modified PIA calculation to eliminate 'windfall' benefits that would apply to individuals qualifying for a pension based on noncovered employment after 1983.[129] While the Committee selected 32 percent as the appropriate percentage factor applicable to the first bracket of AIME for workers who held both covered and noncovered employment, the Committee deviated from the NCSSR's recommendation by providing a phase-in of the WEP – a reduction of 10 percentage points for each year an individual falls short of 30 years of covered employment.[130] The Committee sought to protect individuals with small pensions stemming from non-covered employment by limiting operation of the provision to a reduction of one-third the value of a noncovered pension.[131] The Senate Finance Committee's modified version of S.1 became Amendment Number 516, which passed the Senate on March 23, 1983 as an amendment to H.R. 1900[132]

Thereafter, the House and Senate appointed a Conference Committee that considered the various modifications to the Social Security System on March 24, 1983.[133] In considering the WEP, the Conference Committee reached a compromise between the House and Senate proposals regarding the percentage factor applicable to the first bracket of AIME for individuals who held both covered and noncovered employment, setting the percentage factor at 40 percent.[134] The conference agreement incorporated the phase-in provision from the Senate's amendment reducing the applicable percentage factor at a rate of 10 percentage points for each year below 30 years of covered employment.[135] H.R. 1900, as agreed to in the Conference Committee Report, passed in the House on March 24 and the Senate on March 25,[136] and President Regan signed the bill into law on April 20, 1983.

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126. H.R. REP. NO. 98-25, pt. 1, Section II Summary of Principal Provisions (1983).(1983).

127. John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 3, 14 (1983).

128. *Id.* at 17.

129. S REP. NO. 98-23, at 5-6 (1983).

130. *Id.*

131. *Id.*

132. John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 3, 17, 21 (1983).

133. *Id.* at 23.

134. H.R. CONF. REP. NO. 98-47, p. 13-16 (1983).

135. *Id.*

136. John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 3, 24 (1983).

G.   The WEP Formula

The WEP is potentially applicable to individuals reaching early retirement age or becoming eligible for disability benefits after 1985, who also qualify, after 1985, for a government pension based, in whole or in part, upon noncovered employment.[137] However, even if a worker meets these two requirements, Title II provides several exclusions from application of the WEP. For example, the WEP does not apply to: (1) an individual that was a government employee before January 1, 1984 to whom the Social Security Amendments Act of 1983 extended mandatory social security coverage;[138] (2) individuals who receive benefits from foreign Social Security systems where the foreign country has reached a totalization agreement with the United States;[139] and (3) individuals who receive a pension under the Railroad Retirement Act of 1937 or 1974.[140] Additionally, the WEP does not apply to individuals who receive at least 30 years of substantial earnings in Social Security covered employment.[141] The SSA determines the amount of earnings necessary to qualify as "substantial earnings" by multiplying the contribution and benefit base, as determined prior to the Social Security Amendments of 1977 ($84,300 in 2013) by 25 percent.[142] Thus, in 2013, earnings of $21,075 qualify as "substantial earnings."[143] Finally, the WEP is applicable to derivative Social Security benefits, including spousal and dependent benefits; however, the provision does not apply to survivors' benefits.[144]

The WEP directs the SSA to follow the traditional procedure for determining AIME and PIA for a worker with less than 30 years of Social Security covered employment who qualifies for a pension based on noncovered employment.[145] However, the WEP modifies the formula for PIA by replacing the traditional percentage factor applicable to the first bracket of AIME – 90 percent – with a percentage factor of 40 percent for workers with earnings deriving from noncovered employment.[146] Thus, the WEP decreases the replacement rate for the first bracket of AIME – the ratio between PIA and AIME – for such workers. For individuals attaining early retirement age between 1986 and 1990, the WEP phased-in by decreasing the traditional 90 percent rate applicable to the first bracket of AIME by 10 percentage points per year over the 5-year phase-in period.[147] Additionally, the

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137. 42 U.S.C. § 415(a)(7)(A)(i), (ii) (2006).

138. 42 U.S.C. § 415(A)(7)(E).

139. 42 U.S.C. § 415(a)(7)(A)(ii).

140. *Id.*

141. 42 U.S.C. § 415(a)(7)(D).

142. 42 U.S.C. § 415(a)(1)(C)(ii), (a)(7)(D); Cost-of-Living Increase and Other Determinations for 2013, 77 Fed. Reg. 65,754 (Oct. 30, 2012); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011) (setting forth the contribution and benefits base amounts for 2012 as $81,900 and substantial earnings as $20,475).

143. Cost-of-Living Increase and Other Determinations for 2013, 77 Fed. Reg. 65,754 (Oct. 30, 2012).

144. 42 U.S.C. § 402 (2006).

145. 42 U.S.C. § 415(a)(7)(A)(ii), (a)(7)(B)(i), (a)(7)(D).

146. 42 U.S.C. § 415(a)(7)(B)(i).

147. 42 U.S.C. § 415(a)(7)(B)(ii)(I)-(IV).

WEP contains a second formula[148] that is applicable in certain circumstance to protect low-income workers.[149] Congress included the second formula as a guarantee that the reduction in a worker's Social Security benefits due to application of the WEP will not exceed one-half of the value of a worker's noncovered pension.[150] The second formula instructs the SSA to calculate PIA for a worker with noncovered employment using the traditional percentage factors, but to subtract one-half the value of the worker's noncovered pension from PIA.[151] The greater of the amounts derived from the first and second formulas becomes the worker's PIA.[152] When an individual has an employment record with between 21 and 29 years of substantial earnings in Social Security covered employment, the WEP is not fully applicable.[153] For such individuals, the WEP applies the percentage factor of 40 percent to the first bracket of AIME; however, each additional year of substantial earnings in Social Security covered employment above 20 years increases the applicable percentage factor by five percentage points.[154] Thus, for such workers, the percentage factors applicable to the first bracket of AIME range from 45 percent for 21 years of substantial earnings in Social Security covered employment, to 85 percent for 29 years.

As a demonstration of the WEP's application to individuals with both Social Security covered employment and noncovered employment, consider again the example of the high-income worker, average-income worker, and low-income worker. As in the previous examples, the workers received average indexed annual earnings of $98,388, $45,000, and $9,000 respectively; however, each worker held Social Security covered employment for 15 years and noncovered employment for 20 years. Since AIME is based on the worker's average earnings over 35 years (420 months), including a zero value for calendar years without substantial earnings in Social Security covered employment, the AIME for each worker is $3,513.90, $1,607.10, and $321.40 respectively (the same result as in the second example).[155] Accordingly, the PIA of the high-income worker is $1,185.8 (($767 *.4) + (($3,513.90 - $767) * .32),[156] resulting in a replacement rate of 34 percent. Note that application of the WEP has reduced the replacement rate for the worker with noncovered employment from 45 percent to 34 percent; however, the high-income worker still receives a replacement rate four percent greater than his counterpart with 35 years of Social Security covered employment.[157] Similarly, the average income worker receives a PIA of $575.60 (($767 *.4) + (($1,607.10 - $767) *

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148. *Id.*

149. ALLISON M. SHELTON, CONG. RESEARCH SERVICE., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) (2010); S. Rep. No. 98-23, at p. 15 (1983).

150. H.R. CONF. REP. NO. 98-47, at 120-121 (1983).

151. 42 U.S.C. § 415(a)(7)(B)(i).

152. 42 U.S.C. § 415(a)(7)(B)(i).

153. 42 U.S.C. § 415(a)(7)(D).

154. *Id.*

155. *See* Discussion *supra* Parts 2.C: The Social Security Benefits Formula, 2.D: Effect of Noncovered Employment under the Social Security Benefits Formula.

156. 42 U.S.C. § 415(a)(1)(A), (a)(7)(B)(ii)(V).

157. *See* Discussion *supra* Parts 2.C: The Social Security Benefits Formula, 2.D: Effect of Noncovered Employment under the Social Security Benefits Formula.

.32)[158] or a replacement rate of 36 percent. Here, the WEP has reduced the benefit replacement rate for the average-income worker with both covered and noncovered employment from 62 to 36 percent, but the worker now receives a replacement rate that is eight percent lower than his counterpart with 35 years of Social Security covered employment.[159] Finally, the low-income worker's PIA is $128.60 ($321.40 * .4),[160] which is equal to a replacement rate of 40 percent. As the low-income worker's AIME falls entirely within the bracket to which the first percentage factor (90 percent) traditionally applies, application of the WEP has decreased the replacement rate that the Social Security benefits formula traditionally affords the low-income worker by 50 percent.[161]

	AIME (worker with identical earns stemming only from 35 years of covered employment)	PIA under Social Security Benefits Formula	Rep. Rate	AIME (based only on covered earnings)	PIA (without the WEP)	Rep. Rate	PIA (with the WEP	Rep. Rate
High-Income Worker	$8,199	$2,460.70	30%	$3,513.90	$1,569.30	45%	$1,185.80	34%
Average-Income Worker	$3,750	$1,644.80	44%	$1,607.10	$989.10	62%	$4,575.60	36%
Low-Income Worker	$750	$675	90%	$321.40	$289.30	90%	$128.60	40%

As noted above, two components of the WEP can mitigate its affects for these hypothetical workers: (1) the guarantee of a maximum reduction equal to one-half the value of a worker's non-covered pension[162] and (2) a greater applicable percentage factor to the first bracket of AIME for 21-29 years of Social Security covered employment.[163] First, the maximum possible benefit reduction for a worker attaining early retirement age in 2012, regardless of income, is $383.50 ($4,602 annually).[164] This limitation on the benefit reduction arises because the WEP only adjusts the percentage factor applicable to the first bracket of AIME (reduction of the replacement rate for the first $767 of AIME from 90 percent to 40 percent).[165] As the reduction in benefits due to the WEP cannot exceed one-half the value of a noncovered pension, the WEP will not be fully applicable to any worker, regardless

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158. 42 U.S.C. § 415(a)(1)(A), (a)(7)(B)(ii)(V).

159. *See* Discussion *supra* Parts 2.C: The Social Security Benefits Formula, 2.D: Effect of Noncovered Employment under the Social Security Benefits Formula.

160. 42 U.S.C. § 415(a)(1)(A), (a)(7)(B)(ii)(V).

161. *See* Discussion *supra* Part 2.C: The Social Security Benefits Formula.

162. 42 U.S.C. § 414(a)(7)(B)(i).

163. 42 U.S.C. § 415(a)(7)(D).

164. 42 U.S.C. § 415(a)(1)(A), (a)(1)(B)(i), (a)(7)(B)(ii)(V).

165. *Id.*

of income, who receives a government pension of less than $767 ($383.50 * 2) per month. In the previous examples, the low-income worker received a PIA of $690.30 before application of the WEP, but a PIA of $306.80 after application of the WEP – a reduction of $383.50 ($690.30 - $306.80). If the low-income worker, for example, is concurrently entitled to receive a noncovered pension of $500 per month, by operation of the guarantee, the WEP can only reduce his PIA to $440.30 ($690.3 – ($500 / 2)) because application of the reduced percentage factor to the first bracket of AIME results in a benefit reduction greater than one-half of the noncovered pension.

Second, the WEP reduces the percentage factor applicable to the first bracket of AIME from 90 percent to 40 percent; however, if a worker has an employment record consisting of 21-29 years of substantial earnings in Social Security covered employment, the applicable percentage factor increases by five percentage points per year of additional employment.[166] If the average-income worker from the previous example worked for 25 years in Social Security covered employment (rather than 20 years), his PIA under the WEP would increase from $575.60 (($767 *.4) + (($1,607.10 - $767) * .32) to $767.4 (($767 *.65) + (($1,607.10 - $767) * .32).[167] Similar results occur for the low-income and high-income workers.

H.   WEP Applicability

According to the Government Accountability Office, in 2007 the Social Security system covered approximately 96 percent of the American workforce; the remaining four percent of noncovered workers were predominately public employees.[168] While noncovered workers comprised a relatively small percentage of the American workforce, these workers accounted for 25 percent of public employees, and were disproportionately concentrated in state and local governments (approximately 90 percent of noncovered workers).[169] Recently, SSA data, released in 2005, indicates that there were approximately 6.8 million noncovered state and local government workers, and half a million noncovered federal government workers.[170] States vary significantly in the extent to which governments have elected Social Security coverage for state and local employees.[171] For example, nearly all state and local government employees receive Social Security coverage in New York and Vermont; by contrast, less than 5 percent of state and local government employees pay into the Social Security system in Massachusetts and Ohio.[172] Moreover, 70 percent of noncovered state and local government employees are concentrated in only seven states – California, Colorado, Illinois, Louisiana, Massachusetts, Ohio, and Texas.[173] In 2009, the SSA

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166. 42 U.S.C. § 415((a)(7)(D).

167. *Id.*

168. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 1.

169. *Id.* at 1, 3.

170. *Id.*

171. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4.

172. *Id.*

173. *Id.*

provided the Congressional Research Service with data on the number of
beneficiaries for whom the WEP reduced benefits; at the time, 1,197,020 Social
Security beneficiaries received reduced benefits by operation of the WEP (including
retired and disabled workers, as well as dependents).[174] In general, the WEP affects
male retirees and disabled workers disproportionately; approximately 65 percent of
WEP affected beneficiaries were male in 2006.[175] At the time, eight states –
California, Florida, Illinois, Maryland, Massachusetts, Ohio, Texas, and Virginia,
accounted for 50 percent of WEP affected beneficiaries.[176] If one considers WEP
affected beneficiaries as a percentage of total Social Security recipients within a
state, then Alaska, Colorado, Maine, Maryland, Nevada, and Ohio are the states
most affected by the provision, with the ratio ranging from a low of 4.7 in Nevada
to a high of 10.6 percent in Alaska.[177]

III. WEP: THE PROBLEMS

Reducing Social Security benefits for over one million retired federal, state,
and local government employees[178] the WEP is an extremely controversial
component of the Social Security Act. The WEP has elicited a variety of criticisms
from scholars and opponents, including: (1) the WEP has a disproportionate impact
on low-income workers relative to high-income workers,[179] (2) the SSA has
insufficient information to apply the provision to all of the targeted beneficiaries,[180]
and (3) SSA efforts to communicate with the public about the provision are
insufficient, resulting in public misperception and resentment,[181] as well as
significant hardship where workers mistakenly fail to account for the provision's
effects.[182]

A. Disproportionate Impact

Among criticisms of the WEP, the charge that the WEP disproportionately
affects low-income workers appears frequently in scholarly literature.[183] As
structured, the WEP operates to the disadvantage of low-income workers in three
ways: (1) under the WEP, the adjustment to Social Security benefits based on

174. ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35, SOCIAL SECURITY: THE WINDFALL
ELIMINATION PROVISION (WEP) 4-5 (2010).
175. Barbara A. Lingg, *Social Security Beneficiaries Affected by the Windfall Elimination Provision in
2006*, 68 SOC. SECURITY BULL. 1, 3 (2008).
176. *Id.*
177. Lingg, *supra* note 170, at 10-11.
178. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4.
179. Brown & Weisbenner, *supra* note 21, at 8-13.
U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4-7 (2007).
181. . Brown & Weisbenner, *supra* note 21, at19; ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35,
SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) 19 (2010).
182. *Id.* at 6.
183. . Brown & Weisbenner, *supra* note 21, at 8-13 (performing an analysis similar to the proceeding
sections); Francine Lipman, *Social Security Benefits 101*, 53 ORANGE COUNTY LAW. 30, 32-33 (2011);
ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION
PROVISION (WEP) 6 (2010).

noncovered employment is highly regressive;[184] (2) high-income workers are more likely to cross the WEP's substantial earnings threshold, thereby becoming eligible for a significant increase in benefits;[185] and (3) the WEP affords high-income workers a replacement rate above the rate they would be statutorily entitled to under the general formula of the Social Security system while penalizing low-income workers with a lower replacement rate.[186] This Part of the Article examines each point in turn.

1.   The WEP's Regressive Nature

Having recognized that high-income workers with significant periods of noncovered employment received 'windfall' benefits under the traditional formula by operation of the averaging provision,[187] Congress enacted the WEP to preserve the progressivity of the Social Security benefits formula. Notwithstanding Congress' effort to preserve the formula's progressivity, the WEP itself is regressive, and does not effectively attain Congress' goal.

Although the WEP provides for a uniform reduction, regardless of income, in the percentage factor applicable to the first bracket of AIME,[188] the reduction has a disproportionate impact on low-income workers.[189] The disproportionate impact experienced by low-income workers with noncovered employment stems directly from the design of the WEP.[190] As the WEP is only applicable to the first bracket of AIME,[191] the benefit reduction gradually increases as earnings increase within the first bracket of AIME, reaching the maximum WEP reduction at the first bendpoint ($767 in 2012).[192] Consequently, the WEP imposes a maximum benefit reduction of 383.50[193] monthly in 2012 ($4,602 annually) on all workers with 20 or fewer years of Social Security covered employment and AIME at or above the first bendpoint.

