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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1620

Nonappropriated Fund Employees

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is publishing interim regulations governing Thrift Savings Plan (TSP) participation by certain persons who move between Federal civil service positions and positions with Nonappropriated Fund (NAF) instrumentalities of the Department of Defense (DOD) and U.S. Coast Guard (Coast Guard). These interim regulations implement sections 10, 11, 13 and 14 of the Portability of Benefits for Nonappropriated Fund Employees Act of 1990 (1990 Portability Act), as amended by section 1043 of the National Defense Authorization Act for Fiscal Year 1996 (Defense Authorization Act).

DATES: These interim rules are effective on August 10, 1996. Comments must be received on or before October 10, 1996.

ADDRESSES: Comments may be submitted to the Federal Retirement Thrift Investment Board, 1250 H Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Patrick J. Forrest, Federal Retirement Thrift Investment Board, 1250 H Street, N.W., Washington, D.C. 20005. Telephone: (202) 942-1662. Telefacsimile: (202) 942-1676.

SUPPLEMENTARY INFORMATION: The Board administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Pub. L. 99-335, 101 Stat. 514 (1986), which has been codified, as amended, largely at 5 U.S.C. 8401-8479

(1994). 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.

The 1990 Portability Act, Pub. L. 101-508, 104 Stat. 1388, 1388-335 to 1388-341 (codified largely at 5 U.S.C. 8347(p)(1) and 8461(n)(1)), as amended by section 1043 of the Defense Authorization Act, Pub. L. 104-106, 110 Stat. 186, 434-439, provides that certain employees who move from Federal service to NAF instrumentalities are eligible to participate in the TSP by virtue of their election to be covered by the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS). These regulations set forth the rules and procedures which the NAF instrumentality must follow for its employees who are eligible to participate in the TSP pursuant to the 1990 Portability Act, as amended. Different rules apply depending on whether the employee moved on or after August 10, 1996, and whether he or she elects to be covered by CSRS or FERS. The regulations also address an employee's eligibility to participate in the TSP if the employee moves from a NAF instrumentality to a Federal Government agency.

The 1990 Portability Act permitted CSRS and FERS employees of the Department of Defense and the U.S. Coast Guard who moved on or after January 1, 1987, to a NAF instrumentality to elect to maintain their CSRS or FERS retirement coverage after the move. On June 10, 1991, the Board published an interim rule with request for comments in the Federal Register (56 FR 26,722) implementing the 1990 Portability Act as it pertained to the TSP. The Board received no comments on the interim rule.

Section 1043 of the 1996 Defense Authorization Act amended the 1990 Portability Act by expanding the eligibility requirement for employees of NAF instrumentalities in two ways. First, all Federal employees moving to a NAF instrumentality, not just those from the Department of Defense and U.S. Coast Guard, are eligible to continue their CSRS or FERS retirement coverage after their move. Second, the amendment changed the threshold for being eligible for CSRS or FERS

retirement coverage from employees who moved to a NAF instrumentality after December 31, 1986, to employees who made the move after December 31, 1965. The Board's NAF regulations are being revised to implement this amendment to the 1990 Portability Act. The revised regulations do not change the procedures for retroactive participation in the TSP by affected employees of NAF instrumentalities.

Sections 1620.93 (a)(2) and (a)(3) pertain to "an employee who moved to a NAF instrumentality on or after August 10, 1996, but after December 31, 1965, elects to be covered by FERS * * *." The 1990 Portability Act, as amended, does not change the current Federal law which provides that FERS coverage can only begin on or after January 1, 1987. However, under Office of Personnel Management regulations, eligible employees who transferred to a NAF instrumentality prior to January 1, 1987, may elect FERS coverage to be retroactively effective on or after January 1, 1987.

Section 1620.93(c) provides that employees who are covered by a NAF retirement plan are not eligible to participate in the TSP. Under section 1620.93, some employees who are covered under CSRS or FERS can elect retroactive NAF retirement coverage. If a TSP participant elects retroactive NAF retirement coverage, there could be contributions in his or her account which relate to a period during which he or she was ineligible to participate in the TSP. The 1990 Portability Act, as amended, does not provide for the transfer of funds between the TSP and a NAF defined contribution plan. Therefore, these contributions must be removed from the TSP under the Board's error correction regulations at 5 CFR part 1605.

