

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1605, 1620, 1651 and 1655

Correction of Administrative Errors; Expanded and Continuing Eligibility; Death Benefits; Loan Program

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is revising the Board's Uniformed Services Employment and Reemployment Rights Act (USERRA) regulations regarding Thrift Savings Plan (TSP) contributions and loan payments, and updating the definitions used in those regulations. The Executive Director is also amending the Board's death benefit regulations to allow the spouse of a deceased participant to transfer a TSP death benefit payment to an eligible retirement plan or to the spouse's existing TSP account. Finally, the Executive Director is amending the Board's loan regulations to explain that the Soldiers' and Sailors' Civil Relief Act of 1940 allows a participant returning to civilian service from active duty military service to reduce to 6 percent the interest rate owed on a TSP loan for the period of missed TSP loan payments due to military leave.

EFFECTIVE DATE: July 30, 2002.

FOR FURTHER INFORMATION CONTACT: Merritt A. Willing or Patrick J. Forrest on (202) 942-1661. FAX (202) 942-1676.

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. The TSP provisions of FERSA have been codified, as amended, largely at 5 U.S.C. 8351 and 8401-79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services which is similar to cash or deferred arrangements established under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

The Board published these regulations in proposed form in the *Federal Register* on May 17, 2002 (67 FR 35051). The Board received several comments on those regulations, which are discussed by section below.

Proposed § 1605.31(c) explains how a Federal Employees' Retirement System (FERS) employee who separates or enters nonpay status to perform military service will receive agency makeup TSP contributions to his or her civilian

account when he or she is reemployed or returned to pay status in the civilian service. One commenter asked the Board to state expressly that the employee otherwise must be eligible to receive civilian agency contributions before being eligible to receive those agency makeup contributions. Final § 1605.31(c) contains that statement.

Proposed § 1620.42 pertains to contribution elections filed by TSP participants who are reemployed or restored to pay status in the civilian service under USERRA. One commenter asked the Board to state expressly that agencies must reinstate contribution elections that were on file when the participant separated or entered nonpay status to perform military service, unless a new election is filed. Agencies retain the records of employees who enter nonpay status; therefore, they must reinstate a contribution election if the participant returns to pay status from a nonpay status unless a new election is filed. However, agencies do not necessarily maintain the records of employees who separate; therefore, an agency is not required to reinstate a contribution election if the participant is reemployed. Final § 1620.42(b) informs participants and agencies of this distinction.

Proposed §§ 1651.2, 1651.5, and 1651.14 pertain to the payment of a TSP death benefit to the spouse of a participant. One commenter urged the Board to "work with Congress" to extend certain tax benefits now available for surviving spouses to surviving same sex partners. The commenter acknowledged that this would require a change in statute. The Board has a longstanding practice of taking no position on benefit levels and views them as matters for the Congress and the Administration to debate and conclude. The Board is neither chartered nor staffed to analyze, advocate, or oppose them.

The final comment concerns proposed § 1651.14, which explains that the spouse of a deceased participant may request the TSP to transfer all or a portion of a TSP death benefit to the spouse's TSP account if he or she already has one. The commenter asked if the TSP would apply this rule retroactively. The TSP applied this rule as early as permitted by statute. Before January 1, 2002, under the Internal Revenue Code (I.R.C.) a TSP death benefit could be transferred only to an individual retirement account. However, the I.R.C. was amended effective January 1, 2002, to allow a death benefit to be transferred to any eligible retirement plan, including the TSP. See 26 U.S.C. 402(c)(8), (c)(9). The

Board decided to offer the death benefit transfer option to all qualified spouses at the earliest possible point permitted by statute, *i.e.*, in January 2002. Therefore, the TSP notified each qualified spouse who was to be paid a TSP death benefit in January 2002 that he or she could transfer that payment to his or her TSP account. The current rule merely codifies that practice.

After publication of the proposed rule, Board staff reconsidered the wording in two of its provisions and made minor changes. First, proposed § 1605.31(d) pertains to the payment of lost earnings and states that agencies will submit "lost earnings records." Those records will not exist when the new record keeping system is introduced; therefore, final § 1605.31(d) does not mention records. The rule continues to be, however, that agencies are required to make these payments. Second, the proposed definition of "retroactive period" at § 1620.41 discusses "retroactive agency contributions," which are more accurately described as "missed agency contributions" in the final definition.

