

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1605

Correction of Administrative Errors

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is amending the Board's regulations on correction of administrative errors to change the period of time for submission of claims for the correction of errors in a participant's Thrift Savings Plan (TSP) account. As presently written, certain sections of the regulations impose conflicting duties upon participants to file claims for correction of errors in their TSP accounts within one year of receipt of notice of an error, and also upon employing agencies or the Board to correct an error without regard to when the error is discovered. The amended regulation resolves this conflict by specifying when errors must be corrected by the employing agency, the Board, or the TSP record keeper, as the case may be, and when they may be corrected in the sound discretion of these parties.

In addition, the amended regulation provides that lost earnings in back pay cases involving separations from service will be calculated based upon the G Fund rates of return, as the regulation presently provides, or as otherwise requested by the parties or ordered by a court or other tribunal with jurisdiction over the back pay case.

EFFECTIVE DATE: March 12, 2001.

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SUPPLEMENTARY INFORMATION: The Board administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514, codified, as amended, largely at 5 U.S.C. 8351 and 8401-8479. The TSP is a tax-deferred retirement savings plan for Federal employees, similar to a cash or deferred arrangement established under section 401(k) of the Internal Revenue Code. Sums in a TSP participant's account are held in trust for that participant.

On December 27, 1996, and May 1, 1998, the Board published final rules in the **Federal Register** concerning the correction of administrative errors (61 FR 67472 and 63 FR 24380). These rules

were codified at 5 CFR part 1605 and explain how employing agencies, the TSP record keeper, and the Board identify and correct administrative errors in TSP contributions or account balances. The Board published an amendment to part 1605 in proposed form in the **Federal Register** on April 13, 2000 (65 FR 19862). The Board received five comments, three from Federal agencies and two from individuals.

One agency endorsed the idea of holding participants accountable for ensuring that their transactions are completed correctly, pointing out that it was often difficult for an agency to correct an error after an extended period of time. Another agency asked what types of errors would warrant the exercise of sound discretion in deciding whether to correct them and who would be responsible for making such decisions.

The regulation provides that an agency may exercise its sound discretion to correct any error that it discovers or is brought to its attention after the time period has passed for mandatory correction. See § 1605.6(b). Each agency will have to decide how to handle these issues. The document in which the agency describes its claims process (whether a regulation or internal directive) should also identify those persons responsible for making the decision. The Board expects that agencies will decide to give responsibility for exercising the agency's discretion to the same persons that presently have responsibility for considering participant claims for TSP error correction.

The Board expects that, in designing the claims procedures that are required by this part, agencies will describe the types of errors which might warrant correction even if notice was untimely. Examples of situations where an agency might exercise its discretion to correct an error that it is not otherwise required to correct are situations in which the employee has a reasonable explanation for failing to identify the error in a timely fashion.

One agency pointed out that an employee might be out of the country for months at a time or may have had a long illness. Where such an absence or illness has prevented the participant from reviewing his or her participant statement, the agency may exercise its discretion to correct the error. On the other hand, where the participant simply has neglected to look at his or her participant statement in a timely fashion, the agency may decline to exercise its discretion to correct the error.

A third agency was concerned with the proposed change to the method by which earnings would be calculated in back pay cases involving separation from service. The agency pointed out that some back pay cases involving separation are resolved by an appeal within the agency, without the intervention of a court or other tribunal. In the proper case, the agency might agree that, but for the separation, the participant would have continued to contribute to the TSP in accordance with his or her contribution allocation on file at the time of the separation. The agency therefore suggested that the TSP also accept an agreement by the parties that lost earnings on such TSP contributions should be calculated based on the returns of the funds to which the employee was contributing at the time of separation.

It was the Board's intent to include cases in which the back pay issue was settled by the parties before it reached the courts. However, the Board recognizes that the proposed language might not be interpreted to permit that result. Therefore, the Board has changed the language of § 1605.4 to permit explicitly the payment of earnings at a rate other than at the G Fund rate upon agreement of the parties in back pay cases that do not reach the courts.

The other two commenters objected to the amendment. The first suggested that the Board give a participant 60 days, rather than 30, after receipt of a TSP participant statement to file a claim for correction. The commenter asserted that in other situations, such as errors in bank statements or credit card statements, an account holder generally has 60 days to bring the error to the attention of the financial institution. One of the agency commenters also suggested that 30 days may not always be sufficient time for a participant to seek correction. (This agency offered the examples given above, such as absence or illness, which the Board believes would be appropriate for the exercise of agency discretion.)