While the benefit reduction is constant at or above an AIME of $767, as a worker's AIME increases, the reduction in benefits decreases as a percentage of AIME. For example, a worker with AIME of $767 receives a 50 percent benefit reduction ($383.50 / $767) through operation of the WEP, while a worker with an AIME representing maximum taxable earnings through 2012 ($8,199)[194] receives less than a five percent benefit reduction ($383.50 / $8,199).[195] Demonstrating the regressive nature of the WEP reduction, Figure 1 plots the replacement rate (the ratio of AIME to PIA) over varying levels of income for two workers retiring at full

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184. . *See* Discussion *infra* Part 3.A.I: The WEP's Regressive Nature.

185. . *See* Discussion *infra* Part 3.A.II: Disproportionate Affect of the Substantial Earnings Test.

186. . *See* Discussion *infra* Part 3.A.III: Comparison with a Proportional WEP.

187. H.R. CONF. REP. NO. 98-47, at 120 (1983).

188. 42 U.S.C § 415(a)(7)(B)(ii)(V) (2006).

189. Brown & Weisbenner, *supra* note 21, at 8.

190. Francine Lipman, *Social Security Benefits 101*, 53 ORANGE COUNTY LAW. 30, 32 (2011).

191. 42 U.S.C § 415(a)(7)(B)(i).

192. 42 U.S.C § 415(a)(1)(B)(i), (ii); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

193. ($767 * .9) – ($767 * .4) = $383.50.

194. http://www.ssa.gov/oact/COLA/Benefits.html.

195. 42 U.S.C. § 415(a)(1)(A), (a)(7)(B)(ii)(V).

retirement age: (1) the line beginning at a replacement rate of 90 percent represents a worker who is exempt from the WEP because she received substantial earnings in Social Security covered employment for 30 or more years;[196] (2) the line originating at a replacement rate of 40 percent represents a worker who is subject to the WEP because she worked in Social Security covered employment for 20 or fewer years.[197] The difference between the two lines represents the WEP reduction, and the reduction is significantly larger for low-income workers than for their high-income counterparts. Thus, in seeking to address 'windfall' benefits that accrue to high-income workers with significant periods of noncovered employment, Congress enacted a provision that imposes a proportionally larger benefit reduction on low-income workers. As such, the WEP neither replicates the replacement rates of the Social Security benefits formula, nor tracks its progressivity.
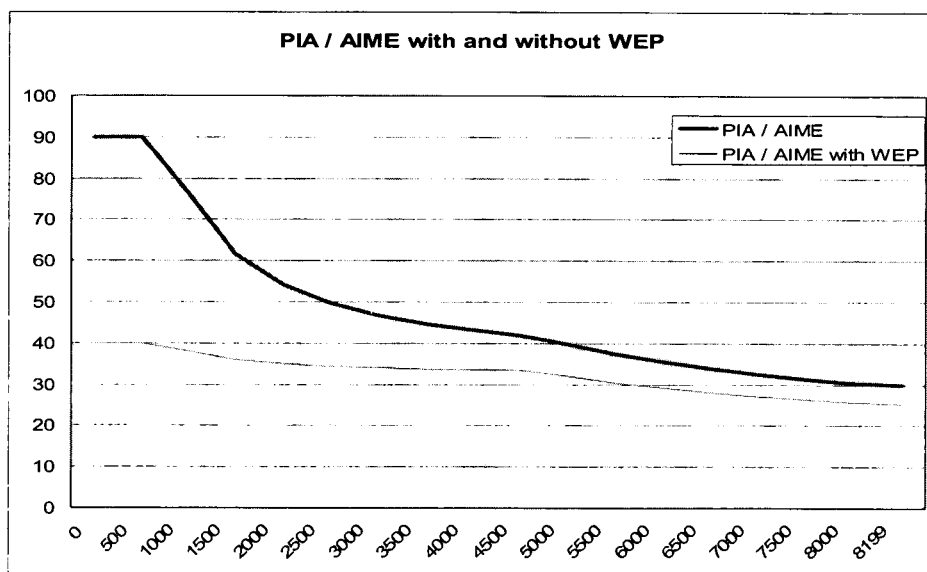

Figure 1

2.   Disproportionate Impact of the Substantial Earnings Test

Besides creating a regressive benefit reduction, the WEP disproportionately impacts low-income workers by operation of its provision for phasing-in the reduced replacement rate, as the moderating effect of the provision is not equally available to low-income workers. Recall that the WEP applies a reduced percentage factor of 40 percent to the first bracket of AIME for individuals with 20 or fewer years of substantial earnings in Social Security covered employment.[198] Where an individual receives between 21 and 29 years of substantial earnings in Social Security covered employment, the WEP gradually implements the reduced

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196. 42 U.S.C § 415(a)(7)(D).
197. 42 U.S.C § 415(a)(7)(B)(i), (a)(7)(D).
198. 42 U.S.C. § 415(a)(7)(D).

percentage factor.[199] For such individuals, the WEP applies the reduced percentage factor of 40 percent, but for each additional year above 20 years of substantial earnings in Social Security covered employment, the WEP increases the applicable percentage factor by five percentage points.[200] At 30 years of substantial earnings in Social Security covered employment, the WEP is fully phased-out.[201] Thus, for purposes of the phase-in provision, the critical question is whether a worker received substantial earnings in Social Security covered employment during a given year. In 2012, to qualify for a year of substantial earnings, a worker must receive $20,475 or more in Social Security covered employment.[202]

To illustrate the issue of access to the phase-in provision, consider the unrealistic, but illustrative example of a worker who chooses to split her earning potential equally between covered and noncovered employment.[203] If such an individual earns $40,950 or more in 2012, she will receive at least $20,475 in Social Security covered employment thereby crossing the substantial earnings threshold.[204] By contrast, if the worker earns $30,000 in 2012, her earnings of $15,000 in Social Security covered employment will be insufficient to satisfy the substantial earnings test.[205] While the scenario of an individual electing to split her earning potential equally between covered and noncovered employment is unrealistic, the example demonstrates that individuals with a higher earning potential are more likely to cross the substantial earnings threshold – a threshold which can turn on a single dollar of income.

For individuals to whom the phase-in provision potentially applies, the effect of an additional year of substantial earnings in Social Security covered employment can be quite significant. Consider, for example, a hypothetical low-income worker who meets the following criteria: the individual (1) has an AIME of $767; (2) reaches early retirement age in 2012; and (3) defers retirement until full retirement age. If the individual's employment record reflects 20 years of Social Security covered employment, her PIA will be $306.80 ($767 * .4).[206] By contrast, an individual whose employment record reflects an additional year of substantial earnings in Social Security covered employment will receive a PIA of $345.15 ($767 * .45).[207] Thus, if one holds all other criteria constant, but permits the number of years of covered employment to fluctuate, then each additional year of substantial earnings in Social Security covered employment, above 20 years, results in an increase to PIA of $38.35 (or $460.20 annually).

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199. *Id.*

200. *Id.*

201. *Id.*

202. 42 U.S.C. § 415(a)(1)(C)(ii), (a)(7)(D); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

203. Brown & Weisbenner, *supra* note 21, at 9.

204. 42 U.S.C. § 415(a)(1)(C)(ii), (a)(7)(D); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

205. *Id.*

206. 42 U.S.C. § 415(a)(1)(A), (a)(7)(D); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011); 42 U.S.C. § 402 (2006).

207. *Id.*

Although raising a worker's PIA by $38.35 may not appear significant, the increase to aggregate wage-indexed lifetime earnings that an individual would ordinarily require to achieve a similar increase of her PIA underscores the magnitude of the WEP's phase-in provision. As the previous example placed the individual's AIME at $767, the next additional dollar earned will fall within the second bracket of AIME - the bracket to which the replacement rate of 32 percent applies.[208] Where AIME falls within the second bracket, absent the phase-in provision, an individual must earn an additional $50,316 (($38.35 / .32) * 420) in aggregate wage-indexed lifetime earnings to achieve an increase to her PIA of $38.35.[209] Even more striking, for a high-income worker – defined as a worker whose AIME falls within the third bracket – to raise her PIA by $38.35, she would have to earn additional aggregate wage-indexed lifetime earnings of $107,380 (($38.35 / .15) * 420).[210] Thus, the WEP's phase-in provision permits an individual to avoid significant contribution costs for the bargain price of an additional year of' substantial earnings ($20,475 in 2012).[211] However, an additional year of substantial earnings in Social Security covered employment affords the high-income worker more than twice the savings in contribution costs as the low-income worker, yet grants both workers the same increase to PIA. This highlights yet another example of the WEP's disproportionate impact, particularly where the high-income worker is already more likely to cross the phase-in provision's substantial earnings threshold.

3.   Comparison with a Proportional WEP

A final approach to understanding the disproportionate impact of the WEP on low-income workers entails introducing a new concept – a proportional WEP, which represents an alternative to the present WEP.   Seeking to preserve the progressivity of the Social Security benefits formula, Congress enacted the WEP to eliminate the 'windfall' benefits that accrue to high-income workers with significant periods of noncovered employment.[212] To accomplish this task, the WEP reduces the percentage factor ordinarily applicable to the first bracket of AIME to 40 percent.[213] The decision to adopt 40 percent as the applicable percentage factor under the WEP was the product of Congressional bargaining – a compromise between the Senate and House proposed percentage factors of 32 and 60 percent respectively.[214] Not surprisingly, the WEP is an imprecise, and many would argue

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208. 42 U.S.C. § 415(a)(1)(A); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

209. 42 U.S.C. § 515(a)(1)(A).

210. *Id.*

211. 42 U.S.C. § 415(a)(1)(C)(ii), (a)(7)(D); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

212. . H.R. CONF. REP. NO. 98-47, at 120-121 (1983).

213. . 42 U.S.C. § 415(a)(7)(B)(ii)(V).

214. . H.R. REP. NO. 98-25, at Part I, Section II (1983); S REP. NO. 98-23, at 15-16 (1983); H.R. CONF. REP. NO. 98-47, at 120-121 (1983).

arbitrary[215] provision, that as illustrated in Figure 1, neither tracks the replacement rates of the Social Security benefits formula, nor tracks its progressivity.[216] Given Congress' purpose in enacting the WEP, the most equitable approach to the 'windfall' benefits problem would entail downward adjusting PIA for workers with significant periods of noncovered employment, such that the replacement rates obtained by affected workers would be identical to that of workers with identical annual incomes earned over 35 years of covered employment. A proportional WEP would accomplish exactly this task.

Scott Weisbenner and Jeffrey Brown, in a paper entitled *The Distributional Effects of the Social Security Windfall Elimination Provision*, analyzed one example of a proportional WEP.[217] The authors suggested calculating AIME based on both a worker's covered and noncovered earnings.[218] Next, to derive PIA, one would apply the Social Security benefits formula, without the WEP, to the worker's AIME.[219] As such, the worker with noncovered employment will receive the exact same replacement rate as a worker with identical earnings who only held Social Security covered employment.[220] To account for the years during which the worker did not contribute to the Social Security system, the proportional WEP would decrease PIA by multiplying the ratio of the worker's covered to total earnings.[221] The resulting figure represents the worker's "covered PIA."[222] Imagine, for example two workers each earning $90,000 per year; however, Worker A held Social Security covered employment for 35 years, while Worker B held covered employment for 20 years and noncovered employment for 15 years. Under the proportional WEP, both workers have the same AIME – $7,500 (($90,000 *35)) / 420).[223] Similarly, both worker's' initially have a PIA of $2,355.90 (.9 * $767) + (.32 * ($4,624 – $767)) +

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215. . ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) 3 (2009).

216. . *See infra* Figure 1.

217. . Brown & Weisbenner, *supra* note 21, at 5, 10-12. This method first appeared as part of the NCCSR's recommendation for addressing the WEP. *See* Discussion, *supra* Part 2.E: Towards Enactment of the WEP. During markup sessions on the Social Security Amendments Act of 1983, the Subcommittee on Social Security of the House Committee on Ways and Means considered the NCSSR's alternative approaches to addressing 'windfall' benefits, and concluded that including non-covered wages in the calculation for AIME would pose "insurmountable administrative problems." John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 3, 10 (1983). Senator Hutchison and Representative Brady have introduced a bill that employs a similar mechanism during every Congress from 2004 to 2011. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004); *See infra*, Legislative Action; This Article proposes a method of adjusting benefits for workers who held both covered and noncovered employment that achieves a similar result, but through a different mechanism. *See* Discussion *infra* Part 6 Recommendation.

218. . *Id.*

219. . *Id.*

220. . *Id.*

221. . *Id.*

222. . *Id.*

223. . 42 U.S.C. 415(b) (the calculation ignores 42 U.S.C. § 415(b)(1)(A) which considers years of Social Security covered employment).

(.15 * ($7,500 - $4,624)).[224] As such, the proportional WEP provides both workers with the exact same replacement rate based on identical earnings – 31 percent (($2,355.90 / $7,500) * 100). However, the proportional WEP multiplies Worker B's PIA by the ratio of covered to total earnings to account for the worker's time in noncovered employment, resulting in a covered PIA of $1,009.60 ($2,355.90 * ($1,350,000 / $3,150,000)).[225]

By comparing the replacement rates for a high-income, average-income, and low-income worker under a proportional WEP and the current law WEP, one can discern a final manner in which the WEP disproportionately affects low-income workers. For example, consider Figure 2, which charts the replacement rates over varying periods of Social Security covered employment for two high-income workers, each of whom earned $98,388 annually. The bold horizontal line at 30 percent represents the replacement rate that the high-income worker would obtain under a proportional WEP. The line originating at 30 percent and terminating near 35 percent represents the replacement rates that a worker with identical income would obtain under the current law WEP based on different combinations of covered and uncovered employment. Note that the only point that the high-income worker receives the proper replacement rate under the current law WEP is where she works in Social Security covered employment for 35 years. Any other combination of covered and noncovered employment under the current law WEP results in a replacement rate for a high-income worker above the statutorily intended replacement rate. Note also that under the current law WEP, as the number of years the worker held Social Security covered employment increases, the disparity between replacement rates under the proportional WEP and current law WEP decreases.
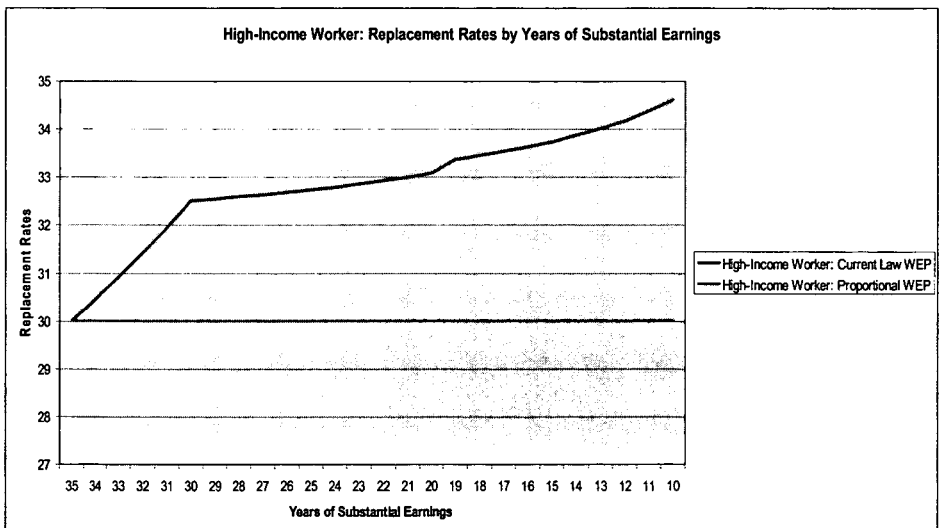

Figure 2

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224. 42 U.S.C. 415(a)(7)(A).