Accordingly, the Board is publishing the proposed rule as a final rule, with the above-mentioned minor modifications.

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, 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 before 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

5 CFR Part 1605

Claims, Employee benefit plans, Government employees, Military personnel, Pensions, Retirement.

5 CFR Part 1620

District of Columbia, Employee benefit plans, Government employees, Military personnel, Pensions, Retirement.

5 CFR Part 1651

Employee benefit plans, Government employees, Pensions, Retirement.

5 CFR Part 1655

Employee benefit plans, Government employees, Military personnel, Pensions, Retirement.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons set forth in the preamble, 5 CFR chapter VI is amended as follows:

PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

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

Authority: 5 U.S.C. 8351, 8432a, and 8474(b)(5) and (c)(1).

Section 1605.14 also issued under Title II, Pub. L. 106–265, 114 Stat. 770.

Subpart D also issued under 5 U.S.C. 8432b(b)(4) and (i), 8440e.

Subpart D—Miscellaneous Provisions

2. Section 1605.31 is revised to read as follows:

§ 1605.31 Contributions missed as a result of military service.

(a) *Applicability.* This section applies to employees who meet the conditions specified at 5 CFR 1620.40 and who are eligible to make up employee contributions or to receive employing agency contributions missed as a result of military service.

(b) *Missed employee contributions.* An employee who separates or enters nonpay status to perform military service may be eligible to make up TSP contributions when he or she is reemployed or restored to pay status in the civilian service. Eligibility for making up missed employee contributions will be determined in accordance with the rules specified at 5

CFR part 1620, subpart E. Missed employee contributions must be made up in accordance with the rules set out in § 1605.11(c) and the following procedures:

(1) The employing agency will use the contribution election on file for the employee at the time he or she separated or was placed in nonpay status. If an employee terminated TSP contributions within two months before entry into military service, he or she may make a retroactive election to resume contributions for the first open season following the termination. The employee may also make retroactive contribution elections for any open season that occurred during the period of military service, as described at 5 CFR 1620.42.

(2) The pay used to determine the amount of contributions eligible for makeup is the pay the employee would have earned had he or she remained continuously employed in the position held immediately before the separation or placement in nonpay status.

(3) If the employee contributed to a uniformed services TSP account during the period of military service, the amount of employee contributions available for makeup will be reduced by the total amount of employee contributions made to the uniformed services TSP account. (This includes contributions from basic pay, incentive pay, and special pay, including bonus pay.)

(c) *Missed agency contributions.* This paragraph (c) applies only to an employee who would have been eligible to receive agency contributions had he or she remained in civilian service or pay status. A FERS employee who separates or enters nonpay status to perform military service is eligible to receive agency makeup contributions when he or she is reemployed or restored to pay status in the civilian service, as follows:

(1) The employee is entitled to receive the agency automatic (1%) contributions that he or she would have received had the employee remained in civilian service or pay status. Within 60 days of the employee's reemployment or restoration to pay status, the employing agency must calculate the agency automatic (1%) makeup contributions and report those contributions to the record keeper. After the contribution has been reported, the agency must submit lost earnings records for the contribution.

(2) An employee who contributed to a uniformed services TSP account during the period of military service is also immediately entitled to receive agency matching makeup contributions

to his or her civilian account for the employee contributions to the uniformed services account that were deducted from his or her basic pay, subject to any reduction in matching contributions required by paragraph (c)(4) of this section. However, an employee is not entitled to receive agency matching makeup contributions on contributions that were deducted from his or her incentive pay or special pay, including bonus pay, while performing military service.

(3) An employee who makes up missed contributions is entitled to receive attributable agency matching makeup contributions (unless the employee has already received the maximum amount of matching contributions, as described in paragraphs (c)(2) and (c)(4) of this section).

(4) If the employee received uniformed services matching contributions, the agency matching makeup contributions will be reduced by the amount of the uniformed services matching contributions.

(d) *Lost earnings.* The employee is entitled to lost earnings on missed agency contributions made under paragraph (c) of this section. The employee will elect to have the lost earnings calculated using either the rates of return based on the contributions allocation(s) on file for the participant during the period of military service or using the rates of return for the G Fund; the participant must make this election at the same time his or her makeup schedule is established pursuant to § 1605.11(c).