Section 1620.93(d) pertains to employees who elected CSRS or FERS coverage under the 1990 Portability Act before the effective date of these regulations. Their TSP elections are valid if they were properly implemented by the NAF instrumentality under then-effective regulations. In all other respects, these regulations apply to those employees. The Board is also making several changes to the interim regulations which are unrelated to the Defense Authorization Act amendments. The Board has received questions from employees moving from NAF

instrumentalities to Federal civil service positions regarding when they are eligible to participate in the TSP. The 1990 Portability Act, as amended, does not change the eligibility requirements set forth in FERSA. Section 1620.94 is being revised to explain those requirements. In addition, since this subpart was first published on June 10, 1991, the Board has changed the manner by which an employing agency is required to transmit employee separation data to the TSP recordkeeper. See TSP Bulletin 94-29, Elimination of Form TSP-18, Validation of Retirement Information, and New Procedures for Submitting Form TSP-3, Designation of Beneficiary. Section 1620.97 is being amended to reflect this change.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

Paperwork Reduction Act

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

Waiver of Notice of Proposed Rulemaking and 30-Day Delay of Effective Date

Under 5 U.S.C. 553 (b)(3)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days because section 1043 of the Defense Authorization Act, 110 Stat. at 434-435, requires these regulations to be effective on or before August 10, 1996.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, sec. 201, Pub. L. 104-4, 109 Stat. 48, 64, the effect of this regulation on State, local, and tribal governments and on the private sector has been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by any State, local, or tribal governments in the aggregate or by the private sector. Therefore, a statement under section 202, 109 Stat. 48, 64-65, is not required.

Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedure Act (APA), as amended by the Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, tit. II, 110 Stat. 847, 857-875 (5 U.S.C. 801(a)(1)(A)), the Board 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 General Accounting Office prior to the publication of this rule in today's Federal Register. This rule is not a "major rule" as defined in section 804(2) of the APA as amended (5 U.S.C. 804(2)).

List of Subjects in 5 CFR Part 1620

Employee benefit plan, Government employees, Pensions, Retirement.
Federal Retirement Thrift Investment Board
Roger W. Mehle,
Executive Director.

For the reasons set out in the preamble, Part 1620 of chapter VI, Title 5 of the Code of Federal Regulations is amended as follows:

PART 1620—CONTINUATION OF ELIGIBILITY

1. The authority citation for Part 1620 is revised to read as follows:

Authority: 5 U.S.C. 8474 and 8432b; Pub. L. 99-591, 100 Stat. 3341; Pub. L. 100-238, 101 Stat. 1744; Pub. L. 100-659, 102 Stat. 3910; Pub. L. 101-508, 104 Stat. 1388; Pub. L. 104-106, 110 Stat. 186.

2. Subpart G of part 1620 is revised to read as follows:

Subpart G—Nonappropriated Fund Employees

Sec.

1620.90 Scope.

1620.91 Definitions.

1620.92 Employees who move to a NAF instrumentality on or after August 10, 1996.

1620.93 Employees who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965.

1620.94 Employees who move from a NAF Instrumentality to a Federal Government agency.

1620.95 Payment of TSP contributions.

1620.96 Loan payments.

1620.97 Transmission of information.

1620.98 Notices.

1620.99 Other regulations.

Subpart G—Nonappropriated Fund Employees

§ 1620.90 Scope.

This subpart applies to any employee of a Nonappropriated Fund (NAF) instrumentality of the Department of Defense (DOD) or the U.S. Coast Guard who elects to be covered by the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS) and to any employee in a CSRS or FERS covered position who elects to be covered by a retirement plan established for employees of a NAF instrumentality pursuant to the

Portability of Benefits for Nonappropriated Fund Employees Act of 1990, Pub. L. 101-508, 104 Stat. 1388, 1388-335 to 1388-341 (codified largely at 5 U.S.C. 8347(p)(1) and 8461(n)(1) (1994)), as amended by section 1043 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186, 434-439.

§ 1620.91 Definitions.

As used in this subpart, the terms—
Basic pay means the pay from the NAF instrumentality used to compute the amount the individual is required to contribute to the Civil Service Retirement and Disability Fund as a condition for participating in CSRS or FERS, as the case may be.

