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## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### 5 CFR Parts 1605 and 1653

#### Correction of Administrative Errors; Court Orders and Legal Processes Affecting Thrift Savings Plan Accounts

**AGENCY:** Federal Retirement Thrift Investment Board

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

**SUMMARY:** The Federal Retirement Thrift Investment Board (Agency) is issuing an interim final rule to amend its regulations governing back pay awards and retirement benefits court orders. This rule clarifies that the regulations governing a participant's options for electing makeup contributions when he or she receives a back pay award or other retroactive pay adjustment apply when the back pay award or other retroactive pay adjustment is for a period during which the participant was not appointed to a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized.

This rule also clarifies that an attorney is not a permissible payee for a retirement benefits court order or legal process affecting the Thrift Savings Plan and ensures that the date used to compute earnings on a court-ordered distribution amount is the same as the date used to compute the payee's entitlement.

**DATES:** This interim final rule is effective December 16, 2011. Comments should be received on or before January 17, 2012.

**ADDRESSES:** You may submit comments using one of the following methods:

- *Mail:* Office of General Counsel, Attn: Thomas Emswiler, Federal Retirement Thrift Investment Board, 1250 H Street NW., Washington, DC 20005.

- *Hand Delivery/Courier:* The address for sending comments by hand delivery or courier is the same as that for submitting comments by mail.

- *Facsimile:* Comments may be submitted by facsimile at (202) 942-1676.

The most helpful comments explain the reason for any recommended change and include data, information, and the authority that supports the recommended change.

**FOR FURTHER INFORMATION CONTACT:** Laurissa Stokes at (202) 942-1645.

**SUPPLEMENTARY INFORMATION:** The Agency administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401-79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

#### Back Pay Awards and Other Retroactive Pay Adjustments

Section 1605.13 of the Agency's regulations (5 CFR 1605.13) governs a participant's options for electing makeup contributions when he or she receives a back pay award or other retroactive pay adjustment. Paragraph (a) of section 1605.13 governs situations in which a participant was separated from Government service and subsequently reinstated. This interim final rule clarifies that paragraph (a) of section 1605.13 also governs situations in which an individual was not appointed to a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized and was subsequently appointed to such position.

This rule also changes each occurrence of the term "Government employment" in section 1605.13 to the term "Government service." This revision is non-substantive. It is intended to make the terminology in section 1605.13 consistent with the terminology in section 1690.1 of the Agency's regulations.

#### Retirement Benefits Court Order Payments to Attorneys

Section 1653.5 of the Agency's regulations (5 CFR 1653.5) contains the Agency's procedures for making retirement benefits court order payments. Paragraph (g) of section 1653.5 provides that the TSP will honor an order that awards multiple payees. It further provides that if the order does not specify an order of precedence for the payments, the TSP will pay a current or former spouse first, a dependent second, and an attorney third.

However, in 2004 the Agency amended Part 1653 to remove language that permitted an attorney to receive a payment pursuant to a retirement benefits court order. *See* 69 FR 18294 (April 7, 2004). The Agency determined that "the security of a participant's immediate family is better preserved by conforming the TSP to the private sector practice of limiting court order payees to the participant's immediate family members, not by making tax-deferred retirement savings available for the payment of legal fees." *Id.* Accordingly, this interim final rule removes the residual reference to attorneys in section 1653.5(g). It also amends an incorrect citation in paragraph (a) of section 1653.11.

#### Calculating Earnings on Court-Ordered Amounts

Section 1653.4 of the Agency's regulations (5 CFR 1653.4) provides that a payee's entitlement under a retirement benefits court order will be credited with TSP investment earnings only if the court order expressly provides for earnings. Paragraphs (b) and (c) of section 1653.4 provide the date on which a payee's court-ordered award amount is calculated. If the court order awards a percentage or fraction of an account as of a specific date, the payee's entitlement is calculated based on the account balance as of that date. 5 CFR 1653.4(b). If the court order awards a percentage or fraction of an account but does not contain a specific date as of which to apply that percentage or fraction, the payee's entitlement is calculated based on the account balance as of the effective date of the court order. 5 CFR 1653.4(c).