In light of these comments, the Board again reviewed the types of errors that can be made by an employing agency, the Board, or the TSP record keeper to determine the applicability of the 30-day claim period. Effective May 1, 2001, the TSP will modify its current record keeping system to introduce two new investment funds. Also at this time, participants will submit contribution allocation elections directly to the TSP, not to their employing agencies. Following these changes, the Board can identify only two TSP transactions that will be performed by employing agencies that can directly affect the

value of participants' accounts, both generically involving payment: remitting contributions and remitting loan repayments. The Board can discern no reason to differentiate the time for correction of errors made with respect to these payments. Thus, the Board has amended § 1605.6(a) to provide that an employing agency must correct any error in a TSP *payment*, whenever the error is discovered (by either the agency or by the participant) within six months of its occurrence.

Presently, employing agencies also perform a third type of transaction, *i.e.*, effecting participant's chosen contribution allocation. A contribution allocation error affects the investment of future contributions and, when the current record keeping system is modified, loan payments. Thus, a contribution allocation error does not entail an incorrect remittance; it entails the erroneous investment of a correct remittance. To provide too long a time period to file a claim for an erroneous investment would allow a participant to use hindsight to make an investment decision.

After May 1, 2001, agencies will no longer report the allocation of contributions among the investment funds (and, thus, agency errors in contribution allocations will not be possible). Instead, participants will submit contribution allocations directly to the TSP record keeper, and the TSP will use these allocations to invest the contributions remitted by their agencies. Although participants will then be able to change their contribution allocations at any time (which will affect the investment of future contributions), it will be difficult to correct contribution allocation errors made by agencies after the TSP begins processing contribution allocations. For these reasons, the Board has retained the 30-day claim period, but has limited its applicability to errors involving contribution allocations processed by agencies before May 1, 2001.

The proposed regulation concerning correction of Board and TSP record keeper errors (§ 1605.8) requires correction of an error made within six months of its discovery if the error involves the withdrawal of an account, the change of a withdrawal election, or the distribution of a death benefit. "Other" errors would be corrected only if discovered within 30 days after issuance of a TSP participant statement or a transaction confirmation. "Other" errors may occur in the posting of a loan repayment, the restoration of a forfeited account, the issuance of a court-ordered payment, the disbursement of a loan, or the processing of a contribution

allocation or an interfund transfer. With the exception of contribution allocations or interfund transfers, each of these potential errors concerns the TSP's processing of a receipt or disbursement. The Board has decided that there is no reason to differentiate the time for correction among the explicitly enumerated errors and the foregoing "other" errors (except for contribution allocations and interfund transfers). Thus, the Board has amended § 1605.8 to provide that the TSP must correct any error involving a receipt or disbursement if the error is discovered within 6 months of its occurrence.

In contrast, contribution allocations and interfund transfers involve neither a receipt nor a disbursement. As indicated above, a contribution allocation affects the investment allocation of a participant's future contributions and loan payments among the TSP investment funds; an interfund transfer is initiated by a participant to shift monies among different investment funds. At the time the contribution allocation or interfund transfer request is processed, the TSP mails the participant a confirmation notice. Application of a 30-day time limit for (mandatory) correction will require a participant to be vigilant in assuring his or her instructions have been carried out correctly; it will also prevent a participant from using extended hindsight to decide whether to request a correction.

The Board had considered whether a different time limitation might be more appropriate for the correction of contribution allocations or interfund transfers. For example, the Uniform Commercial Code (§ 8-319) provides that, where a sale or purchase of a security is confirmed in writing, the transaction is enforceable if no written objection is made to it within 10 days after receipt of the confirmation. The Board believes that this error correction period is relevant to both contribution allocations and interfund transfers, which entail an explicit written confirmation. However, the Board also believes that 10 days is too short and that 30 days is more reasonable. For these reasons, the Board has retained the 30-day period in the final regulation, but for contribution allocations and interfund transfers only.

The second individual commenter objected because the Board's regulations require that participants take an active role in correcting errors in their accounts. The commenter stated that participants should be relieved of any responsibility because employing agencies, and not participants, have the information necessary to discover and

correct an error. However, participants do have access to relevant TSP information. Participants know the amount of their basic pay from the pay and leave statements that they receive from their employing agencies every pay period. Participants know the amount of employee contributions they have elected to make to the TSP, and can determine from the pay and leave statement whether the proper amount is being deducted. Participants know how they elected to have their contributions allocated among the TSP's investment funds, and can determine from the participant statements issued by the TSP whether their contributions have been deposited in the correct fund. Participants can also determine from their participant statements whether agency contributions have been made to their TSP accounts at the correct time and in the correct amount. Further information, such as the rates of return for each fund, is available from the TSP Web site. Thus, just as users of commercial services are expected to review statements recording transactions in their accounts and to assert their rights in the event of an error, so are TSP participants.

The commenter also stated that employing agencies and the Board fail to provide information to participants concerning the payment of lost earnings or the deposit of makeup contributions. However, lost earnings are shown on the participant statement and makeup contributions are shown on both the pay and leave statement and the participant statement. Furthermore, before makeup contributions can be made, participants must prepare, with their agencies, a schedule of makeup contributions against which participants can compare the activity in their accounts. *See* 5 CFR 1605.2(c). Thus, participants have sufficient information available to determine whether makeup contributions and lost earnings are being properly credited to their accounts.

The commenter objected at length about the problems arising out of retirement system misclassification. The Office of Personnel Management and the employing agencies, not the Board, are responsible for retirement system classification. However, the Federal Erroneous Retirement Coverage Corrections Act, Public Law 106-265, signed on September 19, 2000, addresses the commenter's concerns. The Office of Personnel Management is responsible for its implementation.

Finally, the commenter objected to the Board's lack of authority to penalize agencies that fail to follow its regulations concerning error correction.

However, the Board is unaware of an agency that has refused to follow its error correction regulations to correct an error.

For these reasons, the Board is adopting the proposed regulation, but with the changes as discussed above.

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 employees of the Federal Government.

Paperwork Reduction Act

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

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, and 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 section 1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 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 United States prior to publication of this rule in today's **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1605

Claims, Employment benefit plans, Government employees, Pensions, Retirement.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons set out in the preamble, 5 CFR part 1605 is amended as set forth below:

PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

1. The authority citation for part 1605 continues to read as follows:

Authority: 5 U.S.C. 8351 and 8474.

§ 1605.4 [Amended]

2. Section 1605.4 is amended by adding after the word "account" at the

end of paragraph (a)(3) the words "unless otherwise requested by the agency (with the concurrence of the participant) or as ordered by a court or other tribunal with jurisdiction over the participant's back pay case".

3. Section 1605.6 is revised to read as follows:

§ 1605.6 Procedures for claims against employing agencies; time limitations.

(a) *Agency's discovery of error.* (1) Upon discovery of an error made within the past six months involving the correct or timely remittance of payments to the TSP (other than a contribution allocation error as covered in paragraph (a)(2) of this section or a retirement system misclassification error, as covered in paragraph (c) of this section), an employing agency must promptly correct the error on its own initiative. If the error was made more than six months before its discovery, the agency may exercise sound discretion in deciding whether to correct it, but, in any event, the agency must act promptly in doing so.

(2) An employing agency must promptly correct a contribution allocation error that occurred before May 1, 2001, on its own initiative if it is discovered within 30 days of its first occurrence. No contribution allocation error which occurred before May 1, 2001 may be corrected if it is not the subject of a timely discovery.

(b) *Participant's discovery of error.* (1) If an agency fails to discover an error of which a participant has knowledge involving the correct or timely remittance of a payment to the TSP (other than a contribution allocation error as covered by paragraph (b)(2) of this section, or a retirement system misclassification error as covered by paragraph (c) of this section), the participant may file a claim for correction thereof with his or her employing agency without limitation of time. The agency must promptly correct any such error for which the participant files a claim within six months of its occurrence; the correction of any such error for which the participant files a claim after that time is in the agency's sound discretion.

(2) A participant may file a claim for correction of a contribution allocation error made before May 1, 2001, with his or her employing agency no later than 30 days after the participant receives a TSP participant statement first reflecting the error. The agency must promptly correct such errors.

(3) If a participant fails to file a claim for correction of an error described in paragraph (b)(2) of this section in a

timely manner, no such error may be corrected.

(c) *Retirement system misclassification error.* Errors arising from retirement system misclassification must be corrected no matter when they are discovered, whether by an agency or a participant.

