

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1650 and 1653

Retirement Benefits Court Order Regulations

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is publishing final regulations governing retirement benefits court orders. The regulations contain a number of procedural changes which reflect the Board's experience in processing retirement benefits court orders, as well as changes in Federal tax law. The regulations establish a new Part in the Code of Federal Regulations replacing existing regulations regarding court orders.

EFFECTIVE DATE: April 12, 1995.

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SUPPLEMENTARY INFORMATION: The Board administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Pub. L. 99-335. The provisions governing the TSP are codified primarily in subchapters III and VII of Chapter 84 of Title 5, United States Code. The TSP is a tax-deferred retirement savings plan for Federal employees that is similar to cash or deferred arrangements established under section 401(k) of the Internal Revenue Code. Sums in a TSP participant's account are held in trust for that participant. 5 U.S.C. 8437(g).

Under 5 U.S.C. 8467(a), payments from the TSP that would otherwise be made to a TSP participant shall be paid "to another person if and to the extent that the terms of a court decree of divorce, annulment or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation expressly provide." A related provision, 5 U.S.C. 8435(d), states that an election or change of election of TSP benefits shall not be effective to the extent that it would conflict with "a court decree of divorce, annulment or legal separation * * * or any court order or court-approved property settlement agreement incident to such decree * * *." The TSP need only honor court orders or decrees meeting the requirements of 5 U.S.C. 8467(a) and 8435(d) if the Executive Director receives proper notice of the order before disbursement of the participant's account.

These regulations, when effective, will supersede the interim regulations presently found at 5 CFR §§ 1650.27 to 1650.43. Proposed regulations governing alimony and child support orders which are governed by 5 U.S.C. 8437(e)(3) will be promulgated in a separate subpart of Part 1653.

On October 26, 1994, the Board published a proposed rule in the **Federal Register** (59 FR 53874) relating to the Board's processing of court orders and decrees described in 5 U.S.C. 8435(d) and 8467 and referred to as "retirement benefits court orders." The Board did not receive any comments on the proposed regulations.

The Board, however, is making two changes to § 1653.3 of the regulations. First, the Board is deleting the notification provision in paragraph (c). Due to the increasing volume of court orders which are being processed by the Board, providing notification to the parties that the participant's account was frozen upon receipt of a court order has become administratively burdensome. Therefore, the Board has decided that the decision letter regarding the court order provides sufficient notice that the participant's account has been frozen. Second, paragraph (k) is being added to provide that the Board will hold in abeyance the processing of a court order payment pursuant to a qualifying court order if the Board is advised by one of the parties that the underlying court order is on appeal in the state court system and that the effect of the filing of such an appeal under state law or procedures is to stay the effect of the order.

Section-By-Section Analysis

Section 1653.1 states the purpose of the regulations. The procedures set forth in the regulations will be applied in determining whether the Board must honor orders purporting to constitute retirement benefits court orders described in 5 U.S.C. 8435(d) and 8467. The regulations also establish procedures for calculation and payment of awards pursuant to qualifying retirement benefits court orders.

Section 1653.2(a) sets forth the general rule that only "qualifying" retirement benefits court orders will be honored. If an order is determined not to be qualifying, it will not affect the participant's account. TSP participants involved in divorce proceedings, and their representatives, are encouraged to read the TSP publication "Information About Court Orders" to obtain useful information for drafting and submitting court orders that will be deemed qualifying under the regulations.

Section 1653.2(b) sets forth the requirements for a court order to be "qualifying." Section 1653.2(b)(1) describes the type of legal document that can be a qualifying order. The first sentence is designed to clarify that the language "court decree of divorce, annulment, or legal separation," as used in both 5 U.S.C. 8435(d) and 8467 has been interpreted by the Board to mean "a court decree of divorce, a court decree of annulment, or a court decree of legal separation." In order to have a qualifying court order, a court must be involved. A legal separation agreement that has not been approved by a court, for example, is not a "court decree of legal separation," and therefore cannot constitute a qualifying court order. Also, a property settlement agreement must be court-approved in order to be qualifying. This means that the court's approval must be demonstrated on the face of the document or in an accompanying court order.

The second sentence of § 1653.2(b)(1) is designed to make it clear that a "court order or court-approved property settlement agreement incident to [a decree of divorce, of annulment or of legal separation]" may occur at any stage of the proceeding, not just after the entry of a final decree of divorce, of annulment or of legal separation. For example, courts often issue orders during a divorce proceeding in order to preserve the *status quo* in anticipation of a final decree dividing the property of the parties. The regulations also allow for the possibility that an order serving a function other than preservation of the *status quo* could be deemed "incident to" a decree that has not yet been entered.

If the Board receives an otherwise valid order awarding a former spouse a portion of a TSP account, but prior to payment receives a valid amended order changing the earlier award, the amended order will be honored. However, under no circumstances will the Board accept the return to the TSP of funds that have been properly paid pursuant to an earlier order, even if a subsequent order would dictate such a result. The processing of multiple court orders is addressed in § 1653.3(1).

Section 1653.2(b)(2) addresses the requirement in 5 U.S.C. 8435(d)(2)(A) that a court order must "expressly relate" to a participant's TSP account and the requirement in 5 U.S.C. 8467 that the court order must "expressly provide" for payment to someone other than the participant. For an order to be honored under either provision, the order must unambiguously address the TSP account.