225. Brown & Weisbenner, *supra* note 21, at 5, 10-12.

By contrast, Figure 3 charts the replacement rates, over varying periods of Social Security covered employment, for two average-income workers each earning $50,000 annually. The horizontal line at 43 percent represents the replacement rate that an average-income worker subject to a proportional WEP would receive, regardless of the number of years during which the worker held Social Security covered employment. The line originating at 43 percent and terminating at 37 percent represents the replacement rates that an average-income worker subject to the current law WEP would receive based on different combinations of covered and noncovered employment. In this example, where the average-income worker received less than 20 years of substantial earnings in Social Security covered employment, her replacement rates are up to eight percent lower than those obtained by her counterpart who is subject to the proportional WEP. When the average-income worker has sufficient earnings to cross the substantial earnings threshold, the replacement rates begin to approach, and eventually surpass, those obtained by the worker's counterpart who is subject to the proportional WEP. Finally, at 31 years of substantial earnings in Social Security covered employment, the replacement rates obtained by the average-income worker begin to decrease until reaching a replacement rate identical to a worker who held Social Security covered employment for 35 years.
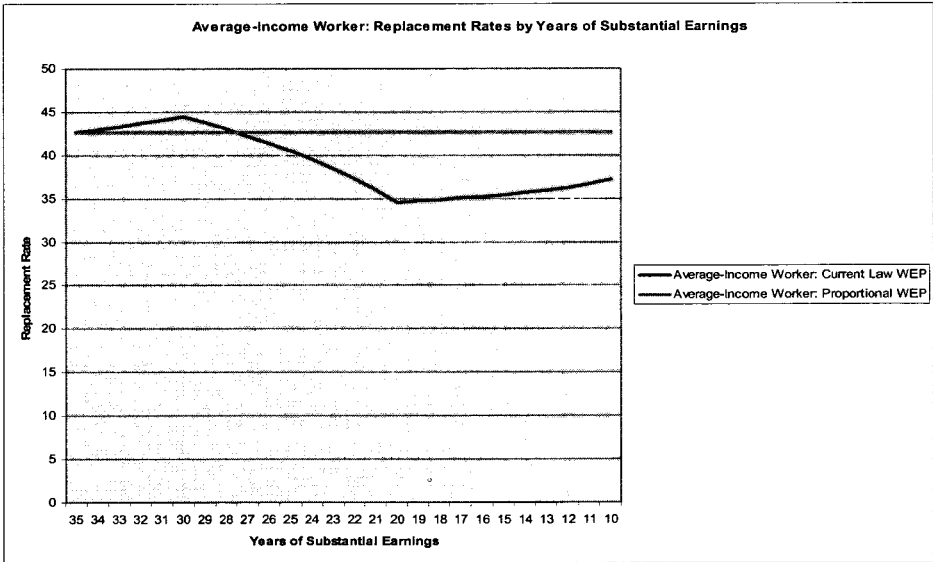

Figure 3

Finally, Figure 4 compares the replacement rates obtained by two low-income workers, each of whom earned $20,000 annually, for different combinations of covered and noncovered employment. The horizontal line at 59 percent represents the replacement rate that the low-income worker would obtain under a proportional WEP. By contrast, the line originating at 36 percent and terminating at 40 percent represents the replacement rates the worker would obtain under the current law

WEP. Note that any combination of covered and noncovered employment under the current law WEP results in a replacement rate for a low-income worker below the statutorily intended replacement rate. In fact, even where the low-income worker who held both covered and noncovered employment has an employment record reflecting 35 years of Social Security covered employment, her replacement rate falls below that of an identical worker who only held covered employment. This anomaly occurs because the low-income worker's annual earnings never crossed the WEP's substantial earnings threshold - $20,475 in 2012.[226] Thus, although the worker's qualification for a noncovered pension subjects him to the WEP,[227] the worker can never qualify for the mitigating effects of the WEP's phase-in provision.
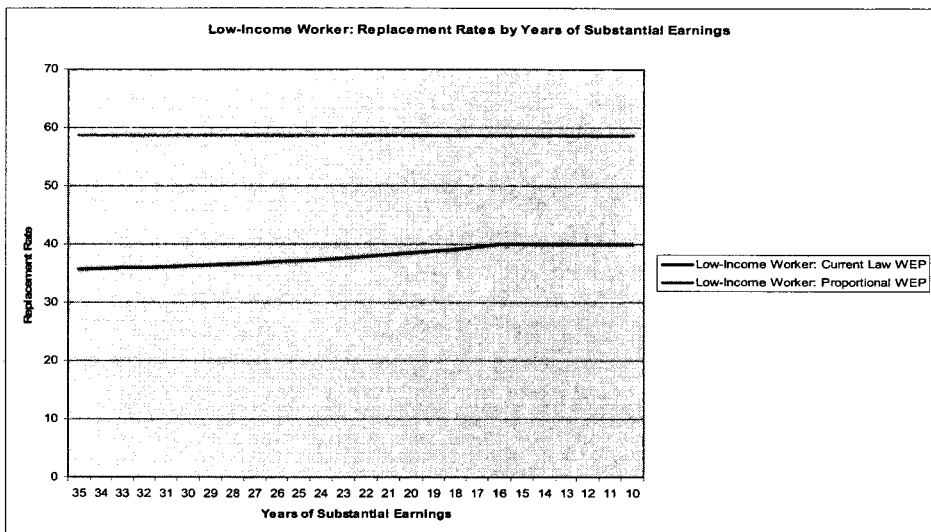

Figure 4

The foregoing examples demonstrate that under the current law WEP, a high-income worker will always obtain a replacement rate greater than the statutorily intended replacement rate. By contrast, the replacement rate obtained by a low-income worker who does not cross the WEP's substantial earnings threshold will always fall below those obtained by the worker's counterparts who only held Social Security covered employment. This is yet another example of the WEP's disproportionate impact.

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226. . 42 U.S.C. § 415(a)(1)(C)(ii), (a)(7)(D) (2006); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

227. . 42 U.S.C. § 415(a)(7)(A), (a)(7)(D).

B.   The SSA Has Insufficient Information to Apply the WEP to All of the Targeted Beneficiaries

As previously noted, the WEP is potentially applicable to individuals attaining early retirement age – 62 years of age – after 1985, who also become eligible, after 1985, for a government pension, based in whole or in part, upon noncovered employment.[228] Thus, effective administration of the WEP requires the SSA to determine which beneficiaries are, or potentially will be, eligible to receive government pensions based upon noncovered employment.[229] Historically, the SSA relied on a system of self-reporting to determine whether beneficiaries were eligible for noncovered government pensions.[230] When reviewing an initial benefits application, SSA staff examined an applicant's earnings record to determine whether there were significant gaps in the individual's employment history.[231] When SSA staff identified such a gap in the applicant's employment record, a staff member was required to determine whether the gap was attributable to noncovered employment.[232] Additionally, SSA staff asked the applicant whether she was eligible, or will become eligible, to receive a government pension based upon noncovered employment.[233] If an applicant answered in the affirmative, the SSA would make the appropriate benefit reduction for applicants already receiving a noncovered pension, or, for applicants with future eligibility, would make a note in the applicant's file for later action.[234] If an applicant indicated that she was not, and would not become, eligible for a noncovered government pension, "SSA staff record[ed] and accept[ed] [her] answer unless the staff believe[d] further investigation [wa]s warranted."[235]

For federal retirees, the SSA employed an additional level of verification.[236] On a monthly basis, the SSA received data listing federal retirees and the amount of their noncovered pensions from the Office of Personnel Management, the agency charged with administering the Civil Service Retirement System.[237] Upon an individual's initial application for benefits, the SSA cross-referenced the applicant's record with the data received from the Office of Personnel Management.[238] Where the cross-referencing procedure provided evidence that an applicant was receiving a noncovered federal pension, the SSA noted the pension in the applicant's earnings record, thereby ensuring compliance with the WEP.[239]

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228. 42 U.S.C. § 415(a)(7)(A)(i), (ii).

229. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 6 (2007).

230. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-76, SOCIAL SECURITY: BETTER PAYMENT CONTROLS FOR BENEFIT REDUCTION PROVISIONS COULD SAVE MILLIONS 4-5 (1998).

231. *Id.* at 4.

232. *Id.*

233. *Id.*

234. *Id.* at 5.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

The SSA expressed concern during the 1990s that its procedures for administering the WEP required strengthening because it was using a self-reporting system that lacked an independent source to verify the accuracy of information applicants provided regarding noncovered pensions.[240] In this context, the House Subcommittee on Social Security instructed the U.S. General Accounting Office to undertake an examination of the SSA's efforts to administer the WEP, resulting in a 1998 report entitled *Social Security: Better Payment Controls for Benefit Reduction Provisions Could Save Millions.*[241] Based on a study of 36,000 cases for which the SSA suspected WEP related overpayments to federal retirees, the General Accounting Office report determined that the SSA erroneously failed to apply the WEP to approximately 7,130 federal retirees, resulting in total overpayments of approximately $32 million.[242] Employing the study of federal retirees to determine the amount of WEP related overpayments to state and local government retirees, the General Accounting Office report determined that the SSA erroneously failed to apply the WEP to between 4,334 and 10,835 state and local government retirees at an estimated cost of between $19.5 million and $48.8 million.[243]

Given the large number of beneficiaries to whom the WEP should apply that the SSA failed to detect, the General Accounting Office proposed two methods to strengthen procedures for administering the WEP.[244] The General Accounting Office suggested that the SSA expand its effort to verify the accuracy of information reported by federal retirees by periodically cross-referencing beneficiary records with the Office of Personnel Management data, rather than limiting this procedure to the initial application period.[245] The General Accounting Office indicated that the "postentitlement match" procedure would be "relatively straightforward" as the SSA already receives the necessary data from the Office of Personnel Management.[246] Moreover, SSA staff had already acknowledged that the procedure was effective for detecting federal retirees who first applied for Social Security benefits, and later became eligible for a noncovered pension, but failed to notify the SSA.[247]

Alternatively, the General Accounting Office proposed that the SSA employ an independent source to verify the accuracy of information regarding noncovered pensions provided by state and local government retirees.[248] As part of its proposal, the General Accounting Office identified two alternative sources of independent verification: (1) the individual retirement systems providing noncovered pensions

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240. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-76, SOCIAL SECURITY: BETTER PAYMENT CONTROLS FOR BENEFIT REDUCTION PROVISIONS COULD SAVE MILLIONS 3, 16 (1998).

241. *Id.* at 1.

242. *Id.* at 11.

243. *Id.* at 12-13.

244. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-76, SOCIAL SECURITY: BETTER PAYMENT CONTROLS FOR BENEFIT REDUCTION PROVISIONS COULD SAVE MILLIONS 13 (1998).

245. *Id.* at 13.

246. *Id.* at 5, 13, 16.

247. *Id.* at 5.

248. *Id.* at 13.

and (2) the Internal Revenue Service (IRS).[249] According to the General Accounting Office, obtaining information on noncovered pensions directly through the individual retirement systems offered the advantage of timeliness, as the individual retirement systems possessed the most up to date information regarding their beneficiaries.[250] However, obtaining the information directly through the individual retirement systems posed significant administrative challenges, according to the General Accounting Office, as there were thousands of retirement systems, some of which state law precluded from disclosing beneficiary information.[251] Moreover, all of the retirement systems would have to develop a reporting mechanism to provide the SSA with pertinent information.[252]

Instead, the General Accounting Office advocated obtaining the necessary information regarding noncovered pensions for state and local government retirees from the IRS.[253] At the time, the individual retirement systems reported payment of pension benefits for each individual beneficiary annually to the IRS through Form 1099R – *Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc..*[254] By employing the IRS as a conduit for the pertinent information, the proposal offered the significant advantage of avoiding the administrative difficulties associated with obtaining the same information directly from the individual retirement systems. However, the proposal suffered from two drawbacks.[255] First, as independent retirement systems filed Form 1099Rs annually, the information would not have been as timely as that obtained directly through the individual retirement systems.[256] Additionally, Form 1099R required modification to allow the SSA to distinguish noncovered pension payments from other categories of information reported on the form.[257] Given the relative advantages and disadvantages of each proposal, the General Accounting Office concluded that obtaining the necessary information from the IRS would be "the most efficient and least disruptive option" to improve administration of the WEP.[258] In a letter responding to the General Accounting Office report, Michael Dolan, the Deputy Commissioner of the IRS, indicated that the IRS concurred with the report's proposal, and could implement changes to form 1099R's reporting requirements for the processing year 2000.[259]

Responding to the General Accounting Office's report, the SSA implemented postentitlement matching using data from the Office of Personnel Management to verify the accuracy of information which federal retirees report.[260] According to the

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249. *Id.*
250. *Id.*
251. *Id.* at 14.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 14-15.
256. *Id.* at 13-14.
257. *Id.* at 15.
258. *Id.* at 16.
259. *Id.* at 28.
260. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 5-6 (2007).

General Accounting Office, the postentitlement matching procedure has identified beneficiaries for whom the SSA had failed to administer the WEP, and correction of those errors will result in "hundreds of millions of dollars in savings."[261] While the SSA has implemented a measure to improve administration of the WEP for federal retirees, the SSA to date has not developed an independent source to verify the accuracy of information provided by state and local government employees.[262]

Although the IRS initially indicated that it could implement changes to form 1099R to facilitate reporting of state and local retirees' noncovered pension to the Social SSA, the IRS subsequently determined that it could not implement the procedure without a legislative mandate.[263] In response, the U.S. General Accountability Office issued reports in 2003, 2005, 2007, and 2011 urging Congress to adopt legislation authorizing the IRS to gather needed information for the effective administration of the WEP.[264] To date, the only Congressional response occurred when Congress was considering H.R. 743, the Social Security Protection Act of 2004.[265] During markup sessions on the bill, the Senate Finance Committee added a provision to the bill that would have authorized the IRS to collect data on noncovered state and local government pensions.[266] However, Congress did not include this provision in the final version of the bill.[267] The Office of Management and Budget's *Fiscal Year 2012 Budget of the U.S. Government* included a legislative proposal that would dedicate $50 million to developing an "electronic mechanism" which would collect data from state and local government retirement systems regarding retirees receiving noncovered pensions.[268] The Office of Management and Budget estimated that the legislative proposal, if enacted, would have saved approximately $3.3 billion over ten years by improving the SSA's ability to administer the WEP.[269]

An internal audit conducted by the SSA's Office of the Inspector General in 2011 determined that the SSA overpaid approximately 24,900 beneficiaries approximately $623.8 million through April 2011 due to failure to administer the WEP and Government Pension Offset (GPO) properly.[270] While the audit included

261. *Id.* at 6.

262. U.S. Gov't Accountability Office, GAO-11-318SP, Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue 327 (2011).

263. U.S. Gov't Accountability Office, *supra* note 17, at 6 (2003).

264. U.S Gov't Accountability Office, GAO-03-710T, Social Security: Issues Relating to Noncoverage of Public Employees 9 (2003); U.S. Gov't Accountability Office, GAO-05-786T, Social Security: Coverage of Public Employees and Implications for Reform 9 (2005); U.S. Gov't Accountability Office, *supra* note 17, at 10; U.S Gov't Accountability Office, GAO-11-318SP, Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue 328 (2011).

265. H.R. 743, 108th Cong. (2003).

266. S. Rep. No. 108-176, at 21 (2003).

267. Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493.

268. Office of Mgmt. & Budget, Exec. Office of the President, Fiscal Year 2012 Budget of the U.S. Government: Terminations, Reductions, and Savings (2012).

269. *Id.* (noting that the total also includes savings from preventing GPO related overpayments).

270. Social Security Administration, Office of the Inspector General, A-13-10-10143, Audit Report: Old-Age, Survivors and Disability Insurance Benefits Affected by State or Local Government Pensions at 6 (2011).

data for both the WEP and the GPO, one can extrapolate the proportion of WEP related overpayments from an earlier SSA report, which concluded that approximately 62 percent of the overpaid dollars from 2005 through 2009 were WEP related.[271] These overpayments occur because the SSA lacks sufficient information regarding beneficiaries receiving noncovered state and local government pensions to administer the WEP effectively and fairly.[272] Any Social Security overpayment due to the failure to apply the WEP is patently unfair to two categories of beneficiaries: (1) beneficiaries who held Social Security covered employment for 35 years and receive Social Security benefits pursuant to the statutorily intended progressive benefit formula and (2) beneficiaries who receive noncovered government pensions to whom the SSA applies the WEP. However, because the SSA implemented a mechanism to improve WEP application in relation to federal employees without implementing a similar mechanism to address state and local employees, a disparity presently exists in the degree to which the SSA enforces the WEP against federal retirees, as compared to state and local retirees.[273] This disparity in application represents "yet another source of unfairness in the calculation of Social Security benefits for public employees."[274]

C. Public Misperception and Resentment: SSA Efforts to Educate the Public

Beyond structural issues and the administrative challenges of enforcing the WEP, the provision imposes a significant public relations problem. Congressional testimony of those affected by the WEP demonstrates that public misperception and resentment of the WEP is pervasive.[275] Moreover, examples of hardship arising from retirees' failure to account for the provision in their retirement plans appear frequently.[276] However, the problem is not merely one of public resentment towards the government. As evidenced by the personal accounts of hardship, the underlying issue is the quality of retirement that society seeks to ensure for the elderly. In 2010, Social Security benefits lifted approximately 14 million retirees above the poverty line.[277] Retirees increasingly rely on Social Security benefits for a greater percentage of their post-retirement incomes, yet many workers approaching retirement are unfamiliar with the mechanics of the Social Security benefits formula.[278] Too often, the result is personal hardship at a time when retirees are least able to redress the situation.[279] To humanize the issue, this Part begins by providing examples of the personal hardship suffered by retirees who failed to account for the WEP in their retirement plans. Next, this Part examines issues of

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271. *Id.* at B-2.

272. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 6 (2007).

273. *Id.*

274. *Id.*

275. . *See, Hearing: Penalty for Public Service, supra* note 42; *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family Planning, supra* note 1.

276. . ALLISON M. SHELTON, CONG. RESEARCH SERVICE., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP). (2009).

277. . Lipman & Williamson, *supra* note 39, at 30.

278. . *Id.*

279. . *Id.*

public misperception and resentment, seeking to dispel the underlying controversies. Finally, this Part explores the methods through which the SSA attempts to communicate with the public regarding the WEP, identifying problems in the SSA's framing of the WEP that may account for public misperceptions.

