Calendar No. 217

118TH CONGRESS *1st Session* } SENATE { REPORT 118–101

U.S. CUSTOMS AND BORDER PROTECTION OFFICER RETIREMENT TECHNICAL CORRECTIONS ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 311

TO CORRECT THE INEQUITABLE DENIAL OF ENHANCED RETIREMENT AND ANNUITY BENEFITS TO CERTAIN U.S. CUSTOMS AND BORDER PROTECTION OFFICERS

OCTOBER 3, 2023.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE
49–010 WASHINGTON : 2023

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

GARY C. PETERS, Michigan, *Chairman*

THOMAS R. CARPER, Delaware	RAND PAUL, Kentucky
MAGGIE HASSAN, New Hampshire	RON JOHNSON, Wisconsin
KYRSTEN SINEMA, Arizona	JAMES LANKFORD, Oklahoma
JACKY ROSEN, Nevada	MITT ROMNEY, Utah
ALEX PADILLA, California	RICK SCOTT, Florida
JON OSSOFF, Georgia	JOSH HAWLEY, Missouri
RICHARD BLUMENTHAL, Connecticut	ROGER MARSHALL, Kansas

DAVID M. WEINBERG, *Staff Director*
LENA C. CHANG, *Director of Governmental Affairs*
DEVIN M. PARSONS, *Professional Staff Member*
WILLIAM E. HENDERSON III, *Minority Staff Director*
CHRISTINA N. SALAZAR, *Minority Chief Counsel*
ANDREW J. HOPKINS, *Minority Counsel*
LAURA W. KILBRIDE, *Chief Clerk*

Calendar No. 217

118TH CONGRESS, 1st Session — SENATE — REPORT 118–101

U.S. CUSTOMS AND BORDER PROTECTION OFFICER RETIREMENT TECHNICAL CORRECTIONS ACT

OCTOBER 3, 2023.—Ordered to be printed

Mr. PETERS, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 311]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 311) to correct the inequitable denial of enhanced retirement and annuity benefits to certain U.S. Customs and Border Protection Officers, having considered the same, reports favorably thereon with an amendment, in the nature of a substitute, and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE AND SUMMARY

S. 311, the *U.S. Customs and Border Protection Officer Retirement Technical Corrections Act*, would address a U.S. Customs and Border Protection (CBP) error involving around 1,200 officers. In 2008, CBP told these officers they were eligible for an enhanced retirement benefit without certain mandatory retirement requirements, also known as a proportional annuity. Officers affected by this error received a job offer before the enhanced benefit took effect on July 6, 2008, but entered on duty after July 6, 2008. Several years later, the Office of Personnel Management (OPM) issued guidance with a different interpretation of the law's requirements. Over a decade later, CBP finally realized its retirement policy toward this group of officers did not align with the law. CBP rescinded these officers' eligibility for a proportional annuity in 2021. The bill directs CBP to reinstate the proportional annuity for the affected officers and includes a retroactive annuity adjustment for eligible individuals who retire before the date of enactment of this bill. The bill also includes a GAO study of CBP's retirement benefit practices to ensure a similar issue does not occur again.[1]

II. BACKGROUND AND NEED FOR THE LEGISLATION

In December 2007, Congress passed legislation that included provisions to establish an enhanced retirement benefit for CBP officers, which the President signed into law.[2] This legislation structured a new retirement benefit for CBP officers similar to retirement provisions for other special retirement groups, such as law enforcement officers, nuclear material couriers, and firefighters.[3] For such positions with heightened physical and mental demands, a 1.7% enhanced annuity rate is coupled with a mandatory retirement age and maximum age of entry, requiring individuals to complete 20 years of service before age 57.[4] Both the employee and the agency pay higher contributions toward the officer's retirement, aligned with the higher annuity level.[5]

The enhanced annuity benefit established for CBP officers took effect prospectively, starting on the first day of the pay period six months after the enactment of the 2007 legislation, meaning July 6, 2008.[6] The legislation included transition rules allowing for a hybrid retirement benefit, referred to as a "proportional annuity," for individuals already serving as CBP officers at the time the new benefit took effect. Specifically, the legislative text states that individuals "serving as a customs and border protection officer on the effective date [. . .] pursuant to an appointment made before that date" are eligible for the enhanced annuity calculation going forward without being subject to the mandatory separation provisions or the 20-years-of-service requirement.[7]

In 2008, the CBP Office of Human Resources Management (HRM) coordinated with the CBP Office of Chief Counsel, Department of Homeland Security (DHS), and OPM to implement the enhanced retirement for CBP officers over a six-month period. The HRM Office of Compensation and Organizational Effectiveness Division; Benefits, Medical and Worklife Division; and Hiring Center worked together on guidance for implementing the enhanced benefit.[8] The guidance stated that employees who received a tentative

---

[1] On March 30, 2022, the Committee approved S. 3868, the *U.S. Customs and Border Protection Officer Retirement Technical Corrections Act*, with an amendment in the nature of a substitute. That bill, as reported, is substantially similar to S. 311. Accordingly, this committee report is, in many respects, similar to the committee report for S. 3868. *See* S. Rept. 117–175.

[2] Consolidated Appropriations Act, 2008, Pub. L. 110–161, Division E, Sec. 535.

[3] Letter from Acting Director Kathleen McGettigan, Office of Personnel Management, to Anthony M. Reardon, National President of the National Treasury Employees Union (Apr. 1, 2021).

[4] Congressional Research Service, *Retirement Benefits for Federal Law Enforcement Personnel* (R42631) (Sep. 5, 2017).

[5] Letter from Acting Director Kathleen McGettigan, *supra* note 3.

[6] Consolidated Appropriations Act, 2008, Pub. L. 110–161, Division E, Sec. 535(e)(1).

[7] Consolidated Appropriations Act, 2008, Pub. L. 110–161, Division E, Sec. 535(e)(2).

[8] U.S. Customs and Border Protection, Office of Human Resources Management, Production to Senate Homeland Security and Governmental Affairs Committee (copy on file with Committee); Email from Allie Cleaves, Office of Congressional Affairs, U.S. Customs and Border Protection, to Senate Homeland Security and Governmental Affairs Staff (Jan. 19, 2022).

job offer before July 6, 2008, but entered on duty after this date are eligible for the proportional annuity, even if they leave the position before 20 years. This classification resulted in the CBP Hiring Center using the "O52" remark code in the personnel records for this group of officers, which states that the officer is "[e]xempt from mandatory retirement and eligible for prorated Annuity upon retirement."[9]

In July 2011, OPM, in consultation with DHS, published final regulations for the enhanced CBP officer retirement benefit.[10] The regulations further clarify that the proportional annuity computation applies only to "an employee serving in a primary or secondary customs and border protection officer position on July 6, 2008."[11] Both the regulations and the underlying statute specify that individuals who enter on duty as a CBP officer after July 6, 2008 are not eligible for the proportional annuity.[12]

In 2020, a CBP employee requested information from the agency about the prorated annuity described in the individual's O52 code. This employee had entered on duty after July 6, 2008, even though CBP had offered the position to the individual prior to that date. The CBP officer's inquiry brought the O52 code to the agency's attention for similarly situated officers, after over a decade of having implemented the benefit. CBP realized that the policy for this group of officers failed to comply with federal statute or the related OPM regulations that had since been finalized. OPM confirmed the error on the part of CBP in January 2021. In response, CBP rescinded the O52 remark code in February 2021 from the personnel record of any officer who had not technically entered on duty prior to or on July 6, 2008, even if the officer had been offered a position before that date.[13]

CBP's error resulted in a number of officers becoming ineligible for the proportional annuity they had been promised and contributed toward since the beginning of their careers as CBP officers.[14] Nearly 1,200 officers have been impacted by this CBP error. Of this total, CBP identified 764 employees who entered on duty as officers before age 37, the maximum entry age since the start of the enhanced benefit. Although these employees will reach the 20-year mark at or below the mandatory retirement age of 57, they had still been told at the time of their hiring that they did not necessarily have to follow this timeline in order to access their benefits. Additionally, there are just over 400 officers who are at an even higher risk of losing their enhanced benefits because they entered on duty as a CBP officer after age 37 and may not be able to work a total of 20 years.[15]

---

[9] U.S. Customs and Border Protection, Office of Human Resources Management, Talent Management Directorate, *CBP Hiring Center: CBP Officer Enhanced Retirement Coverage-Eligible for a Prorated Annuity* (Jul. 2020).