Section 1653.2(b)(2)(i) requires that an order must clearly and specifically deal with a participant's TSP account. It is not sufficient to use generic language that is arguably broad enough to include the TSP. For example, an order that states, "Former Spouse is awarded 50% of all of Participant's Federal retirement benefits" would not be language that expressly relates to the TSP, even though the TSP is a Federal retirement benefit. First, the order must describe it in such a way that there can be no confusion that the parties are referring to the TSP, rather than some other plan or financial assets; parties to divorce actions are encouraged to attempt to obtain such specific language in their orders. However, § 1653.2(b)(2)(ii) makes it clear that, even if the Thrift Savings Plan is identified by name, the order must not contain language that is inconsistent with the division of a participant's interest in a defined contribution plan, such as the TSP, in which the participant has an individual account. References to "benefit formulas," "accrued benefits," or "eventual benefits" may or may not be acceptable in context, because such terms may raise the question whether the order is truly dealing specifically with the TSP account or is simply including the TSP among other retirement benefits to which the participant may be entitled. Since use of such terms may lead the Board to reject an order as not expressly relating to the TSP account, these terms should be avoided in favor of references to the "TSP account" or "TSP account balance."

Section 1653.2(b)(3) further implements the requirement of 5 U.S.C. 8467 that a payment pursuant to a court order must be expressly provided for in the order. If the order requires a payment from the TSP account, it must either award a specific dollar amount or divide the participant's account balance by applying a fraction, a percentage, or a formula that yields a mathematically possible result. For example, a formula where the numerator is larger than the denominator and therefore yields an amount greater than the entire account balance is not acceptable. All of the variables for the formula must also be set forth in the order or must be available through reference to Government employment records. The dollar amounts, percentages, fractions or variables used must be clearly determinable; they cannot be qualified by terms such as "approximately." The order may or may not provide for interest or earnings to be added to the amount of the award, but any award of

earnings must also be clearly determinable. The order may also award a survivor annuity under 5 U.S.C. 8435(e).

Under § 1653.2(b)(4), an order will only be deemed qualifying if it calls for payment to the spouse, former spouse, attorney for the spouse or former spouse, dependent children of the participant, other dependents of the participant, or the attorney for the participant's dependent children or other dependents. Payment cannot be made to the participant or to others, such as credit card companies, mortgage lenders, or other creditors of the parties to the divorce. The TSP is a retirement savings plan, and the occasion of a divorce should not be a general opportunity for the participant to obtain access to his or her account or for the parties to use retirement savings to liquidate their general debts. In this context, payment to the attorney for the participant is tantamount to a payment to the participant, since the participant owes a debt to the attorney. Thus, the rules would not permit such a payment. In contrast, it is permissible for the court to award a payment from the TSP account to the attorney representing the spouse/former spouse or dependent children or other dependents for legal fees incurred in connection with the divorce, because direct payments to the spouse/former spouse or dependent children or other dependents are also permissible. The Board will not honor an order asking for payment to be made jointly, such as to the former spouse and his or her children. Rather, the order should separately specify the award to be made to each person.

Section 1653.2(c) specifically states that certain orders are not qualifying. Section 1653.2(c)(1) provides that an order relating only to money that is not vested (under 5 U.S.C. 8432(g)) shall not be deemed a qualifying order unless the money will become vested within 90 days of receipt of the order if the participant were to remain in Federal employment.

Section 1653.2(c)(2) represents a significant departure from current rules for processing court orders. Under current rules the Board has been paying court orders as soon as the amount of the award can be calculated, even where the order calls for a payment at a later date. In cases where a dollar amount is awarded and the order specifies that payment is to be made upon a date in the future, that dollar amount has been paid immediately. On the other hand, where the amount of the award is based on a percentage of the account balance as of a date in the future (such as the participant's separation from Federal

Government employment or some other specified date), or is based on a percentage determined by a formula containing variables that cannot be determined until a date in the future, the Board's current procedures have called for the order to be retained by the Board so that payment could be made at the appropriate time in the future.

Under § 1653.2(c)(2)(i), orders requiring payment at a future specified date will not be considered qualifying orders unless two requirements are met. First, it must be currently possible to calculate the amount of the entitlement. Second, the award must provide for interest or earnings to be paid on the amount of the award until the date of payment. If both of these requirements are met, the order will be considered qualifying. However, payment will be made not at the future date specified in the order, but rather will be made currently after following the procedures of § 1653.5. The rationale for this limited exception to the general rule that orders requiring future payment will be rejected is that, where the amount of the award can currently be calculated and the order calls for interest or earnings, a payment of that amount currently is the economic equivalent of a payment of the same amount plus earnings at a future date. However, under the regulations there will be no case in which the Board will hold orders until a future date specified by a court for payment.

Section 1653.2(c)(2)(ii) is designed to clarify that it is not necessary for the exact amount of the award to be determinable upon receipt of the order by the Board. An order may be qualifying if it provides for a current payment to be calculated as of the date of payment. The Board recognizes that the procedures set forth in the regulations will often require a few months between the receipt of the order by the Board and the payment of the account. Orders will not be deemed non-qualifying future orders merely because the amount of the award cannot be calculated until a payment date that will invariably be later than the date of receipt of the order by the Board. For example, an order that incorporates a formula using a variable such as the number of months of the participant's Federal employment as of the date of payment would not be considered a non-qualifying future order, even though the length of the participant's Federal service will have to be determined as of the date of payment, which is likely to be a few months after the Board's receipt of the order.