1. Accounts of Personal Hardship

Workers, lacking sufficient information about the WEP, often fail to account for the effects of the provision in their retirement plans.[280] Tragically, the result is unanticipated hardship. In testimony before the Committee on Governmental Affairs in 2003 and the Subcommittee on Social Security, Pensions, and Family Policy in 2007, Senators, private parties, and organizations representing public sector employees frequently cited examples of the hardship to retirees stemming from failure to account for the WEP.[281] The stories of Julia Worchester and Paul McLaughlin are representative of the problem.

Julia Worchester held Social Security covered employment for 20 years during which time she worked as a waitress and in various positions at a factory.[282] However, Julia dreamed of becoming a teacher, and at age 49, she enrolled in a university program in pursuit of her goal.[283] Thereafter, Julia taught full-time for 15 years, retiring at age 68.[284] Approximately 4-5 years after beginning her teaching career, Julia learned that the WEP would be fully applicable to her because she only held Social Security covered employment for 20 years, resulting in a PIA of $156.[285] Worse yet for Julia, the 15 years during which she held a teaching position were insufficient to qualify her for a full pension under her state's retirement program.[286] As a result, Julia received a combined monthly pension benefit of under $800 per month ($9,600 annually).[287] At the time of the hearing before the Subcommittee on Social Security, Pensions, and Family Policy in 2007, Julia was 77 years old, and still working as a substitute teacher to make ends meet.[288] Similarly, Paul McLaughlin began his working years in Social Security covered employment by driving a taxicab and moving furniture during high school to earn money for college.[289] After finishing college, Paul taught for 31 years in a state that permitted state and local government employees to pay into an alternative pension program.[290] However, during this period he also held part-time jobs in Social

280. ALLISON M. SHELTON, CONG. RESEARCH SERVICE, 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) (2009).

281. *Hearing: Penalty for Public Service, supra* note 42, at19-20, 22, 72, 73, 76, 78, 81; *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning,* supra note 1, at 5, 7, 11, 47-49, 121-129.

282. *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning,* supra note 1, at 5.

283. *Id.*

284. *Id.*

285. *Id.; Hearing: Penalty for Public Service, supra* note 42, at 20.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning,* supra note 1, at 48.

290. *Id.*

Security covered employment to supplement his income.[291] Upon retiring in 2001, Paul was shocked to learn he would not receive the PIA of $421 for which he planned, but rather, a PIA of $187.10 due to application of the WEP.[292] At 71 years of age, Paul was still working a part-time job at the time of the hearing before the Subcommittee on Social Security, Pensions, and Family Policy.[293]

In analyzing the structural problems of the WEP and administrative difficulties inherent in enforcing the provision, it is easy for one to lose sight of the human indignity of the problem. However, through recognition of the hardship that results when a retiree mistakenly fails to account for the WEP, one can better understand the public misperception and resentment surrounding the provision, as well as the importance of the SSA's efforts to educate the public about the WEP.

2. Public Misperception and Resentment

The Social Security benefits formula is complex. Briefly stated, the formula requires the SSA to (1) wage-index a worker's annual earnings,[294] (2) average the worker's 35 highest earning years to calculate AIME,[295] and (3) derive PIA by applying a progressive formula to AIME.[296] Complicating the entire process, the SSA must also wage-index a component of the progressive benefits formula – the bendpoints – before it can even apply the formula to derive a worker's PIA.[297] In a study to determine how well individuals can calculate the benefits to which they are entitled, the Financial Literacy Center determined that one-quarter of participants in the study overestimated benefits by more than 21 percent, and one-quarter underestimated benefits by more than 22 percent.[298] Given the complexity of the formula, the Financial Literacy Center study suggested: "few Americans would be capable of making these calculations even if they had a computer spreadsheet program."[299] In this context, the WEP adds a layer of complexity to the entire process. The WEP requires a complex, involved calculation an understanding of which requires thorough knowledge of the policy behind the Social Security benefits formula. Given the overall complexity of the Social Security benefits formula and the WEP, public misperception and resentment of the provision are not surprising.

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291. *Id.*

292. *Id.* at 49

293. *Id.*

294. 42 U.S.C. § 415(b)(3)(A) (2006).

295. 42 U.S.C. § 415(b)(1), (b)(1)(A), (b)(2)(A)(i), (b)(2)(B)(i).

296. 42 U.S.C. § 415(a)(1)(A).

297. 42 U.S.C. § 415(a)(1)(B)(ii).

298. *Does the Social Security Statement Improve Americans' Knowledge of Their Retirement Benefits?*, FINANCIAL LITERACY CENTER, http://financial-literacy.rand.org (last visited Mar. 1, 2012).

299. *Id.*

a.   The Myth of a Stolen Entitlement

Parsing Congressional testimony proffered both by Senators and individuals to whom the WEP applies, one can find numerous examples of misperceptions of the WEP and Social Security benefits policy in general.[300] For example, during a 2003 hearing before the Committee on Governmental Affairs, Senator Collins observed: "what is so frustrating to teachers and firefighters and police officers who have paid in personally into the system, worked for 10 years in the private sector, [is that they] earned their benefits and can't get the benefit."[301] The same sentiment expressed by a retiree during a hearing four years later before the Subcommittee on Social Security, Pensions, and Family Policy elicited applause from the audience.[302] On one hand, this perception of an injustice is correct to the extent a fundamental tenant of the Social Security system is that benefits are an "earned right."[303] However, the magnitude of the entitlement depends on contributions to the Social Security system.[304] Upon paying into the Social Security system for 40 quarters (10 years), a worker becomes eligible to receive Social Security benefits.[305] While the minimum criteria for eligibility is 40 quarters of sufficient earnings in covered employment,[306] the Social Security benefits formula bases PIA on a worker's highest 35 years of annual wage-indexed earnings.[307] Moreover, the formula actually considers 40 years[308] during which both the worker (in Social Security covered employment) and her employer pay Federal Insurance Contribution Act (FICA) taxes (6.2 percent of earnings up to the employee's maximum taxable earnings for the OASDI program).[309] Thus, the WEP does not seek to deprive affected beneficiaries of an earned right, but rather, attempts to measure benefits according to the amount of the entitlement earned.

b.   The Myth of Discriminatory Treatment of Public Servants

Another frequent concern evidenced by Congressional testimony of individuals to whom the WEP applies is that the WEP discriminates against federal, state, and local government employees or penalizes workers for their decisions to pursue a public sector career.[310] For example, Elbert Bade, a retired teacher explained: "Teaching's [sic] a great career and very satisfying but no one tells you they're

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300. *See, Hearing: Penalty for Public Service, supra* note 42; *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning, supra* note 1.

301. *Hearing: Penalty for Public Service, supra* note 42, at 14.

302. *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning, supra* note 1, at 21.

303. *Hearing: Penalty for Public Service, supra* note 42, at 13.

304. *Id.*

305. 42 U.S.C. § 414(a)(2) (2006); 42 U.S.C. § 413(a)(2)(A)(ii) (2006).

306. *Id.*

307. 42 U.S.C. § 415(b)(1)(A), (b)(2)(A)(i), (b)(2)(B)(i) (2006).

308. 42 U.S.C. § 415(b)(1)(A).

309. 26 U.S.C § 3101(a) (2010); 26 U.S.C. § 3111(a) (2011).

310. *See, Hearing: Penalty for Public Service, supra* note 42; *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning, supra* note 1.

going to jerk your Social Security because you were a teacher."[311] Similarly, Joan Piacquadio, a retired school nurse, observed: "Ordinarily people who don't work in the public sector don't have any idea how public employees are treated. . . We are treated like second-class citizens."[312] In fact, the title for the hearing before the Committee on Governmental Affairs itself questions, without answering, whether the WEP unfairly discriminates against employees and retirees.[313] Underlying these views are two concerns: (1) The WEP is discriminatory because it does not require reduction of Social Security benefits for beneficiaries who receive private pensions[314] and (2) by penalizing public sector employees, who generally receive low salaries, the WEP provides a disincentive to work in important fields such as teaching or law enforcement.[315]

Whether the WEP is discriminatory or penalizes public sector employees are complex issues. For example, suggestions that the WEP imposes a penalty on public sector employees are fraught with the same misperceptions as arguments that the WEP deprives beneficiaries of an earned right. Congress enacted the WEP to address the 'windfall' benefits that accrue to workers with short careers in Social Security covered employment.[316] To the extent that the WEP adjusts a retiree's benefits to reflect contributions paid, the WEP does not actually impose a penalty, but rather, restores the progressivity of the Social Security benefits formula. However, the decision to reduce the percentage factor applicable to the first bracket of AIME from 90 percent to 40 percent was the product of Congressional compromise.[317] As the WEP represents an imprecise solution to a complex problem, the provision does have a disproportionate impact on low-income workers.[318] In this sense, one can view the WEP as imposing a penalty; for example, low-income workers who held noncovered employment receive replacement rates below that of their counterparts with similar earnings who only held covered employment.[319]

Similarly, the WEP does not discriminate on the basis of public sector employment. Rather, the WEP targets public sector employees who pay into alternative government pension programs in lieu of contributing to the Social Security system.[320] As the Second Circuit observed, government employers provide alternative retirement programs to substitute both for Social Security benefits and private pensions.[321] Thus, the Second Circuit upheld application of the WEP to a beneficiary against an Equal Protection Clause challenge, finding that the provision is rationally related to the legitimate government purpose of preventing 'windfall'

311. *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning*, supra note 1, at 84.

312. *Id.* at 49.

313. *Penalty for Public Service: Do the Social Security Government Pension Offset and Windfall Elimination Provision Unfairly Discriminate Against Employees and Retirees?: Hearing Before the S. Comm. On Gov't Affairs*, 108th Cong. (2003).

314. *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning*, supra note 1, at 10.

315. *Hearing: Penalty for Public Service*, *supra* note 42, at 4.

316. *See* Discussion *supra* Part 2.E: Towards Enactment of the WEP.

317. *Id.*

318. *See* Discussion *supra* Part 3.A Disproportionate Impact.

319. *Id.*

320. 42 U.S.C. § 415(a)(7)(B)(ii).

321. Rudykoff v. Apfel, 193 F.3d 579, 581 (2nd Cir. 1999).

benefits from accruing to individuals with short careers in Social Security covered employment.[322] Nevertheless, given the previously discussed deficiencies of the WEP, one might argue that the provision is discriminatory for two reasons: (1) the provision has a disproportionate impact on low-income workers[323] and (2) a disparity presently exists in the degree to which the SSA enforces the WEP against federal retirees, as compared to state and local retirees.[324]

C.   The Myth of a Benefits Reduction

The public's impression that the WEP is discriminatory, imposes a penalty, and deprives workers of an earned right suggests a final, and entirely too common, misperception – the notion that the WEP reduces a worker's benefits.[325] As previously discussed, the WEP attempts to adjust a worker's Social Security benefits to reflect the worker's contribution to the Social Security system.[326] As such, the WEP does not reduce benefits, at least theoretically, but rather, prevents workers with short careers in Social Security covered employment from receiving 'windfall' benefits above their statutorily intended PIA.[327] Of course, the WEP is an imprecise mechanism, which affords low-income workers a replacement rate below that of their counterparts who only held Social Security covered employment, thereby resulting in a benefits reduction.[328]

3.   SSA Efforts to Communicate with the Public Regarding the WEP

Given the complexity of the Social Security benefits formula and the WEP, the hardship that arises when a retiree fails to account for the WEP's effects, and the issues of public misconception, one may wonder how the SSA approaches explaining the provision to beneficiaries to whom the WEP applies. One mechanism that the SSA employs to provide workers with information about the Social Security benefits formula, as well as the WEP, is the Social Security Statement.[329] On December 19, 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989, requiring the SSA to furnish upon request Social Security Account Statements to eligible individuals, defined as Social Security account number holders who have attained the age of 25.[330] Moreover, the provision required the SSA to furnish such a statement, automatically on a biennial basis, to

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322. *Id.*

323. *See* Discussion *supra* Part 3.A: Disproportionate Impact.

324. *See* Discussion *supra* Part 3.B: The SSA Has Insufficient Information to Apply the WEP to All of the Targeted Beneficiaries.

325. *See generally, Hearing: Penalty for Public Service, supra* note 42; *Hearing Before Subcomm. On Soc. Sec., Pensions, and Family planning,* supra note 1.

326. *See* Discussion *infra* Part 2.E: Towards Enactment of the WEP.

327. *Id.*

328. *See* Discussion *infra* Part 3.A: Disproportionate Impact.

329. U.S GOV'T ACCOUNTABILITY OFFICE, GAO-11-787T, Social Security Statements: Observations on SSA's Plans for the Social Security Statement 1, 6 (2007); The Social Security Protection Act of 2004, PUB L. NO. 108-203, 118 Stat. 493.

330. The Omnibus Budget Reconciliation Act of 1989, PUB L. NO. 101-239, 103 Stat. 2106.

all eligible individuals for whom the SSA could determine a mailing address.[331] The Act required the SSA to include basic information such as the eligible individual's annual wages, contributions made, and an estimate of the individual's future PIA.[332] In calendar year 1995, pursuant to the Act, the SSA began mailing the Social Security Statement to individuals who had attained age 60 by October 1, 1994.[333] Thereafter, the SSA phased-in increasingly younger cohorts furnishing the Social Security Statement to all eligible individuals by October 1, 1999.[334]

During the phase-in period, the Social Security Advisory Board released a report in 1997, concluding that the public had an incomplete understanding of the Social Security system, and that the public lacked sufficient knowledge of benefits under the system and the requirements for eligibility.[335] Moreover, the Report determined that the SSA had a responsibility to help both workers and retirees understand how to provide for their economic security in retirement.[336] The Social Security Advisory Board determined that the Social Security Statement must "receive the most careful, high level attention with respect to content and design" because the Statement would become the SSA's "most important means of communicating with the public."[337] Responding to the Advisory Board's Report, the SSA shortened the length of the Social Security Statement and improved its organization and readability; however, a follow-up review in 2000 concluded that the Statement's explanation of benefits remained a concern.[338] The final step in the evolution of the Social Security Statement arrived on March 2, 2004, when Congress enacted the Social Security Protection Act of 2004, which required the SSA to include in the statement, "an explanation, in language calculated to be understood by the average eligible individual, of the operation of the. . . [WEP]. . . and an explanation of the maximum potential effects of such provision[] on the eligible individual's. . . benefits."[339]

Presently the Social Security Statement serves as the SSA's primary means of conveying information to approximately 150 million workers regarding their benefits.[340] Responding to the statutory mandate to provide an explanation that can be understood by the average eligible individual, the Social Security Statement provides the following explanation of the WEP:

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331. *Id.*

332. *Id.*

333. U.S GOV'T ACCOUNTABILITY OFFICE, GAO-11-787T, Social Security Statements: Observations on SSA's Plans for the Social Security Statement 1, 4 (2007); The Social Security Protection Act of 2004, PUB L. No. 108-203, 118 Stat. 493.

334. *Id.*

335. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY ADVISORY BOARD, INCREASING PUBLIC UNDERSTANDING OF SOCIAL SECURITY 4 (1997).

336. *Id.* at 3.

337. . *Id.* at 14.

338. . U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-787T, Social Security Statements: Observations on SSA's Plans for the Social Security Statement 1, 5 (2007).

339. The Social Security Protection Act of 2004, PUB L. NO. 108-203, 118 Stat. 493.

340. GOV'T ACCOUNTABILITY OFFICE, GAO-11-787T, Social Security Statements: Observations on SSA's Plans for the Social Security Statement 1, 6 (2011).

In the future, if you receive a pension from employment in which you do not pay Social Security taxes, such as some federal, state, or local government work. . . and you also qualify for your own Social Security retirement or disability benefit, your Social Security benefit may be reduced, but not eliminated by WEP. The amount of reduction, if any, depends on your earnings and number of years in jobs in which you paid Social Security taxes, and the year you are age 62 or become disabled. For more information, please see. . . www.socialsecurity.gov/WEP.[341]

In considering how the public forms misperceptions of the WEP, several points regarding the statement are of note. To begin, the statement probably leaves a potentially affected beneficiary asking a very simple question – "Why?" Only upon taking further affirmative action can a beneficiary learn more about the WEP. Also of note, the statement explicitly frames the adjustment to benefits as a reduction, and the statement's method of estimating a worker's potential Social Security benefits only reinforces this framing. In estimating future benefits, the statement looks to the worker's past covered earnings, and future annual earnings based on the average of the worker's annual salary during the two years preceding issuance of the statement.[342] Accordingly, the Statement does not apply the WEP to workers who have periods of noncovered employment, but rather, indicates that the WEP may reduce the worker's estimated benefit.[343] Another point of concern, the statement associates the benefit reduction with the beneficiary's alternative government pension. Finally, the Statement does not respond to the statutory mandate to provide a clear statement of the maximum possible effects of the WEP.