(d) *Agency procedures.* Each employing agency must establish procedures for participants to submit claims for correction under this subpart. Each employing agency's procedures must include the following:

(1) The employing agency must provide the participant with a decision on any claim within 30 days of its receipt, unless the employing agency provides the participant with good cause for requiring a longer period to decide the claim. A decision to deny a claim in whole or in part must be in writing and must include the reasons for the denial, citations to any applicable statutes, regulations, or procedures, a description of any additional material that would enable the participant to perfect the claim, and a statement of the steps necessary to appeal the denial.

(2) The employing agency must permit a participant at least 30 days to appeal the employing agency's denial of all or any part of a claim for correction under this subpart. The appeal must be in writing and addressed to the agency official designated in the initial decision or in procedures promulgated by the agency. The participant may include with his or her appeal any documentation or comments that the participant deems relevant to the claim.

(3) The employing agency must issue a written decision on a timely appeal within 30 days of receipt of the appeal, unless the employing agency provides the participant with good cause for requiring a longer period to decide the appeal. The employing agency decision must include the reasons for the decision, as well as citations to any applicable statutes, regulations, or procedures.

(4) If the agency decision on the appeal is not issued in a timely manner, or if the appeal is denied in whole or in part, the participant will be deemed to have exhausted his or her administrative remedies and will be eligible to file suit against the employing agency under 5 U.S.C. 8477. There is no administrative appeal to the Board of a final agency decision.

4. Section 1605.8 is revised to read as follows:

§ 1605.8 Claims for correction of Board or TSP record keeper errors; time limitations.

(a) *Filing claims.* Claims for correction of Board or TSP record keeper errors

under this subpart may be submitted initially either to the TSP record keeper or the Board. The claim must be in writing and may be from the affected participant or beneficiary.

(b) *Board's or TSP record keeper's discovery of error.* (1) Upon discovery of an error made within the past six months involving a receipt or a disbursement, the Board or TSP record keeper must promptly correct the error on its own initiative. If the error was made more than six months before its discovery, the Board or TSP record keeper may exercise sound discretion in deciding whether to correct the error, but, in any event, must act promptly in doing so.

(2) For errors concerning contribution allocations or interfund transfers, the Board or TSP record keeper must promptly correct the error if it is discovered before 30 days after the issuance of the earlier of the most recent TSP participant (or loan) statement or transaction confirmation that reflected (or would reflect) the error. If it is discovered after that time, the Board or TSP record keeper may use its sound discretion in deciding whether to correct it, but, in any event, must act promptly in doing so.

(c) *Participant's or beneficiary's discovery of error.* (1) If the Board or TSP record keeper fails to discover an error of which a participant or beneficiary has knowledge involving a receipt or a disbursement, the participant or beneficiary may file a claim for correction thereof with the Board or TSP record keeper without limitation of time. The Board or TSP record keeper must promptly correct any such error for which the participant or beneficiary filed a claim within six months of its occurrence; the correction of any such error for which the participant or beneficiary filed a claim after that time is in the sound discretion of the Board or TSP record keeper.

(2) For errors involving contribution allocations or interfund transfers of which a participant or beneficiary has knowledge, he or she may file a claim for correction thereof with the Board or TSP record keeper no later than 30 days after receipt of the earlier of a TSP participant (or loan) statement or transaction confirmation reflecting the error. The Board or TSP record keeper must promptly correct such errors.

(3) If a participant or beneficiary fails to file a claim for correction of contribution allocations or interfund

transfers in a timely manner, the Board or TSP record keeper may nevertheless, in its sound discretion, correct any such error that is brought to its attention.

(d) *Processing claims.* (1) If the initial claim is submitted to the TSP record keeper, the TSP record keeper may either respond directly to the claimant, or may forward the claim to the Board for response. If the TSP record keeper responds to a claim, and all or any part of the claim is denied, the claimant may request review by the Board within 90 days of the date of the record keeper's response.

(2) If the Board denies all or any part of a claim (whether upon review of a TSP record keeper denial or upon an initial review by the Board), the claimant will be deemed to have exhausted his or her administrative remedy and may file suit under 5 U.S.C. 8477. If the claimant does not submit a request to the Board for review of a claim denial by the TSP record keeper within the 90 days permitted under paragraph (d)(1) of this section, the claimant shall be deemed to have accepted the TSP record keeper's decision.

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