Section 1653.2(d) defines the term "former spouse" as used in the

regulations by adopting the definition contained in 5 U.S.C. 8401(12).

Section 1653.3 sets forth procedures for reviewing retirement benefits court orders. Section 1653.3(a) provides that the Board will process court orders in accordance with applicable Federal law, namely FERSA and the Board's regulations. The Board's processing of court orders is not controlled by the procedures of the state divorce courts, nor will the Board take into account any fact or rule of state or local law that renders an order invalid which is otherwise valid on its face.

Section 1653.3(a) also makes it clear that the Board cannot be made a party to the underlying divorce action and thereby be subject to the jurisdiction of the court handling the divorce proceeding. The Board is a Federal agency which, under the doctrine of sovereign immunity, is not subject to suit in state court absent specific statutory authorization. Therefore, legal process to join the Board as a party to a divorce proceeding will not be honored. Parties to a divorce must, without the Board's participation in the proceeding, obtain from the court an appropriate order and then submit that order to the Board for a determination as to whether it is a qualifying order. To the extent there is any dispute about the Board's actions concerning a court order, the matter must be resolved in Federal court under 5 U.S.C. 8477, not in state court.

Section 1653.3(b) provides the address for the TSP recordkeeper to which court orders should be sent for processing. Receipt by the recordkeeper is deemed receipt by the Board.

Section 1653.3(c) provides the general rule that the Board will "freeze" the account of a TSP participant for whom a document has been received that purports to be a qualifying retirement benefits court order. When an account is frozen, the participant may not withdraw the account or obtain a loan from the account. The freeze is intended to ensure that the participant may not defeat the purposes of a court order by removing the funds from the account while the Board is conducting its review of what may turn out to be a valid order. Both 5 U.S.C. 8435(d) and 8467 indicate that the Executive Director may not make payments to the participant after receiving a qualifying court order until the court order has been complied with.

Section 1653.3(d) lists certain types of documents that the Board views as not even purporting to constitute qualifying retirement benefits court orders. Therefore, these documents will be rejected without substantive review and no freeze will be placed on the account.

Section 1653.3(d)(1) provides that an order will be rejected if it fails to indicate on its face that it has been issued or approved by a court, unless an accompanying document plainly establishes that the order was approved or issued by a court. An unsigned order will be rejected under this provision.

Section 1653.3(d)(2) provides that an order will be rejected where the account has been closed, which may have occurred either because the participant withdrew his or her account or because the entire account was paid pursuant to an earlier court order. Similarly, because FERSA was enacted on June 6, 1986, court orders entered before that date cannot "expressly relate" to a TSP account, since the court could not have contemplated the existence of a TSP account. Accordingly, under § 1653.3(d)(3), such orders will be rejected without review. Court orders awarding funds in the TSP account only to the participant (§ 1653.3(d)(4)) and court orders failing to make any mention of any retirement benefits (§ 1653.3(d)(5)) will also be rejected without substantive review and without freezing the account.

Sections 1653.3 (e) and (f) require a court order to be either an original or a copy of a complete court order. If a court order is not complete, the parties will be given 30 days to submit a complete document. If it is not received within 30 days, the account will be unfrozen and the order will not be reviewed further. However, if the incomplete order does not include a signature or other indication that it was properly issued or approved by a court, then it will be rejected under § 1653.3(d)(1) without a 30-day period for resubmission.

Sections 1653.3 (g) and (h) require the Board to determine whether court orders accepted for review under this subpart constitute qualifying orders and to provide an explanation of the decision. If the order is found to be qualifying, the decision will state the effect of the order on the TSP account of the participant. In many cases, the effect of a final divorce decree will be a payment from the participant's account to the spouse or former spouse. In the case of a preliminary order, the effect is often maintenance of a freeze on the account until a further court order is received by the Board.

Under current Board procedures, the Board's decisions provide a 30-day appeal period for the parties to request an administrative review of the decision by the Executive Director. Section 1653.3(i) eliminates that appeal period and makes the Board's initial decision the final administrative action. In the

Board's experience, the appeal period has been used primarily as a time for seeking from the divorce court a new order to supersede the earlier order, rather than to raise substantive issues relating to the Board's decision.

The Board believes that it is appropriate for the divorce court, rather than the Board, to clarify any questions concerning the meaning of the order. Elimination of the appeal period will not, however, eliminate any opportunity for the parties to return to the divorce court for an amended order, since § 1653.5(a) provides that even after a determination that an order awards a portion of a TSP account, payment cannot be made until at least 30 days after appropriate tax notification has been provided. Similarly, if the Board determines that an order is not qualifying, § 1653.3(j)(4) provides that the account will remain frozen for 45 days from the date of the Board's determination. Thus, the spouse or former spouse is protected against disbursement of a loan or withdrawal to the participant during the 45-day period, and may seek a new order from the divorce court during that time.

Section 1653.3(j) describes when a freeze imposed under § 1653.3(c) will be removed. Section 1653.3(j)(1) reiterates the provision in paragraph (f) that if the Board receives an incomplete order the parties will be notified that a complete document must be received within 30 days. If it is not received within that time, the freeze will be removed.