Where an individual takes the affirmative step of seeking additional information from the website that the Social Security Statement references, she will find material that further compounds the potential for misperception. The very first heading on the webpage reads, "Your Social Security retirement or disability benefits may be reduced."[344] Under the heading, a potentially effected beneficiary will learn that if she worked for a government employer that did not withhold Social Security taxes, "the pension you get based on that work may reduce your Social Security benefits."[345] Hence, rather than explaining to the reader that the WEP adjusts benefits to reflect contributions, the website likely produces the impression that the WEP reduces benefits because the reader also receives an alternative government pension. From there, the logical question is why the WEP does not apply to individuals receiving private pensions. When the reader proceeds to the heading "Why a different formula is used," she obtains a brief explanation of

341. *Id.* at 19.
342. *Id.*
343. *Id.*
344. *Windfall Elimination Provision: Your Social Security Retirement or Disability Benefits May Be Affected*, SOCIALSECURITY.GOV, http://www.socialsecurity.gov/pubs/10045.html (last visited Feb. 19, 2012).
345. *Id.*

the progressivity of Social Security benefits.[346] Additionally, the page provides the following:

> Before 1983, people who worked mainly in a job not covered by Social Security had their Social Security benefits calculated as if they were long-term, low-wage workers. They had the advantage of receiving a Social Security benefit representing a higher percentage of their earnings, plus a pension from a job where they did not pay Social Security taxes. Congress passed the Windfall Elimination Provision to remove that advantage.[347]

The explanation, particularly the second sentence, reads more as a criticism than an explanation calculated to be understood by the average beneficiary. Although the explanation does describe in basic terms the effect of noncovered employment on a worker's PIA, the description does not offer any clarification as to how the issue actually arises. Moreover, workers perceiving themselves to be low-income workers may still wonder why the provision applies in their situation. While the underlying rationale for the WEP is highly complex, the SSA could demonstrate the rationale through examples – particularly if the examples relate contributions made to benefits paid for covered and noncovered workers (with and without the WEP).

Besides mandating provision of Social Security Statements to eligible individuals, the Social Security Protection Act of 2004 also required state and local government employers to provide workers hired in noncovered positions after January 1, 2005 written notice of the maximum effect of the WEP on the worker's future PIA.[348] The Act requires the written notice to be in a form proscribed by the Commissioner of Social Security and transparent to the average individual.[349] Accordingly, the SSA instructs state and local government employers to provide eligible workers with Form SSA-1945, which provides the following description of the WEP:

> Under the Windfall Elimination Provision, your Social Security retirement or disability benefit is figured using a modified formula when you are also entitled to a pension from a job where you did not pay Social Security tax. As a result, you will receive a lower Social Security benefit than if you were not entitled to a pension form this job. For example, if you are age 62 in 2005, the maximum monthly reduction in your Social Security benefit as a result of this provision is $313.50. This amount is updated annually. This provision reduces, but does not totally eliminate,

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346. *Windfall Elimination Provision: Why a Different Formula is Used*, SOCIALSECURITY.GOV, http://www.socialsecurity.gov/pubs/10045.html (last visited Feb. 19, 2012).

347. *Id.*

348. The Social Security Protection Act of 2004, PUB L. NO. 108-203, 118 Stat. 493.

349. *Id.*

your Social Security benefit. For additional information, please refer to Social Security Publication, 'Windfall Elimination Provision.'"[350]

Although Form SSA-1945 certainly meets the statutory requirement of providing an understandable description of the WEP's maximum benefit reduction, the Form, like the Social Security Statement, can foster misperceptions. For example, the form frames the WEP as a reduction to benefits, links the reduction to a government pension, and fails to provide any explanation as to why the WEP is necessary.

At a time when soon-to-be retirees are making the most important financial decisions of their lives, the SSA generally does not furnish case specific advice.[351] Instead, in planning for retirement, individuals must educate themselves about the operation of the Social Security benefits formula, the impact of decisions including when to retire, and whether and to what extent provisions such as the WEP are applicable.[352] Nevertheless, despite the deficiencies in the Social Security Statement and Form SSA-1945, these documents represent an important milestone in a potentially effected beneficiary's efforts to plan for retirement. For an individual who commenced noncovered employment after January 1, 2005, Form SSA-1945[353] will likely be the first occasion on which the individual learns of the WEP. Hence, the document should provide an impetus for the individual to take affirmative action to learn more about the WEP, and to consider whether noncovered employment represents the best career decision. Workers who commenced noncovered employment prior to January 1, 2005,[354] generally did not have the same opportunity to make an informed decision regarding future employment. For these individuals, the Social Security Statement serves an even more important purpose, as the document provides the first instance in which a worker, potentially on the verge of retirement, likely will learn about the WEP. Moreover, the document provides an annual reminder to individuals who did receive Form SSA-1945.

In this context, it is not surprising that the Social Security Advisory Board would refer to the Social Security Statement as the "most direct and important means of communicating with the public."[355] Given the importance of the Statement, the surprise is that as late as 2009, the Social Security Advisory Board found that the Statement's language was too bureaucratic and confusing.[356] Moreover, the report suggested that if a potentially effected beneficiary even recalls

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350. SOCIAL SECURITY ADMINISTRATION, *Form SSA-1945 Statement Concerning Your Employment in a Job Not Covered by Social Security*, SSA.GOV, http://www.ssa.gov/online/ssa-1945.pdf (last visited February 20, 2012).

351. . Jennie L. Phipps, *7 Little-Known Social Security Benefits*, BANKRATE.COM, http://www.bankrate.com/finance/retirement/7-social-security-benefits.aspx?ec_id=m1078090#slide=1 (last visited Mar. 9, 2012).

352. . *Id.*

353. . The Social Security Protection Act of 2004, PUB L. NO. 108-203, 118 Stat. 493.

354. . *Id.*

355. . SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY ADVISORY BOARD, INCREASING PUBLIC UNDERSTANDING OF SOCIAL SECURITY 1 (2009).

356. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY ADVISORY BOARD, INCREASING PUBLIC UNDERSTANDING OF SOCIAL SECURITY 15 (2009).

reading the excerpt on the WEP, the individual may not be able to discern the meaning of important information contained therein – for example, whether the provision applies in the individual's situation.[357]

IV. LEGISLATIVE ACTION

Since enactment of the WEP in 1983, legislators have introduced numerous bills before Congress to modify, replace, or repeal the controversial provision – by the author's' count, 39 bills and 2 resolutions.[358] Of the 39 bills, the earliest five bills – H.R. 11, H.R. 2141, H.R. 2264, and H.R. 4277 – addressed exclusion of military reservists' benefits and totalization benefits from application of the WEP.[359] These bills are irrelevant for purposes of the present discussion, as they do not relate to the presently existing disadvantages of the WEP, moreover, the amendments proposed became law in 1994.[360] The remaining 35 bills are generally duplicative, as the total includes companion bills from the House of Representatives and the Senate, as well as bills that have been reintroduced year after year. However, the 35 bills represent four distinct legislative proposals: (1) the Social Security Fairness Act,[361] (2) the WEP Relief Act (2004 and later),[362] (3) the WEP Relief Act (pre-2004),[363] and (4) the Public Servant Retirement Protection Act.[364]

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357. *Id.*

358. H.R. 1332, 112th Cong. (2011); H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); S. 113, 112th Cong. (2011); S. 2010, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); H.R. 1221, 111th Cong. (2009); H.R. 2145, 111th Cong. (2009); S. 490, 111th Cong. (2009); S. 484, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); H.R. 726, 110th Cong. (2007); H.R. 2772, 110th Cong. (2007); S. 206, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); H.R. 1690, 109th Cong. (2005); H.R. 1714, 109th Cong. (2005); H.R. Res. 987, 109th Cong. (2006); S. 619, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); H.R. 2011, 108th Cong. (2003); H.R. 2611, 108th Cong. (2003); H.R. 4234, 108th Cong. (2004); H.R. 4391, 108th Cong. (2004); H.R. Res. 523, 108th Cong. (2004); S. 349, 108th Cong. (2003); S. 1011, 108th Cong. (2003); S. 2455, 108th Cong. (2004); H.R. 1073, 107th Cong. (2001); H.R. 2638, 107th Cong. (2001); S. 1523, 107th Cong. (2001); S. 2521, 107th Cong. (2002); H.R. 860, 106th Cong. (1999); H.R. 2549, 105th Cong. (1997); H.R. 922, 103d Cong. (1993); H.R. 2141, 103d Cong. (1993); H.R. 2264, 103d Cong. (1993); H.R. 4277, 103d Cong. (1994); H.R. 11, 102d Cong. (1992).

359. H.R. 922, 103d Cong. (1993); H.R. 2141, 103d Cong. (1993); H.R. 2264, 103d Cong. (1993); H.R. 4277, 103d Cong. (1994); H.R. 11, 102d Cong. (1992).

360. Social Security Independence and Program Improvements Act of 1994, PUB. L. NO. 103-296, 108 Stat. 1464.

361. H.R. 1332, 112th Cong. (2011); S. 2010, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); S. 484, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); S. 206, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); S. 619, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); S. 349, 108th Cong. (2003); H.R. 2638, 107th Cong. (2001); S. 1523, 107th Cong. (2001).

362. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004).

363. H.R. 2011, 108th Cong. (2003); S. 1011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); S. 2521, 107th Cong. (2002); H.R. 860, 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

364. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455, 108th Cong. (2004).

A.   The Social Security Fairness Act

Among the various proposals addressing the WEP, the Social Security Fairness Acts (SSFA) has traditionally received the most support in Congress.[365] First introduced by Senator Feinstein and Representative McKeon in 2001 before Congress,[366] the bill has been reintroduced by Senator Feinstein in the Senate, and Representatives McKeon or Berman in the House, during every succeeding Congress.[367] The most recent iteration of the bill – the SSFA of 2013 – is before the House as H.R. 1795 and the Senate as S. 896.[368] If passed, H.R. 1795 and S. 896 would repeal the WEP allowing beneficiaries who held both covered and noncovered employment to receive Social Security benefits based on the Social Security benefits formula beginning in January 2014.[369]

Support for the SSFA has fluctuated from 2001 to 2013; however, two patterns are evident from an examination of the bills cosponsors in the House of Representatives: (1) strong Democratic support and (2) strong backing from states in which noncovered workers are concentrated. To begin, when first introduced in 2001, the Social Security Fairness Act received 185 cosponsors in the House of Representatives.[370] By the 110th Congress, 337 cosponsors signed onto the bill,[371] but support has subsequently declined to 149 cosponsors in the House during the 112th Congress.[372] While overall support for the bill has fluctuated, Democrats have consistently accounted for between 60 and 70 percent of the bills' cosponsors.[373] Similarly, representatives from California, Colorado, Illinois, Louisiana, Massachusetts, Ohio, and Texas – the seven states in which 70 percent of noncovered state and local government employees are concentrated[374] – have consistently provided strong backing for the SSFA. For example, when Representative McKeon first introduced the bill in 2001, 51 percent of the bill's cosponsors were representatives of the above listed states.[375] Support for the SSFA was more evenly distributed between states in subsequent Congresses; however, the

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365. *Compare* H.R. 82, 110th Cong. (2007) (the iteration of the Social Security Fairness Act to receive the most co-sponsors), *with* H.R. 2011, 108th Cong. (2003) (the iteration of the WEP Relief Act to receive the most co-sponsors), *and* H.R. 1714, 109th Cong. (2005) (the iteration of the Public Servant Retirement Protection Act to receive the most co-sponsors).

366. H.R. 2638, 107th Cong. (2001); S. 1593, 107th Cong. (2001).

367. H.R. 1332, 112th Cong. (2011); S. 2010, 112th Cong. (2011). H.R. 235, 111th Cong. (2009); S. 484, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); S. 206, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); S. 619, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); S. 349, 108th Cong. (2003); H.R. 2638, 107th Cong. (2001); S. 1523, 107th Cong. (2001).

368. H.R. 1795, 113th Cong. (2013), S. 896, 113th Cong. (2013).

369. *Id.*

370. H.R. 2638, 107th Cong. (2001).

371. H.R. 82, 110th Cong. (2008).

372. H.R. 1332, 112th Cong. (2011).

373. H.R. 1332, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); H.R. 2638, 107th Cong. (2001).

374. U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 4.

375. H.R. 2638, 107th Cong. (2001).

seven states continued to account for between 34 and 42 percent of the cosponsors for the bill.[376]

Similarly, support for the SSFA has fluctuated in the Senate.[377] When Senator Feinstein first introduced the S. 1523 in 2001, 14 Senators cosponsored the bill.[378] Subsequently, support for the bill peaked in 2007 with 36 Senators cosponsoring the bill,[379] and fell to a low in 2011 when nine Senators cosponsored the bill.[380] As in the House, the SSFA receives considerable Democratic support in the Senate, ranging from 69 to 84 percent of total cosponsors.[381] Support from Senators representing the seven above listed states has ranged from 11 percent to 36 percent of the bills' cosponsors.[382]

Although the House and Senate always referred the bills to the House Ways and Means Committee and the Senate Committee on Finance, the bills consistently died in committee.[383]

While the SSFA has garnered considerable support in Congress, a prudent balancing of the bill's advantages and disadvantages cautions against repealing the WEP. Beneficiaries to whom the WEP applies are a vocal group.[384] As such, the SSFA is doubtless a politically popular bill – particularly in California, Colorado, Illinois, Louisiana, Massachusetts, Ohio, and Texas where benefits will increase, immediately or in the future, for approximately 4.7 million state and local government employees if Congress passes the bill.[385] Moreover, by repealing the WEP, the SSFA would directly address all of the disadvantages of the provision.[386] On the other hand, repealing the WEP would impose significant costs at a time when the Social Security system is already facing long-term financial challenges.[387] Specifically, the SSA, in a 2007 estimate, indicated that repeal of the WEP would cost approximately $40.1 billion over ten years, and increase the Social Security

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376. H.R. 1332, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); H.R. 594, 108th Cong. (2003).

377. S. 2010, 112th Cong. (2011); S. 484, 111th Cong. (2009); S. 206, 110th Cong. (2007); S. 619, 109th Cong. (2005); S. 349, 108th Cong. (2003); S. 1523, 107th Cong. (2001).

378. S. 1523, 107th Cong. (2001).

379. S. 206, 110th Cong. (2007).

380. S. 2010, 112th Cong. (2011).

381. S. 2010, 112th Cong. (2011); S. 484, 111th Cong. (2009); S. 206, 110th Cong. (2007); S. 619, 109th Cong. (2005); S. 349, 108th Cong. (2003); S. 1523, 107th Cong. (2001).

382. *Id.*

383. *See generally, Bill Tracking Report*, PROQUEST CONGRESSIONAL, http://web.lexis-nexis.com.ezproxy.library.unlv.edu/congcomp (last visited Feb. 25, 2012).

384. *Hearing: Penalty for Public Service, supra* note 42, at 13 (In her testimony, Senator Collins mentions that she receives letters regarding the WEP in the constituent Mail). *Id.* 4. (In his testimony, the President of the National Association of Retired Federal Employees indicates that the organization has received thousands of letters from members since the bill was enacted) *Id.* In response to Congressional Hearings in 2003 and 2005, dozens of affected beneficiaries submitted letters for the Congressional record describing stories of hardship stemming from the WEP). *See generally,* U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17.

385. U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 1, 3, 4 (providing that 6.8 million state and local government employees work in noncovered employment and that 70 percent of those workers are concentrated in the seven listed states).

386. *See infra,* Disadvantages of the WEP.

387. U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 8.

system's long-range deficit by roughly 3 percent.[388] Additionally, repeal of the WEP would raise considerable concerns regarding the fairness of the Social Security benefits formula for private sector employees when compared to federal, state, and local government employees.[389] Congress enacted the WEP to address the 'windfall' benefits that accrue to workers with short careers in Social Security covered employment.[390] Permitting noncovered government employees to receive benefits above the statutorily intended replacement rates would run counter to the fundamental tenants of the Social Security system – progressivity of benefits that are an earned right.[391] Moreover, many of the arguments against the WEP could just as easily apply to the Social Security benefits formula absent the WEP. For example, if the Social Security benefits formula permits noncovered government workers to receive 'windfall' benefits, one could argue that the formula has a disproportionate impact on workers who only held covered employment.

B.   The WEP Relief Act

Representative Frank was the first Congressional representative to undertake a formal effort to modify the WEP, introducing H.R. 2549 in 1997.[392] At the time, the bill was unnamed, but Representative Frank subsequently entitled a modified version of the bill, which he first introduced in 2004, the WEP Relief Act (WEPRA).[393] Between the two versions of the bill, Representative Frank introduced the bill in the House eight times between 1997 and 2009.[394] Senator Kerry introduced the companion bill for the early version of the WEPRA in the Senate twice in 2002 and 2003; the later version of the bill has not appeared before the Senate.[395]

Representative Frank's early version of the WEPRA would have amended the Social Security Act by restricting application of the WEP to individuals receiving combined monthly benefits (including both Social Security benefits and benefits received through a noncovered government pension) in excess of $2,000.[396] For individuals receiving combined monthly benefits exceeding $2,000, the bill would have required the SSA to derive two values (1) the individual's PIA using the traditional formula and (2) the individuals PIA (according to the traditional formula) minus one-half the value of the worker's noncovered monthly pension

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388. ALLISON M. SHELTON, CONG. RESEARCH SERV., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP) 7 (2010).