PART 1620—EXPANDED AND CONTINUING ELIGIBILITY

3. The authority citation for part 1620 is revised to read as follows:

Authority: 5 U.S.C. 8474(b)(5) and (c)(1).

Subpart C also issued under 5 U.S.C. 8440a(b)(7), 8440b(b)(8), and 8440c(b)(8).

Subpart D also issued under sec. 1043(b), Pub. L. 104–106, 110 Stat. 186, 434–435; and sec. 7202(m)(2), Pub. L. 101–508, 104 Stat. 1388.

Subpart E also issued under 5 U.S.C. 8432b(i) and 8440e.

Subpart E—Uniformed Services Employment and Reemployment Rights Act (USERRA)—Covered Military Service

4. Section 1620.41 is revised to read as follows:

§ 1620.41 Definitions.

As used in this subpart:

Current contributions means contributions that must be made for the

current pay date which is reported on the journal voucher that accompanies the payroll submission.

Nonpay status means an employer-approved temporary absence from duty.

Reemployed or returned to pay status means reemployed in or returned to a pay status, pursuant to 38 U.S.C. chapter 43, to a position that is subject to 5 U.S.C. 8351 or chapter 84.

Retroactive period means the period for which an employee can make up missed employee contributions and receive missed agency contributions. It begins the day after the employee separates or enters nonpay status to perform military service and ends when the employee is reemployed or returned to pay status.

Separate from civilian service means to cease employment with the Federal Government, the U.S. Postal Service, or with any other employer from a position that is deemed to be civilian Government employment for purposes of participating in the TSP, for 31 or more full calendar days.

5. Section 1620.42 is revised to read as follows:

§ 1620.42 Processing TSP contribution elections.

(a) *Time for filing election.* Upon reemployment or return to pay status, an employee has 60 days to submit contribution elections to make current contributions and to make up missed contributions. An employee's right to make a retroactive TSP contribution election will expire if the election is not made within 60 days of the participant's reemployment or return to pay status. After the 60-day contribution election period expires, the employee must wait for an open season to submit a contribution election to make current contributions.

(b) *Current contributions.* If the employee entered nonpay status with a valid contribution election on file, the agency must immediately reinstate that election for current contributions when the employee returns to pay status, unless the employee files a new contribution election as described in paragraph (a) of this section. If the employee separated to perform military service, the agency is not required to reinstate a prior contribution election. An election to make current contributions will be effective as soon as administratively feasible, but no later than the first day of the first full pay period after it is received by the employing agency.

(c) *Makeup contributions.* An election to make up contributions will be processed as follows:

(1) If the employee had a valid contribution election on file when he or she separated or entered nonpay status to perform military service, that election form will be reinstated for purposes of makeup contributions, unless the employee submits new contribution elections effective for any missed open season.

(2) An employee who terminated contributions within two months of entering military service will be eligible to make a retroactive contribution election for the first open season that occurs after the effective date that the contributions were terminated. This election may be made even if the termination was made outside an open season.

6. Section 1620.44 is amended by revising the last sentence to read as follows:

§ 1620.44 Restoring forfeited agency automatic (1%) contributions.

* * * The employing agency will follow the procedure described in § 1620.46(e) to have those funds restored.

7. Section 1620.45 is revised to read as follows:

§ 1620.45 Suspending TSP loans, restoring post-employment withdrawals, and reversing taxable distributions.

(a) *Suspending TSP loans during nonpay status.* If the TSP is notified that an employee entered into a nonpay status to perform military service, any outstanding TSP loan from a civilian TSP account will be suspended, that is, it will not be declared a taxable distribution while the employee is performing military service.

(1) Interest will accrue on the loan balance during the period of suspension. When the employee returns to civilian pay status, the employing agency will resume the deduction of loan payments from the participant's basic pay and the TSP will reamortize the loan (which will include interest accrued during the period of military service). The loan repayment term will be extended by the employee's period of military service. Consequently, when the employee returns to pay status, the TSP record keeper must receive documentation to show the beginning and ending dates of military service.

(2) If the TSP does not receive documentation that the employee entered into nonpay status to perform military service and the period of missed loan repayments extends beyond one year, the loan will be closed and the outstanding loan balance (including accrued interest) will be declared a taxable distribution. However, the

taxable distribution can be reversed in accordance with paragraph (c) of this section.

(b) *Restoring post-employment withdrawals.* An employee who separates from civilian service to perform military service and who receives an automatic cashout of his or her account may return to the TSP an amount equal to the amount of the payment. The employee must notify the TSP record keeper of his or her intent to return the withdrawn funds within 90 days of the date the employee returns to civilian service or pay status; if the employee is eligible to return a withdrawal, the TSP record keeper will then inform the employee of the actions that must be taken to return the funds.

(c) *Reversing taxable distributions.* An employee may request that a taxable loan distribution be reversed if the taxable distribution resulted from the employee's separation or placement in nonpay status to perform military service. The TSP will reverse the taxable distribution under the process described as follows:

(1) An employee who received a post-employment withdrawal when he or she separated to perform military service can have a taxable distribution reversed only if the withdrawn amount is returned as described in paragraph (b) of this section;

(2) A taxable loan distribution can be reversed either by reinstating the loan or by repaying it in full. The TSP loan can be reinstated only if the employee agrees to repay the loan within the original loan repayment term plus the length of military service, and if, after reinstatement of the loan, the employee will have no more than two outstanding loans, only one of which is a residential loan; and

(3) The employee must notify the TSP record keeper of his or her intent to reverse a taxable loan distribution within 90 days of the date the employee returns to civilian service or pay status; if the employee is eligible to reverse a taxable loan distribution, the TSP record keeper will then inform the employee of the actions that must be taken to reverse the distribution.

(d) *Earnings.* Employees will not receive retroactive earnings on amounts returned to their accounts under this section.

PART 1651—DEATH BENEFITS

8. The authority citation for part 1651 is revised to read as follows:

Authority: 5 U.S.C. 8424(d), 8432(j), 8433(e), 8435(c)(2), 8474(b)(5) and 8474(c)(1).

9. Section 1651.1 is amended by adding a new definition, in alphabetical order, to read as follows:

§ 1651.1 Definitions.

* * * * *

Eligible retirement plan means an individual retirement account described in I.R.C. section 408(a) (26 U.S.C. 408(a)); an individual retirement annuity described in I.R.C. section 408(b) (26 U.S.C. 408(b)) (other than an endowment contract); a qualified trust; an annuity plan described in I.R.C. section 403(a) (26 U.S.C. 403(a)); an annuity contract described in I.R.C. section 403(b) (26 U.S.C. 403(b)); and an eligible deferred compensation plan described in I.R.C. section 457(b) (26 U.S.C. 457(b)) which is maintained by an eligible employer described in I.R.C. section 457(e)(1)(A) (26 U.S.C. 457(e)(1)(A)).

* * * * *

10. Section 1651.2 is amended by revising paragraph (a)(2) to read as follows:

§ 1651.2 Entitlement to benefits.

(a) * * *

(2) If there is no designated beneficiary, to the spouse of the participant in accordance with § 1651.5;

* * * * *

11. Section 1651.5 is amended by revising the section heading and the first sentence to read as follows:

§ 1651.5 Spouse of the participant.

For purposes of payment under § 1651.2(a)(2), the spouse of the participant is the person to whom the participant was married on the date of death. * * *

12. Section 1651.14 is amended by revising paragraph (c) to read as follows:

§ 1651.14 How payment is made.

* * * * *

(c) *Payment to the participant's spouse.* The spouse of the participant may request that the TSP transfer all or a portion of the payment to an eligible retirement plan (including the spouse's TSP account, if he or she already has one). A transfer to a spouse's TSP account is permitted only if the spouse is not receiving monthly payments from the account. In order to request such a transfer, a spouse must file Form TSP-13-S, Spouse's Election to Transfer to

IRA or Other Eligible Retirement Plan, with the TSP record keeper.

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PART 1655—LOAN PROGRAM

13. The authority citation for part 1655 is revised to read as follows:

Authority: 5 U.S.C. 8433(g) and 8474; 50 U.S.C. App. 526.

14. Section 1655.7 is amended by revising paragraph (c) to read as follows:

§ 1655.7 Interest rate.

* * * * *

(c) The interest rate calculated under this section remains fixed until the loan is repaid, unless the participant informs the TSP record keeper that he or she entered into active duty military service and requests that the interest rate on a loan issued before entry into active duty military service be reduced to an annual rate of 6 percent for the period of such service. The participant must provide the record keeper with the beginning and ending dates of active duty military service.

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