Section 1653.3(j)(2) provides that, where a qualifying order precludes disbursements from the participant's account, the freeze will remain on the account until the order is either superseded or vacated by a subsequent order of the court. Of course, if the subsequent order itself requires freezing the account, then the account will not be unfrozen. A common situation involves a preliminary order entered to preserve the *status quo* by precluding the participant from obtaining a loan or withdrawal from his or her account while the divorce proceedings are pending. The court then enters a final divorce decree, which dissolves the preliminary order but also includes an award of a portion of the TSP account to the former spouse. Because the final divorce decree will itself require that the account be frozen, the freeze will remain on the account until payment of the former spouse's share.

Section 1653.3(j)(3) provides that, where it is determined that an order makes an award of a portion of a TSP account, the freeze will be removed upon payment.

As discussed in connection with the elimination of the appeal period, § 1653.3(j)(4) provides that, where the Board determines that an order is not qualifying, the account will remain frozen for 45 days after that determination. This enables the parties to seek and submit to the Board a new, qualifying order from the divorce court, without concern that the participant may withdraw or borrow from his or her account during the 45-day period. Alternatively, a party may seek to challenge the Board's determination in Federal court. The freeze may be removed sooner than the expiration of the 45-day period only upon written agreement from both parties to the divorce proceedings.

Section 1653.3(k) provides that the Board will hold in abeyance the processing of a court order payment pursuant to a qualifying court order if the Board is advised by one of the parties that the underlying court order is on appeal in the state court system and that the effect of the filing of such an appeal under state law or procedures is to stay the effect of the order. The Board has decided that it should not make payments under court orders that are on appeal. However, the Board also will presume that any court order that appears valid on its face has not been appealed and thus remains valid. Absent notice from one of the parties, the Board will not be responsible for following local or state procedural rules which might otherwise prevent enforcement of the order.

The party notifying the Board of the appeal of the court order must provide proper documentation of the appeal, as well as citations to legal authority which address the effect of the filing of such an appeal. In the absence of proper documentation and appropriate legal authority, the Board will proceed with the payment process. If the Board receives proper documentation and citations to legal authority, the Board will notify all of the parties that it has held the processing of the account in abeyance because of the appeal in the state court system. The account will remain frozen for loans and withdrawals. In order for the freeze to be removed or a payment to be made, the Board must be notified by one of the parties of the disposition of the appeal, provided with a statement regarding the effect of the disposition on the provisions of the original order relating to the TSP, and provided with a copy of the resulting document from the court.

Section 1653.3(l) provides the rules for processing multiple court orders. Section 1653.3(l)(1) provides that,

where there are conflicting orders arising from the same divorce proceeding and involving the same spouse or former spouse, the order bearing the latest date will supersede any earlier orders, regardless of the dates on which they are received by the Board. The date will be determined by using the date the order was entered by the clerk of the court or the date the order was filed by the clerk of the court, if the order does not show a date entered. If the order does not indicate a date entered or filed, the date the order was signed by the judge will be used. Since 5 U.S.C. 8467(a) provides that "[a]ny payment under this subsection to a person bars recovery by any other person," the general rule set forth in § 1643.3(l)(1) obviously cannot be applied if payment on the first order received has already been made before the Board receives a later order that would have superseded the first order. Moreover, consistent with the last sentence of § 1653.2(b)(1), no court order will be honored to the extent that doing so would require the Board to accept the return of money already properly paid pursuant to another order.

Section 1653.3(l)(2) provides that where there are conflicting orders involving different spouses or former spouses, the order with the earliest date (determined in the same manner as under § 1653.3(l)(1)) will be given priority (again, unless payment on the first order received has already been made). Any payments from the account will be made first based on the order bearing the earliest date, and proceeding through any additional orders until the account is exhausted. It is presumed that the earliest order established rights for the spouse or former spouse named in that order which cannot be affected by subsequent orders in different cases in which the first spouse is not a party.

Section 1653.4 sets forth rules for calculation of the amount of an entitlement. TSP accounts are valued once a month as of the last day of the month. Under § 1653.4(a), if the date or event specified in the order for calculating the award falls on any day except the last day of the month, the account balance on which the amount of the entitlement is based is determined as of the last day of the previous month. Unless otherwise excluded by the court order, any outstanding loan balance as of the end of the month used for calculating the entitlement will be included in the account balance for this calculation. If the date or event specified in the order falls on the last day of a month, the account balance is determined as of that day.

The actual month-end account balance used to calculate the entitlement must be adjusted by transactions which are processed before the payment is processed but which relate to the period on or before the month-end used for the calculation. For example, assume that in March 1995 the Board receives a qualifying court order awarding the former spouse one-half of the participant's account balance as of the end of February 1995. In May 1995, the Board processes an adjustment record received from the participant's employing agency which removes from the account \$100 that was determined by the agency to be an excess contribution erroneously made by the agency in January 1995. If payment pursuant to the court order is made in July 1995, the amount paid would be computed based on the February 1995 month-end account balance, minus the \$100 which was removed from the account in May 1995 but which related to the period prior to the February month-end computation date. On the other hand, if the adjustment record was for an erroneous contribution made in April 1995, then the February balance would be used in the calculation of the former spouse's award without reduction for the \$100 adjustment.

Section 1653.4(b) provides that, where the award does not cite a specific date or event, the entitlement will be calculated based on the month-end balance on or immediately preceding the date the order was entered by the clerk of the court or the date the order was filed by the clerk of the court, if the order does not show a date entered. If the order does not indicate a date entered or filed, the date the order was signed by the judge will be used. Once the appropriate date is established, the rules of paragraph (a) are applied as if that date had been specified in the order.