389. U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 8.

390. *See infra,* Toward Enactment of the WEP.

391. *See infra*, Social Security: Purpose and Principles/

392. H.R. 2549, 105th Cong. (1997).

393. H.R 4253, 108th Cong. (2004).

394. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

395. S. 1011, 108th Cong. (2003); S. 2521, 107th Cong. (2002).

396. 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

benefit.[397] The bill would have then instructed the SSA to reduce the greater of the two amounts derived in the previous step by applying a percentage factor to the amount in excess of $2,000 to arrive at the individual's PIA.[398] The bill provided for a phasing-in of the applicable percentage factor for individuals receiving combined monthly benefits between $2,000 and $3,000. For combined benefits exceeding $2,000 but less than $2,250, the applicable percentage factor was 20 percent.[399] Thereafter, the percentage factor increased by 20 percent for every additional $250 of combined monthly benefits until reaching 100 percent (or a total reduction of the amount in excess of $2,000) at or over $3,000.[400] If Congress had enacted the WEPRA, the bill would have required the SSA to recompute workers' PIAs to the extent necessary to carry out the provisions of the bill.[401]

The later version of the WEPRA would have operated to achieve a similar result; however, the bill included notable difference as compared to its predecessor.[402] First, the bill would have restricted application of the WEP to individuals receiving combined monthly benefits exceeding $2,500. Similar to the earlier version of the bill, the modified WEPRA would have instructed the SSA to calculate two values for individuals with combined monthly benefits in excess of $2,500: (1) the individual's PIA determined through the traditional formula and (2) the same amount reduced by one-half the value of the worker's non-covered government pension.[403] To the greater of the two amounts, the bill would have required the SSA to apply a percentage factor to the amount in excess of $2,500, thereby reducing the individual's PIA.[404] The modified version of the WEPRA provided for a phasing-in of the WEP between $2,501 and $3,334, employing a complex formula that reduces the benefit amount in excess of $2,500 by 10 percent for every additional $83.33.[405] Notably, the modified version of the WEPRA included a provision that if enacted would have adjusted the threshold for application of the WEP, as well as the amounts through which the WEP would have phased-in, for changes in the national average wage index.[406] As with the previous version of the bill, the modified WEPRA would have required the SSA to recompute workers' PIAs to carry out the provisions of the bill.[407]

Support for the WEPRA has fluctuated considerably from 1997 to 2009.[408] Endorsements in the House of Representatives have ranged from a single

397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004).
403. *Id.*
404. *Id.*
405. *Id.* The formula is 2.5 * (amount in excess of $2,500 / (1/12 * 30,000)) / ((1/480 * 10,000) / $2,500). *Id.*
406. *Id.*
407. *Id.*
408. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); S. 1011, 108th Cong. (2003); S. 2521, 107th

representative cosponsoring H.R. 2145 during in 2009 to 232 representatives cosponsoring H.R. 1073 in 2001.[409] In general, the early version of the WEPRA – the version that excluded a wage-indexing provision – received far greater support than the more recent iteration of the bill.[410] Similar to the SSFA, the WEPRA has consistently received strong Democratic support.[411] In fact, Democrats have comprised between 78 percent and 100 percent of the total cosponsors for each bill before the House. In contrast to both the SSFA and the Public Servant Retirement Protection Act (discussed below), the WEPRA has not received considerable support in the House from representatives of the seven states in which 70 percent of noncovered state and local employees are concentrated – California, Colorado, Illinois, Louisiana, Massachusetts, Ohio, and Texas.[412] Generally, representative of these seven states have accounted for between 25 and 35 percent of the bill's cosponsors in the House.[413] However, this pattern does have three exceptions: representatives of the seven states accounted for (1) 0 percent of the cosponsors for H.R. 2145 (2009),[414] (2) 43 percent of the cosponsors for H.R. 2549 (1997),[415] and (3) 80 percent of the cosponsors for H.R. 4234(2004).[416] In the Senate, S. 1011 and S. 2521 received five and three cosponsors respectively, each of whom were Democrats, and none of whom hailed from one of the above listed states.[417] On each occasion that the WEPRA has appeared before Congress, the bills have died in the House Committee on Ways and Means or the Senate Finance Committee.[418]

As with the SSFA, the WEPRA has both advantages and disadvantages. For example, the bill responds directly to concerns regarding the disproportionate impact of the WEP on low-income workers[419] by exempting from the WEP individuals with combined monthly benefits falling below $2,500 ($2,000 under the

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Cong. (2002); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997). S. 1011, 108th Cong. (2003).

409. H.R. 2145, 111th Cong. (2009); H.R. 1073, 107th Cong. (2001).

410. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

411. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); S. 1011, 108th Cong. (2003); S. 2521, 107th Cong. (2002); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997). S. 1011, 108th Cong. (2003).

412. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997); U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 4.

413. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

414. H.R. 2145, 111th Cong. (2009);

415. H.R. 2549, 105th Cong. (1997).

416. H.R. 4234, 108th Cong. (2004).

417. S. 1011, 108th Cong. (2003); S. 2521, 107th Cong. (2002).

418. *See generally, Bill Tracking Report*, PROQUEST CONGRESSIONAL, http://web.lexis-nexis.com.ezproxy.library.unlv.edu/congcomp (last visited Feb. 25, 2012).

419. *See* Discussion *supra* Part 3: WEP: The Problems.

early version of the bill).[420] Although eliminating the WEP's disproportionate impact represents a laudable goal, the bill would achieve this by permitting many workers to receive the 'windfall' benefits that gave rise to the WEP.[421] Consider a low-income worker who held noncovered employment for 15 years, earning $20,000 annually, thereby qualifying for an $800 monthly pension benefit under her state retirement program. Subsequently, the worker returned to school, earned a law degree, and obtained a job in Social Security covered employment for which she received maximum taxable earnings for each of the subsequent 20 years. Under the WEPRA, if the worker attains early retirement age in 2012 and elects to defer retirement until full retirement age, the worker will receive a PIA of $1,933.70 ((.9 * $767) + (.32 * ($4,624-$767)) + (.15 * ($4,685.10 - $4,624))). As the combined total of the worker's Social Security benefits and noncovered pension ($2,350.20) does not exceed $2,500, the WEP would not be applicable to the worker under the WEPRA. Had all of the worker's earnings been in Social Security covered employment, the worker would have received a PIA of $2,040.80 ((.9 * $767) + (.32 * ($4,624-$767)) + (.15 * ($5,399.40 - $4,624))). In this example, under the WEPRA, the worker received a replacement rate of 41 percent ($1,933.70 / $4,685.10) * 100). By contrast, if all of the worker's earnings had been in Social Security covered employment, the worker would have received a replacement rate of 37 percent ($2,040.80 / $5,399.40) * 100). Thus, the worker receives both the benefit of a replacement rate that is higher than statutorily intended, and a pension from noncovered employment.

While the above hypothetical is an isolated example, it demonstrates that under the WEPRA, whether 'windfall' benefits will accrue to workers is highly dependent on the size of the worker's noncovered government pension. In this sense, one might argue that the bill embodies one of the underlying principles of the Social Security benefits formula – progressivity of benefits. While there will be examples of workers with significant earnings receiving 'windfall' benefits under the bill, the bill is more permissive of such benefits accruing to workers with smaller total combined benefits – that is, the workers who may benefit most from the 'windfall.'

While the above consideration represent a difficult policy debate, several other concerns weigh against the bill. For example, the bill does apply a modified version of the WEP to the portion of combined benefits exceeding $2,500. However, the bill fails to implement a system through which the SSA can collect data on state and local government retirees receiving noncovered pensions. Thus, the bill would permit the modified version of the WEP to apply to federal retirees to a greater degree than it would apply to state and local government retirees. Additionally, under the bill, the manner in which the SSA addresses the 'windfall' benefits problem would remain highly complex. Without further action by the SSA, issues of public misperception and resentment would likely remain.

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420. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004); H.R. 2011, 108th Cong. (2003); S. 1011, 108th Cong. (2003); S. 2521, 107th Cong. (2002); H.R. 1073, 107th Cong. (2001); H.R 860; 106th Cong. (1999); H.R. 2549, 105th Cong. (1997). S. 1011, 108th Cong. (2003).

421. *See* Discussion *supra* Part 2.E: Towards Enactment of the WEP.

C.   The Public Servant Retirement Protection Act

Among the various proposals to amend or repeal the WEP, the Public Servant Retirement Protection Act (PSRPA) represents the only legislative effort to introduce a proportional WEP.[422] Representative Brady first introduced the bill before the House on May 19, 2004, and a day later, Senator Hutchison introduced a companion bill in the Senate.[423] Thereafter, Representative Brady and Senator Hutchison have reintroduced the bill in every succeeding Congress through 2011.[424]

The PSRPA provides for two alternative formulas for determining a worker's PIA.[425] Under the bill, the applicability of a particular approach to a given worker turns on when the worker first commences employment in a noncovered position.[426] For workers first commencing employment in a noncovered position after the twelfth calendar month following the bill's enactment, the PSRPA would substitute a proportional formula for the current law WEP.[427] If enacted, the bill would instruct the SSA to include both covered earnings and recorded noncovered earnings in the calculation for AIME (henceforth, this Article will use the term total AIME to distinguish from AIME under current law).[428] For purposes of the PSRPA, recorded noncovered earnings are earnings from employment in a noncovered position for which the Commissioner of Social Security determines satisfactory evidence is available in the record.[429] Thereafter, the bill would require the SSA to derive PIA by applying the Social Security benefits formula, without the current law WEP, to the worker's total AIME.[430] Finally, the bill would instruct the SSA to multiply the worker's PIA by the ratio of the worker's current law AIME to total AIME.[431] The product represents a worker's covered PIA.

For example, consider a worker who earned an annual salary of $90,000 in Social Security covered employment for 20 years and recorded noncovered employment for 15 years. As the PSRPA considers both types of earnings, the worker's total AIME would be $7,500 (($90,000 * 35) / 420). Note that the worker's total AIME equals AIME under the current law for a worker with identical earnings stemming only from noncovered employment. Applying the Social Security benefits formula, the worker's PIA under the bill would be $2,355.90 (.9 *

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422. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

423. H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

424. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005).

425. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

$767) + (.32 * ($4,624 - $767)) + (.15 * ($7,500 - $767)). Again, note that the worker has obtained the same replacement rate as a worker with identical earnings arising only from Social Security covered employment – 31 percent (($2,355.90 / $7,500) * 100). Finally, the bill would instruct the SSA to decrease the worker's PIA by multiplying the figure by the ratio of current law AIME to total AIME, resulting in a covered PIA of $1,364.20 ($2,355.90 * (((20 * $90,000) / 420) / $7,500)).

Alternatively, where an individual commenced employment in a noncovered position during or before the 12-month period following enactment of the PSRPA, the bill would permit the individual to take the larger of the covered PIA as determined under the proportional WEP described above, or the PIA determined under the current law WEP.[432] Here, the combined effect of several of the bill's provisions introduces a significant complication. If enacted, the bill would apply retroactively, requiring the SSA to recompute benefits for all potentially effected individuals.[433] As discussed above, the bill would require the SSA to include in total AIME, recorded noncovered earnings arising from services performed in noncovered employment after 1950.[434] However, the SSA lacks data on earnings arising from noncovered employment during calendar years prior to 1978.[435] Beginning in 1978, the SSA collected such data through IRS Form W-2, but the data is often incomplete – especially from years immediately preceding 1978.[436] Thus, for all workers who commenced noncovered employment prior to the date of the bill's future enactment, the proportional WEP would potentially reach back to noncovered earnings for which the SSA lacks data.

To account for the data gap, the drafters of the PSRPA included a provision which substitutes adjusted total covered earnings (ATCE) for total AIME.[437] Where any portion of a worker's earnings consists of nonrecorded noncovered earnings, the PSRPA would instruct the SSA to derive ATCE by calculating the sum of covered and recorded noncovered earnings, and dividing the figure by the number of months elapsed during the years in which the worker earned covered and recorded noncovered earnings.[438] Thereafter, the bill would apply the Social Security benefits formula, without the WEP, to ATCE to derive a worker's PIA.[439] To arrive at covered PIA for a worker, the bill would instruct the SSA to multiply PIA by the ratio of the worker's current law AIME to ATCE.[440]

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432. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

433. *Id.*

434. *Id.*

435. *Fourth in a Series of Subcommittee Hearings on Protecting and Strengthening Social Security: Hearing before the S. Comm. on Soc. Sec.*, 109th Cong. 18 (2005).

436. *Id.*

437. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

438. *Id.*

439. *Id.*

440. *Id.*

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To illustrate application of this alternative approach, imagine a worker who earned $90,000 annually for 20 years in covered employment, 10 years in nonrecorded noncovered employment, and 5 years in recorded noncovered employment. Additionally, assume that the PSRPA had passed in 2011, and that the worker reached early retirement age in 2012. Because some of the worker's earnings arise from nonrecorded noncovered employment, the PSRPA requires the SSA to calculate ATCE, which, in this case, equals $7,500 (($90,000 * 25) / (25 * 12)). Next, the PSRPA applies the Social Security benefits formula to ATCE, resulting in a PIA of $2,355.90 (($767 * .9) + (.32 * ($4,626 - $767)) + (.15 * ($7,500 - $4,624))). Finally, the PSRPA multiplies PIA by the ratio of current law AIME to ATCE, resulting in a covered PIA, if the worker retires at full retirement age, of $1,346.20 ($2,355.90 * ((($90,000 * 20) / 420) / $7,500). As the worker's service in noncovered employment necessarily commenced before enactment of the PSRPA, the final step under this approach is to determine whether the worker's covered PIA exceeds the worker's current law PIA with the WEP, which in this example, equal $1,624.50. As the worker's current law PIA with the WEP exceeds covered PIA, the PSRPA would permit the worker to take $1,624.50 as her monthly benefit.

Although the PSRPA represents the only legislative effort to introduce a proportional WEP, support for the PSRPA has been relatively weak.[441] When Representative Brady, a Republican from Texas, first introduced the bill in the House, five cosponsors endorsed the PSRPA.[442] Support for the bill peaked in 2005, when 24 Representatives joined Representative Brady as cosponsors of the bill.[443] Thereafter, support for the bill has waned, falling to 15 and 16 cosponsors in the House in 2009 and 2011 respectively[444], and reaching a low of seven cosponsors during the 112th Congress.[445] As in the case of the SSFA, two patterns are evident from an examination of the PSRPA's cosponsors in the House of Representatives. First, Republicans have consistently accounted for at least two-thirds of the bill's cosponsors.[446] During recent Congresses, Republican sponsorship of the PSRPA has risen as high as 87.5 percent in 2009, and 100 percent in 2011.[447] Similarly, representatives from Texas – one of the seven states in which more than 70 percent of noncovered state and local government employees are concentrated[448] - have consistently provided strong backing for the PSRPA.[449] In fact, representatives from Texas constituted more than 80 percent of the bill's endorsers between 2007 and

441. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).
442. H.R. 4391, 108th Cong (2004).
443. H.R. 1714, 109th Cong. (2005).
444. H.R. 1221, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007).
445. H.R. 2797, 112th Cong. (2011).
446. H.R. 2797, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004).
447. H.R. 2797, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009).
448. U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 4.
449. H.R. 2797, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004).

2011.[450] In the Senate, support for the bill has consistently been limited to Senator Hutchison – a Republican from Texas and the bill's sponsor.[451] In all cases, the House and Senate referred the bills to the House Committee on Ways and Means or the Senate Committee on Finance, where the bills died in committee.[452]

Proposing a proportional WEP, the PSRPA adopts the most equitable approach to adjusting for noncovered employment of any of the Congressionally proposed methods, as the bill would permit worker's with noncovered employment to receive the same replacement rates as their counterparts who received identical earnings, but only worked in Social Security covered employment.[453] However, depending on whether one emphasizes the earned right principle of the Social Security system or the importance of a progressive benefit structure,[454] the bill's method for achieving proportionality represents either a strength or a weakness. To illustrate, consider two workers, both of whom held Social Security covered employment for 20 years receiving $50,000 annually. The first worker, in addition to his Social Security covered employment, also earned $20,000 annually for 15 years in recorded noncovered employment. As the PSRPA considers both types of earnings, the worker's total AIME would be $3,095.23 ((($50,000 * 20) + ($20,000 * 15)) / 420).[455] Next, under the bill, one would apply the Social Security benefits formula, resulting in an initial PIA for the worker of $1,435.30 (.9 * $767) + (.32 * ($3,095.23 - $767)).[456] Finally, the bill would instruct the SSA to multiply initial PIA by the ratio of AIME to total AIME resulting in a covered PIA of $1,104 (($1,435.30 * ((($50,000 * 20) / 420) / $3,095.23).[457]

As with the example of the first worker, the second worker held recorded noncovered employment for 15 years; however, during her period in noncovered employment, the second worker earned $90,000 annually. Here, the second worker has a total AIME of $5,595.23 ((($50,000 * 20) + ($90,000 * 15)) / 420).[458] If the

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450. H.R. 2797, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007).