Covered by means paying contributions to the Civil Service Retirement and Disability Fund under either CSRS or FERS.

Move means moving from a position covered by CSRS or FERS to a NAF instrumentality of the DOD or Coast Guard, or *vice versa*, without a break in service of more than 1 year.

Thrift Savings Plan (TSP) election means a request by an employee to start contributing to the TSP, to terminate contributions to the TSP, to change the amount of contributions made to the TSP each pay period, or to change the allocation of future TSP contributions among the investment funds and made effective pursuant to 5 CFR part 1600.

§ 1620.92 Employees who move to a NAF instrumentality on or after August 10, 1996.

(a) Any Thrift Savings Plan (TSP) elections:

(1) Made during a previous employment by an employee who moves to a NAF instrumentality on or after August 10, 1996, and who elects to continue to be covered by CSRS or FERS; and

(2) Which is still in effect as of the date of the move shall be implemented by the NAF instrumentality and shall begin with the date of the move.

(b) If an employee who moves to a NAF instrumentality on or after August 10, 1996, does not have a current election to contribute to the TSP, he or she shall be permitted to make such an election during the first TSP Open Season, as described in 5 CFR 1600.2, during which he or she is eligible to do so under 5 U.S.C. 8432.

(c) An employee who moves to a NAF instrumentality on or after August 10, 1996, and who elects to continue to be covered by CSRS or FERS must be permitted during the appropriate Open Seasons to elect under 5 U.S.C. 8351(b)(2) or 8432(a), as applicable, to make future contributions to the Thrift Savings Fund from his or her basic pay.

(d) For an employee who moves to a NAF instrumentality on or after August 10, 1996, and who elects to continue to be covered by FERS, the NAF instrumentality must also contribute each pay period to the Thrift Savings Fund in accordance with Board procedures on behalf of such employee any amounts which the employee is eligible to receive under 5 U.S.C. 8432(c).

(e) In the case of an employee who moves to a NAF instrumentality on or after August 10, 1996, and who elects to continue to be covered by CSRS or FERS, any TSP contributions described in 5 U.S.C. 8351(b)(2) or 8432(a), as applicable, for which such employee is eligible and which are not made in accordance with this section because the employee moves to the NAF instrumentality but does not make an immediate election to be covered by CSRS or FERS, shall be made up according to the error correction procedures contained in 5 CFR part 1605.

§ 1620.93 Employees who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965.

(a) *Future TSP contributions.* (1) *Employee Contributions.* An employee who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965, and who elects to be covered by CSRS or FERS as of the date of such move may elect to make any future contributions to the TSP in accordance with 5 U.S.C. 8351(b)(2) or 8432(a), as applicable, within 30 days of the date of his or her election to be covered by CSRS or FERS. Such contributions shall begin being deducted from the employee's pay no later than the pay period following the election to contribute to the TSP. Any TSP election which may have been in effect at the time of the employee's move will not be effective for any future contributions.

(2) *Agency Automatic (1%) Contributions.* If an employee who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965, elects to be covered by FERS, the NAF instrumentality must also contribute each pay period to the Thrift Savings Fund on behalf of such employee any amounts which the employee is eligible to receive under 5 U.S.C. 8432(c)(1), beginning no later than the pay period following the employee's election to be covered by FERS.

(3) *Agency Matching Contributions.* If an employee who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965,

elects to be covered by FERS and also elects to make contributions to the TSP pursuant to paragraph (a)(1) of this section, the NAF instrumentality must also contribute each pay period to the Thrift Savings Fund on behalf of such employee any amounts which the employee is eligible to receive under 5 U.S.C. 8432(c)(2), beginning at the same time as the employee's contributions are made pursuant to paragraph (a)(1) of this section.

(b) *Retroactive TSP Contributions.* (1) Without regard to any election to contribute to the TSP under paragraph (a)(1) of this section, the NAF instrumentality shall take the following actions with respect to an employee who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965, and who elects to be covered by CSRS or FERS as of the date of the move:

(i) *Agency Automatic (1%) Make-up Contributions.* The NAF instrumentality shall, within 30 days of the date of the employee's election to be covered by FERS, contribute to the Thrift Savings Fund an amount representing the Agency Automatic (1%) Contribution for all pay periods during which the employee would have been eligible to receive the Agency Automatic (1%) Contribution under 5 U.S.C. 8432, beginning with the date of the move and ending with the date that Agency Automatic (1%) Contributions begin under paragraph (a)(2) of this section. Lost earnings will not be paid on these contributions unless they are not made by the NAF instrumentality within the time frames required by these regulations.

(ii) *Employee Make-up Contributions.* (A) Within 60 days of the election to be covered by FERS, an employee who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965, and who elects to be covered by FERS, may make an election regarding Employee Make-up Contributions. The employee may elect to contribute all or a percentage of the amount of Employee Contributions which the employee would have been eligible to make under 5 U.S.C. 8432 between the date of the move and the date Employee Contributions begin under paragraph (a)(1) of this section or, if no such election is made under paragraph (a)(1) of this section, the date that Agency Automatic (1%) Contributions begin under paragraph (a)(2) of this section.

(B) Within 60 days of the election to be covered under CSRS, an employee who moved to a NAF instrumentality prior to August 10, 1996, but after December 31, 1965, and who elects to be covered by CSRS, may make an election

regarding make-up contributions. The employee may elect to contribute all or a percentage of the amount of Employee Contributions which the employee would have been eligible to make under 5 U.S.C. 8351 between the date of the move and the date Employee Contributions begin under paragraph (a)(1) of this section or, if no such election is made under paragraph (a)(1) of this section, the pay period following the date the election to be covered by CSRS is made.

(C) Deductions made from the employee's pay pursuant to an employee's election under paragraph (b)(1)(ii) (A) or (B) of this section, as appropriate, shall be made according to a schedule that meets the requirements of paragraphs (b) (2) and (3) of this section.

(iii) *Agency Matching Make-up Contributions.* The NAF instrumentality must pay to the Thrift Savings Fund any Matching Contributions attributable to Employee Contributions made under paragraph (b)(1)(ii)(A) of this section that the NAF instrumentality would have been required to make under 5 U.S.C. 8432(c), at the same time that such Employee Contributions are contributed to the Fund.

(2) The NAF instrumentality may set a ceiling on the number of pay periods over which the contributions referred to in paragraph (b)(1)(ii) of this section may be made; however, this ceiling may not be less than two times the number of pay periods in which the payments could have been made. The payment schedule must begin no later than the pay period following the date the employee elects such schedule and it may not contain more than four times the number of pay periods in which the payment could have been made. When setting the number of payments, the employee's remaining period of employment with the Federal Government should be considered to ensure that the employee will have sufficient time to make up these contributions.

(3) If the agreed-upon payment schedule cannot be met because the employee has insufficient net pay or because the employee has reached an annual ceiling for tax-deferred contributions under 26 U.S.C. 402(g) or 415, the payment schedule will be suspended until the employee is again able to make full payments through payroll deductions. Pay periods for which an employee is unable to make payments because of insufficient net pay or a ceiling on tax-deferred contributions, will not be counted against the maximum number of pay periods applicable to the schedule and

the maximum number of applicable pay periods must be extended accordingly.

(4) If an employee chooses to contribute the make-up amount, he or she may subsequently terminate that decision at any time and that termination shall be irrevocable. If an employee separates from Federal or covered NAF employment, the employee may accelerate the contribution by lump sum payment from the final salary payment. If the employee dies, the retroactive contributions of the deceased employee will be terminated as of the final salary payment.

(5) The make-up payment amount is not subject to the maximum pay period contribution limitations; however, these amounts must be included when determining amounts subject to annual ceilings on contributions under 26 U.S.C. 402(g) or 415.

(6) In the event an employee does not have sufficient net pay to make all of the TSP deductions, the employee's regular TSP deduction shall take precedence over the employee's payment schedule contribution.

(7) Make-up contributions shall be reported for investment by the NAF instrumentality when contributed, according to the employee's election for current TSP contributions. If the employee is not making current contributions, the retroactive contributions shall be invested according to an election form (TSP-1-NAF) filed specifically for that purpose.

(c) An employee who is covered by a NAF retirement plan is not eligible to participate in the TSP. Any TSP contributions relating to a period for which an employee elects retroactive NAF retirement coverage shall be removed from the TSP as required by the regulations at 5 CFR part 1605.