Section 1653.4(c) provides that, if the court awards a specific dollar amount, but indicates that the amount awarded must be paid out of the balance that is in the account on a certain date, the award will be for the lesser of the amount awarded or the appropriate month-end account balance, determined and adjusted under the same rules as in paragraph (a). This approach is based on the notice that the court has no power to award a sum that is greater than the amount in the account on the particular date cited in the order. Also similar to the rules set forth in paragraph (a), if no date is specified in the court order, the award will be assumed to be based on the date the order was entered, filed, or signed, as appropriate.

Under § 1653.4(d), unless the court order specifies otherwise, no earnings will be credited to the amount awarded. If the court specifies that interest or earnings are to be credited, but does not specify a rate or method of calculation, the Board will use the actual rate of return on the participant's account for the time period involved based on the funds in which the account is invested. The participant's account may be invested in one or more of the following funds: The Government Securities Investment (G) Fund, the Common Stock Index Investment (C) Fund, the Fixed Income Index Investment (F) Fund. Because the earnings may be based in whole or in part on the earnings of the C Fund or the F Fund, and those funds may suffer losses for any given period of time, the earnings credited to the award could be either positive or negative. The earnings calculation will begin with the month after the month-end balance used in calculating the principal amount of the award, and will end with the month preceding payment. If the court specifies a different method for calculating interest to be credited to the award, that method will be used.

Section 1653.4(e) makes it clear that under no circumstances may a participant's Agency Automatic (1%) Contributions be paid pursuant to a court order if those funds are not vested under 5 U.S.C. 8432(g) at the time of payment. While the entitlement may initially be calculated to include such nonvested sums for purposes of advising the parties of the amount awarded, the amount will be recalculated excluding those sums if they have not become vested by the date of payment.

Section 1653.5 sets forth the procedures for making payments pursuant to qualifying retirement benefits court orders. Under § 1653.5(a), if a qualifying order is found to require payment, an appropriate tax notification will be provided to the payee after issuance of the Board's decision. Payment will not be made less than 30 days after issuance of the tax notification because, under the Internal Revenue Code, the payee will often have the right to elect a transfer to an Individual Retirement Arrangement (IRA) or other eligible retirement plan, or to make a tax withholding election. As discussed with respect to the elimination of the period for appeal of the Board's decision, this minimum waiting period of 30 days also provides the participant an opportunity to seek an amended order from the state divorce court or to challenge the Board's

determination in Federal court under 5 U.S.C. 8477.

Section 1653.5(b) states that payment must be made directly to the individual(s) specified in the court order. However, as required by the Internal Revenue Code, this paragraph also provides for a spouse or former spouse to elect to have all or a part of the payment transferred directly to an IRA or other eligible retirement plan.

Section 1653.5(c) provides that no payment may be made from an account that exceeds the vested account balance at the time of payment, excluding any outstanding loan at the time of payment. Although outstanding loan balances are included for purposes of computing the amount of an award as of the appropriate computation date as determined in accordance with § 1653.4, payment cannot include any amount that is outstanding as a loan, because the money is not in the account and thus is not available to be paid.

Section 1653.5(d) provides that orders requiring a series of payments will not be deemed qualifying orders. If an order requires a payment greater than the account balance as of the date of the payment, the full amount of the account will be paid pursuant to the order. If the account subsequently receives additional money, that money will not be paid pursuant to the court order. A new court order would be required for payment of the additional sums. In essence, a payment pursuant to a court order extinguishes all entitlement under that court order; further payment can only be made pursuant to a subsequent order.

Section 1653.5(e) provides that joint payments are not permitted. If more than one person is awarded a portion of the account, the amount awarded to each must be specified in the order. Although the checks will be made payable only to the payee(s) named in the order, the Board will permit each payee to specify the address to which the check should be sent, even if that address is different from an address listed in the court order. However, only the payee may designate an address to which the check should be sent, and such designation must be done in writing. The Board will not honor a change of address submitted, for example, by the payee's attorney. A strict rule against accepting address changes from anyone other than the payee is necessary to protect against forbidden alienation of the benefits to which the payee, as a beneficiary of the TSP, has become entitled. Unless the address is changed by the payee, the check will be sent to an address provided in the court order. If an order

provides an address that is "in care of" another individual, the check will be issued to the payee but sent to the "in care of" address.

Section 1653.5(f) provides that prior to payment the TSP recordkeeper must have the payee's full name, mailing address, and Social Security number. This information may be provided in the court order or separately by the parties or their representatives. However, as discussed in connection with paragraph (e), only the payee may change the mailing address for the check to an address other than his or her own address. The payee's representative may not do so.

Section 1653.5(g) provides that payment will be made to the payee's estate if the payee dies before payment is made pursuant to a court order. It is not necessary that the court order be submitted to the Board prior to the death of the payee, as long as the order was issued prior to the payee's death and in all other respects constitutes a qualifying order. The court may, in the order, provide for an individual or entity other than the payee's estate to receive payment in the event of the payee's death.

If the participant dies prior to payment of the account, a court order entered prior to the participant's death will be honored. It does not matter that the order may not have been received by the Board prior to the participant's death. However, if the order is not received by the Board prior to otherwise proper payment of the account to someone other than the payee(s) specified in the court order, then the court order will not be honored. The Board will neither seek nor accept a return of funds properly paid prior to receipt of a court order.

Section 1653.5(h) provides that remarriage or termination of a legal separation does not nullify a court order that has already been submitted to the Board. The Board does not believe it can be presumed that in all cases in which a domestic relations court divides property, including a TSP account, the division should be rendered void merely because the parties choose to remarry. If that is the court's intent, then the parties must obtain an order to that effect and submit it to the Board before payment is made pursuant to the original court order.

Section 1653.5(i) reflects the last sentence of 5 U.S.C. 8467(a), which provides that, "Any payment under this subsection to a person bars recovery by any other person." Once payment pursuant to a court order has been properly made, the Board will not accept return of the money disbursed.

Nor will an additional payment be made to another payee.

Section 1653.5(j) provides that payments will be made from the TSP investment funds on a *pro rata* basis. For example, if a participant's \$10,000 account balance is invested 50% (\$5,000) in the G Fund, 30% (\$3,000) in the C Fund and 20% (\$2,000) in the F Fund, then an award of \$1,000 would be paid \$500 from the G Fund, \$300 from the C Fund, and \$200 from the F Fund. The Board will not honor any provision in a court order that requires the payment to be made other than *pro rata* from the TSP investment funds.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only internal Board procedures relating to the processing of and payment pursuant to retirement benefits court orders.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

List of Subjects

5 CFR Part 1650

Employment benefit plans,
Government employees, Retirement,
Pensions.

5 CFR Part 1653

Employment benefit plans,
Government employees, Retirement,
Pensions.

Dated: March 6, 1995.

Federal Retirement Thrift Investment Board.

Roger W. Mehle,
Executive Director.

For the reasons set out in the preamble, 5 CFR Chapter VI is amended as follows:

PART 1650—METHODS OF WITHDRAWING FUNDS FROM THRIFT SAVINGS PLAN

1. The authority citation for part 1650 continues to read as follows:

Authority: 5 U.S.C. 8351, 8433, 8434(a)(2)(E), 8434(b), 8435, 8436, 8467, 8474(b)(5), 8474(c)(1), and sec. 4437, Pub. L. 102-484, 106 Stat. 2724.

2. A new part 1653 is added to read as follows:

PART 1653—DOMESTIC RELATIONS ORDERS AFFECTING THRIFT SAVINGS PLAN ACCOUNTS

Subpart A—Retirement Benefits Court Orders

Sec.

1653.1 Purpose.

1653.2 Qualifying retirement benefits court orders.

1653.3 Processing retirement benefits court orders.

1653.4 Calculating entitlement under a retirement benefits court order.

1653.5 Procedures for payment pursuant to retirement benefits court orders.

Subpart B—[Reserved]

Authority: 5 U.S.C. 8435, 8436(b), 8467, 8474(b)(5) and 8474(c)(1).

Subpart A—Retirement Benefits Court Orders

§ 1653.1 Purpose.

This subpart contains regulations prescribing the Board's procedures for processing retirement benefits court orders.

§ 1653.2 Qualifying retirement benefits court orders.

(a) The TSP will only honor the terms of a retirement benefits court order that is qualifying under paragraph (b) of this section.

(b) A retirement benefits court order must meet each of the following requirements to be considered qualifying:

(1) The court order must be a court decree of divorce, of annulment, or of legal separation, or any court order or court-approved property settlement agreement incident to a decree of divorce, of annulment, or of legal separation. Orders may be issued at any stage of a divorce, annulment, or legal separation proceeding. Orders issued prior to a final decree, such as orders for the purpose of preserving the *status quo* pending the final resolution of the proceeding, are referred to as "preliminary" court orders, and will be considered "incident to" a final decree, notwithstanding that a final decree has not yet been, and may not be, issued. Orders issued subsequent to a final decree, such as orders for the purpose of amending such decree, are referred to as "subsequent" court orders, and will also be considered "incident to" such decree. However, any subsequent court order that requires the return of money properly paid pursuant to an earlier court order will not constitute a qualifying order.

(2) The court order must "expressly relate" to the Thrift Savings Plan account of a current TSP participant. This means that:

(i) The order must on its face specifically describe the TSP in such a way that it cannot be confused with other Federal Government retirement benefits or non-Federal retirement benefits; and

(ii) The order must be written in terms appropriate to a defined contribution plan rather than a defined benefit plan. For example, it should generally refer to the individual participant's "account" or "account balance" rather than a "benefit formula" or the participant's "eventual benefits."

(3) If the court order awards an amount to be paid from the participant's TSP account, the award must be for:

(i) A specific dollar amount;

(ii) A stated percentage or stated fraction of the account;

(iii) A portion of the account to be calculated by applying a formula that yields a mathematically possible result. Any variables in the formula must have values that are readily ascertainable from the face of the order or from Government employment records; or

(iv) A survivor annuity as provided in 5 U.S.C. 8435(e).

(4) Court orders that make awards from the TSP may only provide for payments:

(i) To spouses or former spouses of the participant;

(ii) As fees for attorneys for spouses or former spouses of the participant;

(iii) To dependent children or other dependents of the participant;

(iv) As fees for attorneys for dependent children or other dependents of the participant;

(c) The following retirement benefits court orders will be considered non-qualifying:

(1) Orders relating to a TSP account that contains only nonvested money, unless the money will become vested within 90 days of the date of receipt of the order if the participant remains in Federal service;

(2) (i) Orders that award an amount to be paid at a future specified date or upon the occurrence of a future specified event, unless:

(A) The amount of the entitlement can be currently calculated; and

(B) The award provides for the payment of interest or earnings from the date of calculation to the specified date or event for payment.