451. S. 113, 112th Cong. (2011); S. 490, 111th Cong. (2009); S. 1647, 110th Cong. (2007); S. 866, 109th Cong. (2005); S. 2455 108th Cong. (2004).

452. *See generally, Bill Tracking Report,* PROQUEST CONGRESSIONAL, http://web.lexis-nexis.com.ezproxy.library.unlv.edu/congcomp (last visited Feb. 25, 2012).

453. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

454. U.S GOV'T ACCOUNTABILITY OFFICE, supra note 17, at 3; *Hearing: Penalty for Public Service, supra* note 42, at *13* (statement of Jo Anne. B. Barnhart, Commissioner of Social Security).

455. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004); 42 U.S.C. 215(a)(7); 42 U.S.C. 215(b).

456. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004); 42 U.S.C. 215(a)(7); 42 U.S.C. 215(a).

457. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

458. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong.

Beyond policy considerations, an inherent disadvantage exists in the PSRPA's reliance on recorded noncovered earnings – the SSA lacks data on noncovered earnings arising prior to 1978.[466] The bill does provide for an alternative calculation where some portion of a worker's earnings stems from nonrecorded noncovered employment.[467] However, the bill provides a guarantee that such a worker may take the larger of covered PIA as determined under the PSRPA, or PIA as determined under the current law WEP.[468] Consequently, if enacted, the bill would maintain the disproportionate impact of the WEP.[469] As the bill permits a retiree with nonrecorded noncovered earnings to take the greater of covered PIA under the PSRPA or PIA under the current law WEP,[470] only those workers who receive a higher than statutorily intended replacement rate under the WEP – high-income worker – will have an incentive to avail themselves of the option. The above hypothetical provided an example of a high-income worker for whom the disproportionately high replacement rate of the WEP provided a more attractive option. Thus, the bill does not immediately respond to the problem in the WEP that both motivated its enactment and the calls for its repeal.[471] If enacted, the bill would phase-out the problem, as the option of choosing between the PSRPA calculation and the WEP calculation would only be available to workers who commenced noncovered employment during or before the 12-month period following the bill's enactment.[472] However, if enacted the earliest calendar year in which the PSRPA could no longer reach back to nonrecorded noncovered earnings would be 2024, as the SSA first began receiving a complete data set on noncovered earnings in 1983.[473]

Similar to the WEPRA, the PSRPA does not include a provision to implement a system through which the SSA can verify whether state and local government retirees are receiving a noncovered pension.[474] Presently, the SSA employs data obtained from the Office of Personnel Management to determine whether federal retirees are receiving noncovered pensions through the Civil Service Retirement

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466. *See* Discussion *supra* Part 3: WEP: The Problems.

467. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

468. *Id.*

469. *See* Discussion *supra* Part 3: WEP: The Problems.

470. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

471. *See* Discussion *supra* Parts 2.E Towards Enactment of the WEP, 3: WEP: The Problems.

472. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

473. 42 U.S.C. § 415(b)(1)(A), (b)(2)(A)(i), (b)(2)(B)(i), (b)(3)(A) (2006); *Fourth in a Series of Subcommittee Hearings on Protecting and Strengthening Social Security: Hearing before the S. Comm. on Soc. Sec.*, 109th Cong. 23 (2005).

474. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

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System.[475] By failing to provide for a similar system for state and local government retirees, the PSRPA would permit state and local government retirees to escape application of the proportional WEP to a greater extent than federal employees.[476]

One advantage of the PSRPA is its relatively low cost. In 2007, the SSA estimated that a similar proposal would have cost approximately $4.6 billion over 10 years, and in the long-term, would have increased the long-range deficit by roughly .5%.[477] While the PSRPA imposes a relatively small cost on the Social Security system, the administrative burden would be significant if Congress enacts the bill. If enacted, the bill would apply retroactively, requiring the SSA to recompute benefits for all potentially effected individuals.[478] In a 2005 Congressional hearing, a Deputy Director of the SSA stated that gathering the necessary data to administer the PSRPA and to recompute benefits for every potentially effected worker would require approximately 2,200 work-years over a five-year period.[479]

V. RECOMMENDATION

Congress enacted the WEP as part of the Social Security Amendments Act of 1983 to address the problem of 'windfall' benefits accruing to workers who receive pensions from noncovered employment in addition to Social Security benefits.[480] Although, at the time, Congress considered employing a proportional WEP to downward adjust worker benefits in proportion to earnings in Social Security covered employment, Congress determined that acquiring data on noncovered earnings posed insurmountable obstacles.[481] Instead, Congress elected to substitute 40 percent for the percentage factor traditionally applicable to the first bracket of AIME.[482] An imprecise mechanism resulting from Congressional compromise, the WEP has numerous disadvantages including a disproportionate impact on low-income workers.[483] Over the last decade and a half, Congress has attempted to modify, repeal, or replace the WEP to no avail.[484] Of the bills introduced before Congress, the PSRPA represents the most equitable effort to date, as the bill would provide workers with pensions from noncovered employment who also qualify for Social Security benefits with a replacement rate equal to the replacement rate of workers who earned an identical average annual salary, but only worked in Social

475. U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 5-6 (2007).

476. *See* Discussion *supra* Part 3: WEP: The Problems.

477. ALLISON M. SHELTON, CONG. RESEARCH SERVICE., 98-35, SOCIAL SECURITY: THE WINDFALL ELIMINATION PROVISION (WEP). (2010).

478. *Id.*

479. *Fourth in a Series of Subcommittee Hearings on Protecting and Strengthening Social Security: Hearing before the S. Comm. on Soc. Sec.*, 109th Cong. 18 (2005).

480. *See* Discussion *supra* Part 2.E: Towards Enactment of the WEP.

481. John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SECURITY BULL. 10 (1983).

482. H.R. CONF. REP. NO. 98-47, at 120-121 (1983).

483. *See* Discussion *supra* Part 3: WEP: The Problems; *See also, Brown* & Weisbenner, *supra* note 21, at 8-13.

484. *See* Discussion *supra* Part 4: Legislative Action.

Security covered employment.[485] However, by considering total earnings in both covered and noncovered employment, the bill undermines the earned right principle of the Social Security system by permitting noncovered earnings to influence a worker's PIA.[486] By adopting a provision that adjusts the bendpoints in proportion to the number of years a worker held covered employment, Congress can achieve the same equitable result, without permitting noncovered earnings to influence PIA.

The problem of 'windfall benefits' arises by operation of the calculation for AIME, which averages the sum of a worker's 35 highest earnings years in Social Security covered employment over a 35-year period.[487] However, the 'windfall benefits' problem actually implicates a second component of the Social Security benefits formula's structure - specifically, the bendpoints that delineate the brackets of AIME to which the progressive percentage factors apply. In 2012, the first and second bendpoints are $767 and $4,624 respectively,[488] creating three brackets of AIME: (1) $0 to $767, (2) $768 to $4,624, and (3) $4,625 to the level of AIME representing maximum taxable earnings ($8,199 in 2012).[489] Conceptually, one can think of the bendpoints as defining, within each bracket, both the contributions a worker must make to the Social Security system over 35 years and the benefits available to a worker based on 35 years of contributions. Thus, for example, to receive the maximum benefit available within the first bracket of AIME ($690.30 in 2012), a worker reaching early retirement age in 2012 must earn $322,140 ($767 * 420) during 35 of the 40 years preceding 2012.[490] Holding the present FICA employee tax rate constant (6.2 percent),[491] the worker must contribute $19,972.68 ($322,140 * .062) to the Social Security system to receive the maximum benefit available within the first bracket of AIME. As such, one can perceive how the interplay of the calculation for AIME, and the structure of the Social Security benefits formula create the 'windfall' benefits problem. Specifically, the averaging provision compresses AIME for workers who held noncovered employment[492] while the bendpoints continue to delineate the brackets of AIME as if the worker held Social Security employment for 35 years. Each bracket considers too high of a level of AIME (or, conversely, too large of a contribution to the Social Security system) permitting a worker who held less than 35 years of Social Security covered employment to receive too high of a benefit within each bracket.

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485. *See* Discussion *supra* Parts 4.C: Public Servant Retirement Protection Act or 3.A.III: Comparison with a Proportional WEP; H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

486. *See* Discussion *supra* Part 4.C: Public Servant Retirement Protection Act.

487. *See* Discussion *supra* Part 2.D: Effect of Noncovered Employment under the Social Security Benefits Formula. 42 U.S.C. § 415(b)(1), (b)(1)(A), (b)(2)(A)(i), (b)(2)(B)(i) (2006).

488. 42 U.S.C. § 415(a)(B)(i); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

489. *Id.*; 42 U.S.C. § 415(a)(1)(A)(i), (ii).

490. 42 U.S.C. § 415(a)(B)(i), (b)(1), (b)(1)(A), (b)(2)(A)(i), (b)(2)(B)(i); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

491. 26 U.S.C § 3101(a) (2010); 26 U.S.C. § 3111(a) (2011).

492. *See* Discussion *supra* Part 2.D: Effect of Noncovered Employment under the Social Security Benefits Formula.

As soon as one recognizes that the bendpoints essentially define the contributions required of, and benefits available to a worker who held Social Security covered employment for 35 years, a solution to the problem of 'windfall benefits' becomes readily apparent. One must merely multiply each bendpoint by the ratio of years worked in Social Security covered employment to the number of years over which the calculation for AIME averages earnings (35 years). These calculations downward adjust the three brackets in proportion to the number of years worked in Social Security covered employment. Thereafter, one can apply the ordinary Social Security benefits formula, substituting the proportional bendpoints for the bendpoints applicable to a worker who held 35 years of Social Security covered employment.

As a benchmark, consider a worker who reaches early retirement age in 2012 after working in Social Security covered employment for 35 years, earning an annual salary of $75,000. Here, the worker has a full record in Social Security covered employment for purposes of calculating AIME, which, in this example, equals $6,250 (($75,000 * 35) / 420).[493] If the worker defers retirement until full retirement age, the worker will receive a PIA of $2,168.40 ((.9 * 767) + (.32 * ($4,624 - $767)) + (.15 * ($6,250 - $4,624))).[494] Thus, the Social Security benefits formula would provide this worker with a replacement rate of 35 percent ($2,168.40 / $6,250).

Next, consider a worker who earned an identical salary, but held Social Security covered employment for 20 years and noncovered employment for 15 years. By averaging the worker's covered earnings over a period of 35 years, the Social Security Act's averaging provision produces a compressed AIME of $3,571.40 (($75,000 * 20) / 420) for this worker.[495] As the worker held less than 35 years of Social Security covered employment, the next step would require adjusting the bendpoints to reflect the number of years the worker held covered employment. By multiplying each bendpoint by the ratio of years in covered employment to 35 years, one finds that the first and second bendpoints are $438 and $2,642 respectively (($767 * (20/35)) and ($4,624 * (20/35))).[496] By substituting the proportional bendpoints into the ordinary Social Security benefits formula, one finds that if the worker defers retirement until full retirement age, she would receive a PIA of $1,053.50 ((.9 * $438) + (.32 * ($2,642 - $438)) + (.15 * ($3,571.40 - $2,642))) under the alternative formula.[497] Note that the worker in the second example receives the exact same replacement rate - 35 percent ($1,053.50 / $3,035.70) – as the worker from the first example who earned an identical annual salary and only held Social Security covered employment. Thus, the foregoing examples demonstrate that by adjusting the bendpoints such that the benefits available within each bracket of AIME are proportional to the number of years a

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493. 42 U.S.C. § 415(b).

494. 42 U.S.C. § 415(a).

495. 42 U.S.C. § 415(b).

496. 42 U.S.C. § 415(a)(B)(i); Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111, 66,115 (Oct. 25, 2011).

497. 42 U.S.C. § 415(a).

worker held Social Security covered employment, the SSA can provide a worker who held noncovered employment a replacement rate that is identical to the replacement rate of a worker who only worked in covered employment and received identical average annual earnings.[498]

The issue of whether the PSRPA or the proportional bendpoints approach presents the superior method of addressing the 'windfall benefits' problem presents a difficult policy question – should a modified WEP emphasize the progressivity of benefits or the earned right tenet of Social Security benefits. By decreasing benefits as earnings outside of the Social Security system increase, the PSRPA embodies the principle of progressivity, as workers with significant noncovered earnings will appear to be high-earners relative to workers who received less in noncovered employment, but earned an identical annual salary in covered employment.[499] However, inclusion of noncovered earnings in the Social Security benefits formula permits a factor other than contributions to influence a worker's potential benefit.[500] The proportional bendpoints approach would ignore noncovered earnings, achieving progressivity to the extent that the calculation considers covered earnings. Thus, the approach emphasizes the earned right principle of benefits – a worker receives a benefit based only on contributions. However, there is another manner in which one can consider the problem – the two principles do not operate in isolation, but rather are interconnected. The Social Security benefits formula looks to total earnings in Social Security covered employment, representing total contributions, and provides a progressive benefit based on the need demonstrated by a worker's earning level. The proportional bendpoints approach accomplishes exactly this task for the period a worker held covered employment, while permitting the noncovered pension system into which a worker contributed to accomplish the task for the period of noncovered employment. By contrast, the PSRPA would, at least in part, duplicate the function of the noncovered pension.

However, the issue of which approach to calculating benefits for workers who held noncovered employment presents the superior option does not turn on the policy question alone, as there are many advantages to the proportional bendpoints approach. For example, by only considering earnings deriving from Social Security

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498. . Note that the Social Security Act would treat a worker who, for example, held Social Security covered employment for 20 years, and then retired, more favorably. For an individual to be subject to the current law WEP, she must qualify for a noncovered pension after 1985. 42 U.S.C. § 415(a)(7)(A)(ii). In this example, the individual's employment record would not trigger the WEP, as the individual did not hold noncovered employment, she simply retired. Thus, the SSA would enter 15 zero years into the calculation for AIME, divide by 420 months, and apply the Social Security benefits formula. 42 U.S.C. § 415(a), (b). As a result, 'windfall' benefits will accrue to an individual with this type of employment record. *See infra*, Effect of Noncovered Employment under the Social Security Benefits Formula. Whether the individual's situation truly compares to that of a noncovered worker who qualifies for a noncovered pension is debatable. On one hand, the individual will not have the benefit of a noncovered pension in addition to his Social Security benefits. On the other, the individual may have retired after winning the lottery. In the context of broader Social Security reform, the SSA can apply the proportional benefits approach to calculating Social Security benefits for all workers. By applying the approach broadly, the SSA can address 'windfall' benefits that accrue to individuals with the type of employment history described above. The potential benefits and social costs of broad application of this method, however, exceed the scope of this Article.

499. *See* Discussion *supra* Part 4.C: The Public Servant Retirement Protection Act.

500. *Id.*

covered employment, the proportional bendpoints approach avoids issues arising under the PSRPA relating to data on noncovered earnings. The SSA entirely lacks data on noncovered earnings arising from noncovered employment prior to 1978, and has incomplete information on such earnings arising between 1978 and 1983,[501] the PRSPA must turn to an alternative approach to calculating benefits for workers with nonrecorded noncovered earnings.[502] The alternative approach permits a worker with nonrecorded noncovered earnings to take the larger of PIA under the current law WEP or PIA as determined through a calculation that includes ATCE.[503] Thus, this approach both preserves the disproportionate impact of the WEP, and potentially introduces new issues through the ATCE calculation.[504] The proportional bendpoints approach entirely avoids these issues by eliminating the current law WEP, focusing on covered earnings, and creating a single calculation applicable to all workers who receive a pension from noncovered employment.

If the SSA improves the methods by which it communicates with the public regarding the purpose of the WEP, a proportional bendpoints approach to the problem of 'windfall benefits' has a strong potential to allay public misperceptions and resentment towards the WEP. As demonstrated throughout this Article, the Social Security benefits formula is a highly complex, and involved calculation to which the WEP adds a layer of complexity.[505] Understanding the purpose of the WEP requires knowledge of the policy behind the Social Security system, and likely, examples of the effect of noncovered employment on PIA under the ordinary Social Security benefits formula.[506] While the proportional bendpoints approach adds an additional calculation to the formula, it removes much of the WEP's complexity and arbitrariness. The approach does not rely on an imprecise percentage factor that was determined through Congressional compromise.[507] Nor does the method vary the applicable percentage factors based on the number of years a worker held Social Security covered employment.[508] Moreover, one does not need to understand the policy implications of 'windfall benefits' to recognize the equity of setting PIA in proportion to the number of years during which a worker contributed to the Social Security system. The PSRPA accomplishes a similar task, albeit through a different mechanism.[509] However, by permitting noncovered

501. *Fourth in a Series of Subcommittee Hearings on Protecting and Strengthening Social Security: Hearing before the S. Comm. on Soc. Sec.*, 109th Cong. 18, 23 (2005).

502. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

503. *Id.*

504. *See* Discussion *supra* Parts 3: WEP: The Problems, 4.C: The Public Servant Retirement Protection Act.

505. *See* Discussion *supra* Parts 3.C: Public Misperception and Resentment: SSA Efforts to Educate the Public.

506. *See* Discussion *supra* Parts 2.C: The Social Security Benefits Formula, 2.D Effect of Noncovered Employment under the Social Security Benefits Formula.

507. *See infra*, Enactment of the WEP; 42 U.S.C. § 415(a)(7)(B)(ii)(V) (2006).

508. 42 U.S.C. § 415(a)(7)(D).

509. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004).

earnings to influence PIA, the PSRPA is likely to preserve concerns among the public that the provision penalizes government employees for electing to work in the public sector.[510]

Although a proportional bendpoints approach to the 'windfall benefits' problem alleviates concerns regarding the disproportionate impact of the WEP, the modified calculation does not address shortcomings in the SSA's ability to gather data on state and local government employees receiving noncovered pensions. Presently, the SSA periodically cross-references beneficiary records with data from the Office of Personnel Management to verify whether federal government retirees are receiving noncovered pensions.[511] As the SSA only employs a post-entitlement matching procedure for federal retirees, the SSA enforces the WEP against federal government retirees to a greater degree than against state and local government retirees.[512] Accordingly, along with adopting a proportional bendpoints approach, Congress should include a provision permitting the SSA to gather data through Form 1099R on state and local government employees receiving noncovered pensions.

Thus, substituting proportional bendpoints into the Social Security benefits formula for workers who held noncovered employment, thereby earning a noncovered pension, is a superior option. The approach balances the progressivity of the Social Security benefits formula with earned rights inherent in Social Security benefits. Moreover, the approach eliminates the need for the SSA to gather data on noncovered earnings or to rely on alternative calculations, including the current law WEP, for workers with nonrecorded noncovered earnings. Coupled with improved efforts to communicate the need for an alternative calculation from the SSA, the proportional bendpoints method has a strong probability of reducing public misperceptions and resentment towards the WEP. Finally, a bill which adopts the proportional bendpoints approach must also include a provision permitting the SSA to collect data through Form 1099R on state and local government employees receiving public pensions to ensure equal application (see Appendix for a draft bill).

VI. CONCLUSION

Congress enacted the WEP to address the 'windfall' benefits that accrue to workers who held both covered and noncovered employment.[513] A product of Congressional compromise, the WEP is an imprecise mechanism that has significant disadvantages.[514] For example, the provision disproportionately impacts low-income workers.[515] This disproportionate impact arises by operation of the WEP's regressive structure and its phase-in provision, for which a high-income

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510. *Id.*; *See* Discussion *supra* Part 3: WEP: The Problems.

511. U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 5-6 (2007).

512. *Id.* at 6.

513. *See* Discussion *supra* Part 2.E: Towards Enactment of the WEP.

514. *Id.*

515. Brown & Weisbenner, *supra* note 21, at 8-13.

worker is far more likely to qualify, thereby receiving a significant benefit increase.[516] Moreover, the provision neither replicates the replacement rates of the Social Security benefits formula, nor tracks the formula's progressive structure.[517] Administratively, the provision is difficult to enforce.[518] The SSA periodically cross-references beneficiary records with data from the Office of Personnel Management to verify whether federal government retirees are receiving noncovered pensions.[519] As the SSA only employs a post-entitlement matching procedure for federal retirees, a disparity presently exists in the degree to which the SSA enforces the WEP against federal retirees, as compared to state and local retirees.[520] Finally, considerable public misperception and resentment surrounds the WEP.[521] Moreover, instances frequently arise in which retirees suffer significant hardship after having failed to include the effects of the WEP in their retirement plans.[522] In planning for retirement, individuals must educate themselves about the operation of the Social Security benefits formula, the impact of decisions including when to retire, and whether provisions such as the WEP are applicable.[523] Given the instances of personal hardship, as well as the public misperception and resentment surrounding the provision, one finds that the SSA is not effectively educating the public about a very complex provision.[524]

Not surprisingly, the WEP has been the subject of considerable legislative attention since the provision's enactment in 1983.[525] Senators and Representatives have introduced more than 35 bills before Congress to modify, replace, or repeal the WEP represent 4 distinct legislative proposals: (1) the SSFA,[526] (2), the WEPRA (2004 and later);[527] (3) the WEPRA (pre-2004),[528] and (4) the PSRPA.[529] This

516. *See* Discussion *supra* Part 3.A.I: The WEP's Regressive Nature, 3.A.II: Disproportionate Effect of the Substantial Earnings Test.

517. *See* Discussion *supra* Part 3.A.III: Comparison with a Proportional WEP.

518. *See* Discussion *supra* Part 3.B: The SSA Has Insufficient Information to Apply the WEP to All of the Targeted Beneficiaries.

519. U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 5-6.

520. U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 6.

521. *See* Discussion *supra* Part 3.C: Public Misperception and Resentment: SSA Efforts to Educate the Public

522. *Id.*

523. Jennie L. Phipps, *7 Little-Known Social Security Benefits*, BANKRATE.COM, http://www.bankrate.com/finance/retirement/7-social-security-benefits.aspx?ec_id=m1078090#slide=1 (last visited Mar. 9, 2012).

524. *See* Discussion *supra* Part 3.C: Public Misperception and Resentment: SSA Efforts to Educate the Public.

525. *See* Discussion *supra* Part 4: Legislative Action.

526. H.R. 1332, 112th Cong. (2011); S. 2010, 112th Cong. (2011); H.R. 235, 111th Cong. (2009); S. 484, 111th Cong. (2009); H.R. 82, 110th Cong. (2007); S. 206, 110th Cong. (2007); H.R. 147, 109th Cong. (2005); S. 619, 109th Cong. (2005); H.R. 594, 108th Cong. (2003); S. 349, 108th Cong. (2003); H.R. 2638, 107th Cong. (2001); S. 1523, 107th Cong. (2001).

527. H.R. 2145, 111th Cong. (2009); H.R. 726, 110th Cong. (2007); H.R. 1690, 109th Cong. (2005); H.R. 4234, 108th Cong. (2004).

528. H.R. 2011, 108th Cong. (2003); S. 1011, 108th Cong. (2003); H.R. 1073, 107th Cong. (2001); S. 2521, 107th Cong. (2002); H.R. 860, 106th Cong. (1999); H.R. 2549, 105th Cong. (1997).

529. H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455, 108th Cong. (2004).

Article''s analysis of the bills' demonstrates that the bill's either preserve the disadvantages of the WEP, or introduce entirely new problems and inequities.[530]

To begin, the SSFA, by repealing the WEP, would eliminate all of the disadvantages of the WEP if enacted.[531] However, the bill would permit 'windfall' benefits to accrue to worker's who held both covered and noncovered employment, raising questions of equity as to individuals who worked in Social Security covered employment for 35 years.[532]

Similarly, by restricting application of the WEP to workers whose combined covered and noncovered pensions exceed a certain dollar threshold, both versions of the WEPRA would eliminate many of the disadvantages of the WEP for certain workers.[533] However, the provision would permit 'windfall' benefits to accrue to these workers.[534] Moreover, under the WEPRA, whether 'windfall' benefits will accrue to workers is highly dependent on the size of the worker's noncovered government pension.[535] While this approach emphasizes the progressive nature of the Social Security benefits formula, it will not always have its intended result – for example, where a worker is entitled to significant Social Security benefits, but receives a small noncovered pension.[536] Additionally, the bill fails to address the SSA's inability to gather data on state and local government employees receiving noncovered pensions.[537]

Finally, by implementing a proportional WEP, the PSRPA would eliminate the WEP's disproportionate impact on low-income workers.[538] However, by permitting benefits to decrease as earnings in noncovered employment increase, the PSRPA raises a difficult policy question – whether a solution to the 'windfall' benefits problem should emphasize the progressivity of benefits or the earned rights underlying Social Security benefits.[539] Moreover, the SSA does not have complete records on noncovered employment.[540] Consequently, the PSRPA must rely on a second approach to calculating benefits for workers with nonrecorded noncovered earnings.[541] As this approach includes the current law WEP, the PSRPA would preserve the disadvantages of the WEP for many workers.[542] Finally, the PSRPA does not include a provision permitting the SSA to gather data through IRS Form 1099R on workers receiving state and local government noncovered pensions.[543]

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530. *See* Discussion *supra* Part 4: Legislative Action.
531. *See* Discussion *supra* Part 4.A: The Social Security Fairness Act.
532. *Id.*
533. *See* Discussion *supra* Part 4.B: The WEP Relief Act.
534. *Id.*
535. *Id.*
536. *Id.*
537. *Id.*
538. *See* Discussion *supra* Part 4: The Public Servant Retirement Protection Act.
539. *Id.*
540. *Id.*
541. *Id.*
542. *Id.*
543. *Id.*

The proportional bendpoints approach presented in this Article provides the superior option to addressing the problem of 'windfall' benefits accruing to noncovered workers.[544] By merely multiplying each bendpoint by the ratio of years worked in Social Security covered employment to the number of years over which the calculation for AIME averages earnings (35 years), one can adjust the three brackets of AIME, such that the benefits available from each bracket are proportional to the number of years worked in Social Security covered employment.[545] This method ensures equitable benefits to public servants by balancing the progressivity of the Social Security benefits formula with the earned right principle of Social Security benefits.[546]

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544. *See infra*, Part: 5: Recommendation.

545. *Id.*

546. *Id.*

APPENDIX

A BILL

To amend Title II of the Social Security Act to repeal the Windfall Elimination Provision and ensure equitable benefits for public servants.

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

SECTION 1. SHORT TITLE.

This Act May be cited as the "Equitable Benefits for Public Servants Act of 2013"

SECTION 2. REPEAL OF CURRENT WINDFALL ELIMINATION PROVISION

"Paragraph (7) of section 215(a) of the Social Security Act (42 U.S.C. 415(a)(7) is repealed."[i]

SECTION 3. REPLACEMENT OF THE WINDFALL ELIMINATION PROVISION WITH A FORMULA PROVIDING A PROPORTIONAL BENEFIT BASED ON CONTRIBUTIONS TO THE SOCIAL SECURITY SYSTEM FOR CERTAIN INDIVUDALS WITH NONCOVERED EMPLOYMENT

(a)   SUBSTITUTION OF PROPORTIONAL BENDPOINTS FOR THE AMOUNT ESTABLISHED FOR PURPOSES OF CLAUSE (I) AND (II) OF SUBPARAGRAPH (A) OF PARAGRAPH (1).

"(1)IN GENERAL. – Section 215(a) of the Social Security Act (as amended by section 2 of this act) is amended further by inserting after paragraph (6) the following new paragraph:"[ii]

"(7)(A) In the case of an individual whose primary insurance amount would be computed under paragraph (1) of this subsection, who—

(i) attains age 62 after 1985 (except where he or she became entitled to a disability insurance benefit before 1986 and remained so entitled in any of the 12 months immediately preceding his or her attainment of age 62), or

(ii) would attain age 62 after 1985 and becomes eligible for a disability insurance benefit after 1985,And who first becomes eligible after 1985 for a monthly periodic payment (including a payment determined under subparagraph (C), but excluding (I) a payment under the Railroad Retirement Act of 1974 or '937 [45 U.S.C.A. §§ 231 et seq., 228a et seq.], (II) a payment by a social security system of a foreign country based on an agreement concluded between the United States and such foreign country pursuant to section 433 of this title, and (III) a payment based wholly on service as a member of a uniformed service (As defined in section 410(m) of this title) which is based in whole or in part upon his or her earnings for service which did not constitute employment as

defined in section 410 of this title for purposes of this subchapter (hereafter in this paragraph and in subsection (d)(3) of this section referred to as "noncovered service"), the primary insurance amount of that individual during his or her concurrent entitlement to such monthly periodic payment and to old-age or disability insurance benefits shall be computed or recomputed under subparagraph (B)."[iii]

"(B)(i) If paragraph (1) of this subsection would apply to such an individual (Except for subparagraph (A) of this paragraph), there shall be computed an amount equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that for purposes of such computation"[iv] "the amount established for purposes of clause (i) and (ii) of subparagraph (A) of paragraph (1) shall equal"[v]

(ii) "for individuals who initially become eligible for old-age or disability insurance benefits, or who die (before becoming eligible for such benefits), in the calendar year 1979,"[vi] the product of the corresponding amount established under subparagraph (B)(i) of paragraph (1) and the quotient obtained by dividing

(I) the number of years during which the individual held covered employment; by

(II) 35 years

"Each amount so established shall be rounded to the nearest $1, except that any amount so established which is a multiple of $0.50 but not of $1 shall be rounded to the next higher $1."[vii]

(iii) "for individuals who initially become eligible for old-age or disability insurance benefits, or who die (before becoming eligible for such benefits), in any calendar year after 1979,"[viii] the product of the corresponding amount established under clause (ii)(I)-(II) of subparagraph (B) of paragraph (1) and the quotient obtained by dividing

(1) the number of years during which the individual held covered employment; by

(II) 35 years

"Each amount so established shall be rounded to the nearest $1, except that any amount so established which is a multiple of $0.50 but not of $1 shall be rounded to the next higher $1."[ix]

(C) "This paragraph shall not apply in the case of an individual whose eligibility for old-age or disability insurance benefits is based on an agreement concluded pursuant to section 433 of this title or an individual who on January 1, 1984—

(i) is an employee performing service to which social security coverage is extended on that date solely by reason of the amendments made by section 101 of the Social Security Amendments of 1983, or

(ii) is an employee of a nonprofit organization which (on December 31, 1983) did not have in effect a waiver certificate under section 3121(k) of the Internal Revenue Code of 1954 and to the employees of which social security coverage is extended on that date solely by reason of the amendments made by section

102 of that Act, unless social security coverage had previously extended to service performed by such individual as an employee of that organization under a waiver certificate which was subsequently (prior to December 31, 1983) terminated."[x]

SECTION 3. "INFORMATION FOR ADMINISTRATION OF SOCIAL SECURITY PROVISIONS RELATED TO NONCOVERED EMPLOYMENT

(a) Collection. – Subsection (d) of section 6047 of the Internal Revenue Code of 1986 is amended by redesignating paragraph (2) as paragraph (3) and by inserting after paragraph (1) the following new paragraph:

(2) DEFERRED COMPENSATION PLANS OF A STATE.—

(A) IN GERERAL. – In the case of an employer deferred compensation plan (as defined in section 3405(e)(5) of a State, a political subdivision thereof, or any agency or instrumentality of any of the foregoing, the Secretary shall in such forms or regulations require, to the extent such information is known or should be known, the identification of any designated distribution (as defined in section 3405(e)(1)) if paid to any participant or beneficiary of such plan based in whole or in part upon an individual's earnings for service in the employ of any such governmental entity.

(B) STATE – For purpose of subparagraph (A), the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(b) Disclosure. – Paragraph (1) of section 6103(l) of such Code is amended by striking 'and' at the end of subparagraph (B), by striking the period at the end of subparagraph (C) and inserting ';and', and by adding at the end the following:

(D) any designated distribution described in section 6047(d)(2) to the Social Security Administration for purposes of its administration of the Social Security Act.'."[xi]

SEC. 4. EFFECTIVE DATE

"The amendment made by sections (2) and (3) of this Act shall apply with respect to monthly insurance benefits for months commencing with or after the 12th calendar month following the date of the enactment of this Act. Notwithstanding section 215(f) of the Social Security Act, the Commissioner of Social Security shall recompute primary insurance amounts to the extent necessary to carry out the amendments made by this Act."[xii]

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i H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004). (Useful formatting language)

ii *Id.* (Useful formatting language)

iii 42 U.S.C. 415(a)(7)(A) (original language of the Windfall Elimination Provision

iv 42 U.S.C. 415(a)(7)(B)(i) (original language of the Windfall Elimination Provision)

v 42 U.S.C. 415(a)(B)(i)(original language of the Social Security Act)

vi *Id.*

vii 42 U.S.C. 415(a)(1)(A)(Original language of the Social Security Act).

viii 42 U.S.C. 415(a)(B)(ii)(original language of the Social Security Act)

ix 42 U.S.C. 415(a)(1)(A)(Original language of the Social Security Act).

x 42 U.S.C. 415(a)(7)(E)(i), (ii) (Original language of the Windfall Elimination Provision)

xi H.R. 3630, 112th Cong. (2011) (language included in H.R. 3630. H.R. 3630 passed on Feb. 12, 2012; however, as enacted, the legislation did not include the IRS Form 1099R provision). Middle Class Tax Relief and Job Creation Act of 2011, Pub. L. No. 112-96, 126 Stat. 156

xii H.R. 2797, 112th Cong. (2011); S. 113, 112th Cong. (2011); H.R. 1221, 111th Cong. (2009); S. 490, 111th Cong. (2009); H.R. 2772, 110th Cong. (2007); S. 1647, 110th Cong. (2007); H.R. 1714, 109th Cong. (2005); S. 866, 109th Cong. (2005); H.R. 4391, 108th Cong. (2004); S. 2455 108th Cong. (2004). (Useful formatting language)