[10] Office of Personnel Management, *Customs and Border Protection Officer Retirement*, 76 Fed. Reg. 41993 (Jul. 18, 2011) (final rule).

[11] 17 CFR § 842.1009.

[12] Office of Personnel Management, *supra* note 10; *Consolidated Appropriations Act, 2008*, *supra* note 7.

[13] U.S. Customs and Border Protection, Office of Human Resources Management, Production to Senate Homeland Security and Governmental Affairs Committee (copy on file with Committee).

[14] *Id.*

[15] Production from U.S. Customs and Border Protection to the Senate Homeland Security and Governmental Affairs Committee (May 10, 2023) (copy on file with Committee); U.S. Customs

Continued

Unless there is a legislative fix, officers who are not able to reach 20 years of service will only receive a 1% annuity rate for their retirement calculation rather than the 1.7% annuity rate, and they will not be reimbursed for the higher contributions they have made toward their retirement over the years.[16]

The *U.S. Customs and Border Protection Officer Retirement Technical Corrections Act* would ensure impacted officers can receive the retirement benefits they were promised when starting their service. This bill directs CBP to identify eligible individuals and notify them of the correction. Those identified would then be eligible for a correction that would align their retirement benefits with the proportional annuity. The legislation also includes a retroactive annuity adjustment for eligible individuals who retire before the date of enactment of this bill and grants DHS the authority to waive maximum entry age requirements for eligible officers as needed. In order to help prevent a future problem similar to this error that had a negative impact on officers and their families, the bill also requires that the Comptroller General review CBP's internal controls and training to ensure CBP is complying with laws and regulations.

III. LEGISLATIVE HISTORY

Senator Gary Peters (D–MI) introduced S. 311, the *U.S. Customs and Border Protection Officer Retirement Technical Corrections Act*, on February 9, 2023, with original cosponsor Senator Josh Hawley (R–MO). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 311 at a business meeting on May 17, 2023. At the business meeting, Chairman Peters offered a substitute amendment to slightly adjust the officer eligibility language to clarify that the job offers received before July 6, 2008 were still "tentative" offers. The substitute amendment was adopted by unanimous consent with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley present. The bill, as amended, was ordered reported favorably by roll call vote of 12 yeas to 0 nays, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley voting in the affirmative, and with Senators Carper, Johnson, and Marshall voting yea by proxy, for the record only.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the "U.S. Customs and Border Protection Officer Retirement Technical Corrections Act."

Section 2. Adjustment related to transition rules

Subsection (a) defines the term "eligible individual" in the context of this section. Officers are eligible if they received a tentative

and Border Protection, Briefing with Senate Homeland Security and Governmental Affairs Committee (May 11, 2023).

[16] National Treasury Employees Union, *CBP Proportional Retirement Update* (Aug. 24, 2021) (www.nteu.org/~/media//Files/nteu/docs/public/cbp/leo/enhanced-retirement-eligibility-faqs).

offer of employment before July 6, 2008 and entered into duty on or after July 6, 2008.

Subsection (b) describes the benefits these eligible officers are entitled to receive, to align with the benefits promised by the agency between 2008 and 2021. They may receive the enhanced annuity starting in 2008 without being subject to mandatory retirement requirements.

Subsection (c) directs DHS, within 120 days, to create a list of impacted officers, notify the impacted officers of the correction, and provide OPM with the information necessary for the annuity correction. OPM is directed to make the annuity correction after receiving the information, including retroactively for impacted officers who retired before this bill's enactment.

Subsection (d) provides DHS with the authority to waive maximum entry age requirements for the group of impacted officers. It also directs OPM, in consultation with DHS, to issue appropriate guidance to assist in the implementation of the annuity correction.

Subsection (e) directs the Government Accountability Office to review the CBP hiring practices, policies, and procedures related to eligibility for the enhanced retirement benefit, as well as the relevant training provided to CBP senior leaders, and submit a report to the Senate Homeland Security and Governmental Affairs Committee and the House Homeland Security Committee. This report will assist Congress in understanding the process of how this error occurred and how to prevent CBP from issuing guidance in the future that does not comply with federal law.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

At a Glance

S. 311, U.S. Customs and Border Protection Officer Retirement Technical Corrections Act

As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on May 17, 2023

By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	9	24
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	9	24
Spending Subject to Appropriation (Outlays)	0	*	not estimated

Increases *net direct spending* in any of the four consecutive 10-year periods beginning in 2034?	< $2.5 billion	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases *on-budget deficits* in any of the four consecutive 10-year periods beginning in 2034?	< $5 billion	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

* = between zero and $500,000.

The bill would:

- Allow certain Customs and Border Protection Officers to retire with an increased retirement benefit
- Make those officers eligible for an annuity that would treat their years of service similarly to the treatment of time in service for federal law enforcement officers and firefighters

Estimated budgetary effects would mainly stem from:

- Larger retirement annuities for certain Customs and Border Protection Officers
- Retroactive revisions and adjustments to the annuities of affected officers who retire before enactment

Bill summary: S. 311 would allow certain Customs and Border Protection Officers (CBPOs) to retire with a more generous civil service retirement benefit.

Estimated Federal cost: The estimated budgetary effect of S. 311 is shown in Table 1. The costs of the legislation mostly fall within budget function 600 (income security).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF S. 311

	By fiscal year, millions of dollars—												
	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2023–2028	2023–2033
	Increases in Direct Spending												
Estimated Budget Authority	0	1	1	2	2	3	3	3	3	3	3	9	24
Estimated Outlays	0	1	1	2	2	3	3	3	3	3	3	9	24

CBO estimates that administrative costs associated with the identification of people affected by S. 311 and the processing of retirement annuity revisions would increase spending subject to appropriation by less than $500,000 over the 2023–2028 period.

Basis of estimate: For this estimate, CBO assumes that S. 311 will be enacted before the end of calendar year 2023.

Background: In 2007, the Consolidated Appropriations Act, 2008, authorized an enhanced retirement benefit for CBPOs similar to the one available to federal law enforcement officers and firefighters. That change took effect on July 6, 2008, but its implementation was different for officers who already were working on that date and those whose service began after that date.

CBPOs who enter duty after July 6, 2008, and who complete 20 years of service qualify for a retirement benefit that uses a higher multiplier in the annuity calculation: 1.7 percent of an employee's highest three consecutive years of qualifying pay (or high-3) multiplied by the required 20 years of CBPO service. (For any years of federal service beyond 20, 1 percent of the employee's high-3 is included in the annuity calculation.) In addition, officers cannot begin working after age 36 and they generally must retire by age 57. The age limit for starting employment as a CBPO ensures that they can work the 20 years needed to receive an enhanced retirement before they reach the mandatory retirement age. (In contrast, the federal retirement benefit under standard retirement generally is calculated at 1 percent of an employee's high-3 for all years of service.)

CBPOs who already were serving on the effective date are eligible for a proportional annuity, which provides a larger benefit without the requirement to complete 20 years of covered CBPO service (covered service is that which occurs on or after July 6, 2008). Upon retirement, their annuities will be prorated, with the enhanced multiplier of 1.7 percent applying to years of CBPO service after July 6, 2008, and the standard multiplier of 1 percent applying to years of service before that date.