Subparagraph (f)(3) of section 1653.4 describes how the TSP credits a payee's entitlement with investment earnings

when a court order awards earnings. If the court order does not specify an annual percentage rate or a *per diem* dollar amount to be added to the payee's entitlement, the TSP must calculate the earnings amount to be awarded by: (i) Determining the payee's award amount (e.g., the percentage or fraction of the participant's account); (ii) Determining, based on the participant's investment allocation as of the effective date of the court order, the number and composition of shares that the court-ordered award amount would have purchased as of the effective date; and (iii) Multiplying the price per share as of the payment date by that number and composition of shares. 5 CFR 1653.4(f)(3).

Determining the number and composition of shares as of the effective date of the court order, and not a later date, protects the payee from investment decisions made by the participant after the effective date of the court order. However, it fails to protect the payee from investment decisions made by the participant when the date used to calculate the payee's entitlement under section 1653.4(b) is earlier than the effective date of the court order. When the date used to calculate the payee's entitlement under section 1653.4(b) is earlier than the effective date of the court order, the current regulatory language appears to permit the TSP record keeper to either (1) reject the court order because it purports to require the TSP to calculate earnings in a manner that is inconsistent with its regulations, or (2) calculate the payee's entitlement amount using the date specified in the court order and calculate the amount of any earnings on that entitlement using the later effective date of the court order. The latter approach would result in a period of time between the date specified in the court order and the effective date of the court order during which the payee's entitlement may be affected by investment decisions made by the participant. This interim final rule remedies this shortcoming by replacing the references in 5 CFR 1653.4(f)(3)(ii) to "the effective date of the court order" with "the date used to calculate the entitlement." It also amends section 1653.2(b) to provide that a retirement benefits court order is not qualifying if it requires the TSP to calculate the payee's entitlement or earnings in a manner that is inconsistent with section 1653.4.

This interim final rule ensures that the date used to compute earnings on a court-ordered distribution amount will always be the same as the date used to compute the payee's entitlement. It also

makes it clear that a court order that provides otherwise will be rejected as a non-qualifying court order.

#### Interim Final Rule and Request for Comments

Under section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The Agency has determined that the revisions to sections 1605.13, regarding back pay awards, and 1653.4, regarding payments to attorneys, do not require prior notice and public comment because they merely clarify currently existing rules.

The Agency receives many retirement benefits court orders that award earnings to the payee as of a specified date which is earlier than the effective date of the court order. Under the Agency's regulations as they are currently written, it is unclear to the public whether the Agency will reject those court orders because they are non-qualifying, process them pursuant to the language of the court order, or process them by calculating earnings as of the effective date of the court order. Immediate guidance on this matter is necessary to ensure that individuals who draft retirement benefits court orders can do so without uncertainty regarding the consequences of the court order's language.

The Agency encourages public comments on this interim final rule. The Agency will consider post-effective public comments, will modify the rule in light of those comments, and will then adopt a final rule.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514, and which is administered by the Agency. It will also affect individuals who receive a back pay award or other retroactive pay adjustment in connection with a Federal agency's failure to appoint that individual to a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized. It will also affect spouses,

former spouses, children, or dependents of TSP participants who become entitled to a portion of the participant's account pursuant to a qualifying retirement benefits court order.

#### Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

#### Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501-1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under § 1532 is not required.

#### Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(a)(1)(A), the Agency submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before publication of this rule in the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

#### List of Subjects

##### 5 CFR Part 1605

Claims, Government employees, Pensions, Retirement.

##### 5 CFR Part 1653

Alimony, Child support, Claims, Government employees, Pensions, Retirement.

**Gregory T. Long,**

*Executive Director, Federal Retirement Thrift Investment Board.*

For the reasons stated in the preamble, the Agency amends 5 CFR chapter VI as follows:

#### PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

- 1. Revise the authority citation for part 1605 to read as follows:

**Authority:** 5 U.S.C. 8351, 8432a, and 8474(b)(5) and (c)(1). Subpart B also issued under section 1043(b) of Public Law 104-106, 110 Stat. 186 and sec. 7202(m)(2) of Public Law 101-508, 104 Stat. 1388.

- 2. Amend § 1605.13 by revising paragraphs (a) introductory text, (a)(1) and (2), (b) introductory text, and the first sentence of paragraph (d) to read as follows:

**§ 1605.13 Back pay awards and other retroactive pay adjustments.**

(a) *Participant not employed.* The following rules apply to participants who receive a back pay award or other retroactive pay adjustment for a period during which the participant was separated from Government service or was not appointed to a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized:

(1) If the participant is reinstated or retroactively appointed to a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized, immediately upon reinstatement or retroactive appointment the employing agency must give the participant the opportunity to submit a contribution election to make current contributions. The contribution election will be effective as soon as administratively feasible, but no later than the first day of the first full pay period after it is received.