(ii) If an order meets the requirements of paragraphs (c)(2)(i) (A) and (B), a current payment will be made in accordance with the procedures set forth in § 1653.5, rather than a payment at the future date stated in the order.

(d) For purposes of paragraph (c)(2) of this section, orders that require only that the amount of the award be

calculated on the date of payment, without stating a future date or event for payment, will not be considered as awarding an amount to be paid at a future date or upon the occurrence of a future event. In such cases, the date of payment will be determined in accordance with the procedures set forth in § 1653.5, and the amount of the entitlement will be determined in accordance with § 1653.4 using that date of payment.

(e) *Definition.* For purposes of this Part, the term "former spouse" shall have the same meaning as set forth in 5 U.S.C. 8401(12).

§ 1653.3 Processing retirement benefits court orders.

(a) Board's review of retirement benefits court orders is governed solely by the Federal Employees' Retirement System Act (FERSA), 5 U.S.C. Chapter 84, and by the terms of this part. The Board will honor retirement benefits court orders properly issued by a court of any state, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, or the Virgin Islands, and any Indian court as defined by 25 U.S.C. 1301(3). However, those courts have no jurisdiction over the Board and the Board cannot be made a party to the underlying domestic relations proceedings.

(b) Retirement benefits court orders should be submitted to the Board's recordkeeper at the following address: Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, New Orleans, Louisiana 70161-1500. Receipt by the recordkeeper will be considered receipt by the Board.

(c) Upon receipt of a document that purports to be a qualifying retirement benefits court order, including preliminary and subsequent court orders, the participant's account will be frozen. After the account is frozen, no withdrawals or loans will be allowed until the account is unfrozen. All other account activity, including contributions, adjustments, and interfund transfers, will be permitted.

(d) The following documents will not be treated as purporting to be qualifying retirement benefits court orders. Therefore accounts of participants to whom such orders relate will not be frozen and these documents will not be reviewed by the Board:

(1) A document that does not indicate on its face (or accompany a document that establishes) that it has been issued or approved by a court;

(2) A court order relating to a TSP account that has been closed;

(3) A court order dated prior to June 6, 1986;

(4) A court order that fails to award all or any part of the TSP account to anyone other than the participant;

(5) A court order that does not mention retirement benefits.

(e) After the participant's account is frozen, the document will be reviewed initially to determine if it is a complete original or copy of a retirement benefits court order.

(f) If it is determined that the document is not complete, a complete document will be requested. If it is not received within 30 days of the date of such request, the account will be unfrozen and no further action will be taken with respect to the document.

(g) Upon receipt of a complete order that is either an original or a copy of a retirement benefits court order, the Board will review the order and will determine whether it is a qualifying order as described in § 1653.2 and, if it awards an amount to be paid from a participant's TSP account, the amount of the entitlement. The Board will advise all parties in writing of its decision.

(h) The Board's decision will contain the following information:

(1) The Board's determination regarding whether the court order is qualifying;

(2) A statement of the applicable statute or regulations;

(3) If the order is determined to be qualifying, a statement regarding the effect that compliance with the court order will have on the participant's TSP account; and

(4) If the order requires payment, a description of the method by which the entitlement under the court order was calculated and the circumstances under which payment will be made.

(i) The Board's decision will be final. There is no administrative appeal from the decision.

(j) An account frozen under this section will be unfrozen as follows:

(1) If a complete document has not been received within 30 days from the date of a request described in paragraph (f) of this section, upon expiration of the 30-day period;

(2) If the order is a preliminary order or other order precluding payment from the account, as soon as practicable after receipt of a certified copy or original court order vacating or superseding such order (unless the order vacating or superseding the preliminary order itself warrants placing a freeze on the account);

(3) If the order is valid to award a payment from the TSP account of a

participant under this part, upon payment; and

(4) If the Board determines that the order is not a qualifying order under this part, 45 days after issuance of the Board's decision. The 45-day period will be terminated if both parties submit a written request for such a termination to the Board.

(k) (1) The Board will hold in abeyance the processing of a court order payment pursuant to a previously approved qualifying court order if the Board is advised by one of the parties that the underlying court order is on appeal in the state court system and that the effect of the filing of such an appeal under state law or procedures is to stay the effect of the order.

(i) Proper documentation of the appeal and citations to legal authority which address the effect of the filing of such an appeal must be provided.

(ii) The parties will be notified that the processing of the court order is being held in abeyance and the account will remain frozen for loans and withdrawal.

(iii) In the absence of proper documentation and appropriate legal authority, the Board will presume that the provisions relating to the TSP in the court order remain valid and will proceed with the payment process.

(2) The Board must be notified in writing by one of the parties of the disposition of the appeal in order for the freeze to be removed from the account or for a payment to be made. The notification must include a statement regarding the effect of the disposition on the provisions of the original order relating to the TSP and a copy of the resulting document from the court must be provided.