(d) A TSP election made by an employee of a NAF instrumentality who elected to be covered by CSRS or FERS prior to August 10, 1996, which was properly implemented by the NAF instrumentality because it was valid under then-effective regulations, is effective under the regulations in this subpart.

§ 1620.94 Employees who move from a NAF instrumentality to a Federal Government agency.

(a) An employee of a NAF instrumentality who moves from a NAF instrumentality to a Federal Government agency and who elects to be covered by a NAF retirement system is not eligible to participate in the TSP. Any TSP contributions relating to a period for which an employee elects retroactive NAF retirement coverage

shall be removed from the TSP as required by the regulations at 5 CFR part 1605.

(b) An employee of a NAF instrumentality who moves from a NAF instrumentality to a Federal Government agency and who elects to be covered by CSRS or FERS will become eligible to participate in the TSP as follows:

(1) If the employee was previously eligible to participate in the TSP under a prior period of Federal Government service, the employee will be eligible to participate in the TSP the first Open Season (as determined in accordance with 5 CFR 1600.3(d)) beginning after the effective date of the CSRS and FERS coverage.

(2) If the employee was not previously eligible to participate in the TSP, the employee will be eligible to contribute to the TSP in the second Open Season (as determined in accordance with 5 CFR 1600.3(d)) beginning after the effective date of the CSRS or FERS coverage.

§ 1620.95 Payment of TSP contributions.

The NAF instrumentality shall deduct any Employee Contributions authorized under this section from the pay of the employee each pay period and shall remit such amounts to the Thrift Savings Fund in accordance with this subpart and Board procedures. The NAF instrumentality shall contribute any future Agency Automatic (1%) Contributions and Agency Matching Contributions to the Thrift Savings Fund each pay period in accordance with this subpart and Board procedures. The NAF instrumentality shall contribute make-up contributions to the Thrift Savings Fund in accordance with this subpart and Board procedures.

§ 1620.96 Loan payments.

NAF instrumentalities shall deduct and transmit TSP loan payments for employees who elect to be covered by CSRS or FERS to the recordkeeper in accordance with 5 CFR part 1655 and Board procedures. Loan payments may not be deducted and transmitted for employees who elect to be covered by the NAF retirement system. Such employees will be considered to have separated from Government service and must prepay their loans or a taxable distribution will be declared.

§ 1620.97 Transmission of information.

Any employee who moves to a NAF instrumentality shall be reported by the losing Federal Government employing agency to the TSP recordkeeper as having transferred to a NAF instrumentality of the DOD or Coast

Guard rather than as having separated from Government service. If the employee subsequently elects not to be covered by CSRS or FERS, the NAF instrumentality must submit an Employee Data Record to report the employee as having separated from Federal Government service as of the date of the move.

§ 1620.98 Notices.

All NAF instrumentalities employing any individuals covered by § 1620.90 must notify affected employees of the application of the regulations in this subpart as soon as practicable.

§ 1620.99 Other regulations.

NAF instrumentalities and individuals covered by § 1620.90 are governed by the regulations in this chapter, to the extent that the regulations in this chapter are not inconsistent with this subpart.

[FR Doc. 96-20129 Filed 8-8-96; 8:45 am]

BILLING CODE 6760-01-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005, 1007, 1011, and 1046

[Docket No. AO-388-A9, et al.; DA-96-08]

Milk in the Carolina and Certain Other Marketing Areas; Interim Amendment of Orders

7 CFR part	Marketing area	Docket No.
1005 ...	Carolina	AO-388-A9.
1007 ...	Southeast	AO-366-A38.
1011 ...	Tennessee Valley	AO-251-A40.
1046 ...	Louisville-Lexington-Evansville.	AO-123-A67.

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim amendment of rules.

SUMMARY: This interim rule amends, on an emergency basis, four Federal milk orders in the Southeastern United States. The amendments establish a transportation credit balancing fund from which to reimburse handlers for the cost of importing bulk milk into these markets for fluid use when local supplies are insufficient to meet fluid needs. The amendments also establish a monthly assessment to maintain the solvency of the fund and a methodology for computation of the transportation credits. The rules are based upon proposals that were considered at a public hearing held May 15-16, 1996, in