Some CBPOs received a tentative offer of employment before July 6, 2008, but did not begin duty until after that date. Customs and Border Protection (CBP) originally informed those officers (a group of about 1,400, based on data provided by the agency) that they would be eligible for the proportional annuity. However, in 2021, the Office of Personnel Management (OPM) determined that the proportional annuity provisions would not apply because those officers had not entered duty by the effective date. As a result, those CBPOs either will need to continue working until they have completed a full 20 years of covered service to be eligible for the enhanced benefit or they will retire with a smaller than expected annuity (the standard annuity calculation will apply to all their years of service).

S. 311 would, for the purposes of retirement, consider all members of the affected group as having been in their positions on the effective date, thus making them eligible for the proportional annuity calculation.

Direct spending: S. 311 would increase direct spending relative to current law because it would allow the affected officers to receive enhanced retirement benefits for their years of service as CBPOs. In total, CBO estimates, enacting the bill would increase direct spending by $24 million over the 2023–2033 period.

The largest budgetary effect of S. 311 would stem from benefits for CBPOs who were tentatively offered employment before July 6, 2008, and began duty after that date at an age older than 36 (the maximum age to begin work, under current law). Before enhanced retirement coverage for CBPOs was implemented, there was no maximum age, so some of the officers tentatively offered employment before the effective date were older, and some had previous years of federal service at other agencies. CBO estimates that about 225 of those older CBPOs either are already eligible for standard retirement on the basis of their age and total years of service or will become so before they achieve the 20 years of covered service following July 6, 2008, that is necessary to receive enhanced coverage. Moreover, because of the mandatory retirement age of 57, CBO expects that most of those older officers would not or could not work enough additional years to meet the 20-year requirement for enhanced coverage.

Under current law, those officers will receive a standard retirement benefit. If enacted, S. 311 would allow them to retire with the proportional annuity calculation instead. CBO estimates that the proportional calculation would increase their initial retirement benefit by 55 percent, or by about $11,000, on average. Federal retirement benefits are adjusted annually for inflation and thus generally increase over time. On that basis, CBO estimates that the larger benefits for those retirees would increase direct spending by $21 million over the 2023–2033 period.

S. 311 also would direct OPM to retroactively revise the annuities of any affected officer who retires before enactment to use the proportional annuity calculation. CBP indicated that, as of July 2023, about 30 retired CBPOs would qualify for the revised benefit. Including the retroactive adjustment, CBO estimates that revising pre-enactment retirements would initially increase benefits for the group by about $7,000 each, on average. Those benefits also would increase annually to account for inflation and would thus increase direct spending by $3 million over the 2023–2033 period, CBO estimates.

Most of the remaining CBPOs who would be affected by the bill were younger than 37 when they were hired and generally would not be eligible to retire before they complete the 20 years of covered service required to qualify for the enhanced retirement. Thus, CBO expects that enacting S. 311 would not lead to significant costs for that group of officers.

Spending subject to appropriation: S. 311 would direct the Secretary of Homeland Security to identify and notify anyone affected by the bill and to provide necessary information to OPM to facilitate the processing of any required annuity corrections for that group. CBO estimates that the cost would be less than $500,000 over the 2023–2028 period; any spending would be subject to the availability of appropriated funds.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays that are subject to those pay-as-you-go procedures are shown in Table 1.

Increase in long-term net direct spending and deficits: CBO estimates that enacting S. 311 would not increase net direct spending by more than $2.5 billion in any of the four consecutive 10-year periods beginning in 2034.

CBO estimates that enacting S. 311 would not increase on-budget deficits by more than $5 billion in any of the four consecutive 10-year periods beginning in 2034.

Mandates: None.

Estimate prepared by: Federal costs: Amber Marcellino; Mandates: Andrew Laughlin.

Estimate reviewed by: Barry Blom, Chief, Projections Unit; Kathleen FitzGerald, Chief, Public and Private Mandates Unit; Christina Hawley Anthony, Deputy Director of Budget Analysis.

Estimate approved by: Phillip L. Swagel, Director, Congressional Budget Office.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because S. 311 would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.