(1) Multiple court orders pending before the Board will be processed in accordance with the procedures set forth in this part in the following order:

(1) As between conflicting qualifying court orders relating to the same spouse or former spouse, the Board will process only the court order bearing the latest date entered by the clerk of the court. If any order does not have a date entered, then the date the order was filed by the clerk shall be used; if there is no date entered or date filed, then the date the order was signed by the judge shall be used.

(2) As between conflicting qualifying court orders relating to two or more former spouses, the Board will process the orders in the order of the dates entered by the clerk of the court, starting with the order bearing the earliest date, and continuing until the account is exhausted. If any order does not have a date entered, then the date the order

was filed by the clerk shall be used; if there is no date entered or date filed, then the date the order was signed by the judge shall be used.

§ 1653.4 Calculating entitlement under a retirement benefits court order.

(a) If the court order awards a percentage or fraction of the account as of a specific date or event, the amount of the entitlement will be calculated based upon the balance of the account as of the end of the month on or immediately preceding the date or event, plus any transactions posted after the date or event, but before payment, that are effective on or before the month-end date used for calculating the entitlement. For purposes of computing the amount of an entitlement, any loan amount outstanding as of the month-end date used for calculating the entitlement shall be treated as included in the account balance, unless the court order provides otherwise.

(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 the percentage or fraction to the account, the amount of the entitlement will be calculated as described in paragraph (a) of this section, using the account balance as of the end of the month on or immediately prior to the date the order was entered by the clerk of the court or, if the order does not show a date entered, the date the order was filed by the clerk of the court or, if the order does not contain a date entered or a date filed, the date signed by the judge.

(c) If the court order awards a specific dollar amount, the amount of the entitlement will be the lesser of:

- (1) The amount the order awards; or
- (2) The amount in the account as of the end of the month on or before the date specified in the order (or, if no date is specified, the date the order was entered by the clerk of the court or, if the order does not show a date entered, the date the order was filed by the clerk of the court, or, if the order does not contain a date entered or a date filed, the date signed by the judge) plus any transactions posted after the date or event, but before payment, that are effective on or before the month-end date used for calculating the entitlement. For purposes of computing the amount of entitlement, any loan amount outstanding as of the month-end date used for calculating the entitlement shall be treated as included in the

account balance, unless the court order provides otherwise.

(d) Unless the court order specifically provides otherwise, the entitlement calculated under this section will not be credited with interest or earnings. If interest or earnings are awarded, the Board will use the monthly rates of return credited to the account unless the court order specifies a different rate. The TSP monthly rates of return may be either positive or negative. Interest or earnings will be calculated beginning with the month following the month-end valuation date used for calculating the entitlement and ending with the month prior to the month of payment.

(e) All entitlement will be calculated initially under this section including both vested and nonvested amounts in the participant's account. If at the time of payment the non-vested portion of the account has not become vested or has been forfeited, the entitlement will be recalculated using only the participant's vested account balance.

§ 1653.5 Procedures for payment pursuant to retirement benefits court orders.

(a) If a qualifying court order creates an entitlement to a portion of a TSP account under this part, payment will be made no sooner than 30 days after the Board's decision has been issued and the appropriate tax withholding notification has been provided.

(b) A payment made pursuant to a qualifying court order will be made only to the person(s) specified in the court order. If payment is to be made to the spouse or former spouse of the participant, he or she may request that the TSP transfer all or a portion of his or her payment to an Individual Retirement Arrangement (IRA) or other eligible retirement plan. Such a request must be made by filing the TSP form "Spouse Election to Transfer to IRA or Other Eligible Retirement Plan", which must be received before payment.

(c) In no case may a payment made pursuant to a qualifying court order exceed the participant's vested account balance, excluding any outstanding loan amount as of the end of the month preceding the date of payment. If the entitlement calculated pursuant to this subpart exceeds the participant's vested account balance (excluding any outstanding loan amount), then only the vested amount in the account (excluding the outstanding loan balance) will be paid.

(d) The entire amount of an entitlement created by a qualifying court order must be disbursed at one time. A series of payments will not be made even if the court order provides for such a method of payment. A payment pursuant to a court order extinguishes all further rights to any payment under that order even if the entire amount of the entitlement could not be paid. Any further award must be contained in a separate court order.

(e) Payment cannot be made jointly to more than one person. If payment is to be made to more than one person, the order must separately indicate the amount to be paid to each.

(f) In order to make a payment pursuant to a retirement benefits court order, the Board's recordkeeper must be provided with the full name, mailing address, and Social Security number of the payee, even if the payment is being mailed to another address.

(g) If the payee dies before a payment is made pursuant to a qualifying retirement benefits court order, payment will be made to the estate of the payee, unless otherwise specified by the court order. If the participant dies before payment is made pursuant to a qualifying retirement benefits order entered before the participant's death, the order will be honored as long as it is submitted to the Board before payment of the account, regardless of whether the order was received by the Board before the participant's death.

(h) If the parties to a divorce or annulment are remarried, or a legal separation is terminated, a new court order will be required to prevent payment pursuant to a previously submitted qualifying retirement benefits court order.

(i) Payment to a person (including the estate of the payee) pursuant to a qualifying retirement benefits court order made in accordance with this subpart bars recovery by any other person pursuant to that order.

(j) Payments pursuant to qualifying court orders will be paid *pro rata* from the TSP investment funds, based on the balance in each fund on the date as of which the payment is made. The Board will not honor provisions of court orders that require payment to be made from specific investment funds.

Subpart B—[Reserved]