(2) The employing agency must give a reinstated or retroactively appointed participant the following options for electing makeup contributions:

(i) The reinstated or retroactively appointed participant may submit a new contribution election for purposes of makeup contributions if he or she would have been eligible to make such an election but for the erroneous separation or erroneous failure to appoint; or

(ii) If a reinstated participant had a contribution election on file when he or she separated, the contribution election the participant had on file when he or she separated may be reinstated for purposes of makeup contributions.

\* \* \* \* \*

(b) *Participant employed.* The following rules apply to participants who receive a back pay award or other retroactive pay adjustment for a period during which the participant was employed in a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized:

\* \* \* \* \*

(d) *Prior withdrawal of TSP account.* If a participant has withdrawn his or her TSP account other than by purchasing an annuity, and the separation from Government service upon which the withdrawal was based is reversed, resulting in reinstatement of the participant without a break in service, the participant will have the option to restore the amount withdrawn to his or her TSP account.\* \* \*

\* \* \* \* \*

**PART 1653—COURT ORDERS AND LEGAL PROCESSES AFFECTING THRIFT SAVINGS PLAN ACCOUNTS**

■ 3. The authority citation for part 1653 continues to read as follows:

**Authority:** 5 U.S.C. 8435, 8436(b), 8437(e), 8439(a)(3), 8467, 8474(b)(5) and 8474(c)(1).

■ 4. Amend § 1653.2 by adding paragraph (b)(6) to read as follows:

**§ 1653.2 Qualifying retirement benefits court orders.**

\* \* \* \* \*

(b) \* \* \*

(6) An order that requires the TSP to calculate the payee's entitlement or earnings in a manner that is inconsistent with § 1653.4 of this part.

■ 5. Amend § 1653.4 by revising paragraph (f)(3)(ii) to read as follows:

**§ 1653.4 Calculating entitlements.**

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \*

(ii) Determining, based on the participant's investment allocation as of the date used to calculate the entitlement, the number and composition of shares that the payee's award amount would have purchased as of the date used to calculate the entitlement.

\* \* \* \* \*

■ 6. Amend § 1653.5 by revising paragraph (g)(2) to read as follows:

**§ 1653.5 Payment.**

\* \* \* \* \*

(g) \* \* \*

(2) If the order does not specify an order of precedence for the payments, the TSP will pay a current or former spouse first and a dependent second.

\* \* \* \* \*

■ 7. Amend 1653.11 by revising paragraph (a) to read as follows:

**§ 1653.11 Definitions.**

(a) Definitions generally applicable to the Thrift Savings Plan are set forth at 5 CFR 1690.1.

\* \* \* \* \*

[FR Doc. 2011-32301 Filed 12-15-11; 8:45 am]

**BILLING CODE 6760-01-P**

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 210, 215, 220, 235 and 245**

**RIN 0584-AD54**

**[FNS-2007-0023]**

**Applying for Free and Reduced Price Meals in the National School Lunch Program and School Breakfast Program and for Benefits in the Special Milk Program, and Technical Amendments**

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule; Correction.

**SUMMARY:** The Department of Agriculture, Food and Nutrition Service published a final rule in the **Federal Register** on October 28, 2011 (76 FR 66849), concerning changes to eligibility determinations for free and reduced price school meals to implement nondiscretionary provisions of the Child Nutrition and WIC Reauthorization Act of 2004. It also finalized the changes set forth in the interim rule published on November 13, 2007 (72 CFR 63785). This document corrects an amendment to provide additional amendatory language for text that was set out in 7 CFR 245.6(c)(3)(ii). All other information remained unchanged.

**DATES:** *Effective Date:* This rule is effective December 16, 2011.

**FOR FURTHER INFORMATION CONTACT:** Julie Brewer, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service (FNS) at (703) 305-2590.

**SUPPLEMENTARY INFORMATION:****List of Subjects 7 CFR Part 245**

Civil rights, Food assistance programs, Grant programs—education, Grant programs—health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, the final rule published at 76 FR 66849 on October 28, 2011 is corrected as follows:

**PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS**

■ 1. The authority citation for Part 245 continues to read as follows:

**Authority:** 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

■ 2. In § 245.6, redesignate paragraph (c)(3)(ii) as (c)(3)(iii) and add a new paragraph (c)(3)(ii) to read as follows: