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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Parts 1650, 1653, 1655 and 1690

Methods of Withdrawing Funds From the Thrift Savings Plan; Court Orders and Legal Processes Affecting Thrift Savings Plan Accounts; Loan Program; Thrift Savings Plan

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is amending the court order regulations to remove attorneys from the list of permissible court order payees and to require non-English court orders to be accompanied by a certified English translation. The Executive Director is revising the TSP loan regulations to assess a \$50 fee on new TSP loans, restrict a participant to a single general purpose loan at any time, and implement a 60-day waiting period between the date a participant repays a loan and the date the TSP will accept an application for a new loan of the same type. Finally, the Executive Director is clarifying the regulations pertaining to powers of attorney documents, guardianship orders, and conservatorship orders.

DATES: This final rule is effective July 1, 2004.

FOR FURTHER INFORMATION CONTACT: Patrick J. Forrest on (202) 942-1661.

SUPPLEMENTARY INFORMATION: The Executive Director administers the TSP, which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Pub. L. 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. The

TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

On April 7, 2004, the Executive Director published this rule in proposed form in the **Federal Register** (69 FR 18294). The Executive Director requested comments on the proposed rule and received sixty-eight comments on the loan program changes. One comment came from a Federal employees' union, one came from a commercial entity, and the remaining came from TSP participants. The commercial entity asked the Board to clarify proposed sections 1655.21, 1690.12 and 1690.13; they are clarified in the final rule. One of the participants also commented favorably about the proposed changes to the court order, guardianship order, conservatorship order, and power of attorney regulations.

Union Comment

A Federal employees' union commented that the Federal Employees' Retirement System was designed to place more of the risk and financial burden of saving for retirement on the Federal employees and that, in exchange, those employees receive "direct access" to their retirement savings "to use them as they see fit." By making it more difficult and expensive for participants to use their own savings, the union continued, the Board is "breaking a promise made to federal employees upon the inception of the Thrift Savings Plan." The union concluded that the Board is attempting to dictate the financial needs of participants beyond the current reasonable loan restrictions. The union also wrote that with recent low mortgage rates, participants need TSP loans to invest in real property.

There can be no question that the money in the TSP belongs to the TSP participants; however, the TSP was created by the Federal Employees' Retirement System Act of 1986 (FERSA) and exists to provide retirement income to participants and their beneficiaries. To encourage the growth of TSP accounts, Congress exempted TSP contributions and earnings from Federal income taxation until they are withdrawn from the TSP. Just as importantly, Congress also protected

TSP accounts from dissipation by restricting the ability of anyone, including the participant, to access the money in the TSP. For example, a creditor generally cannot access the money in the participant's account. With respect to participants' access, FERSA only allows in-service withdrawals in cases of financial hardship or, if the participant is still employed, on one occasion after reaching 59½. See 5 U.S.C. 8433(h).

Congress also placed restrictions on TSP loans to prevent the dissipation of retirement savings. FERSA requires the TSP to follow the Internal Revenue Code provisions that apply to private sector retirement plan loans. 5 U.S.C. 8433(g)(3). Among other things, those provisions set a maximum dollar amount for loans, require continuous loan payments, require the TSP to charge interest on TSP loans, and limit the length of time over which a loan can be repaid. Initially, FERSA limited the reasons for which a loan could be taken; Congress eliminated this "purpose" test in 1996 in favor of the current rule allowing a general purpose loan.

Therefore, it is incorrect to conclude that Congress gave participants "direct access" to the savings in their TSP accounts "to use them as they see fit." FERSA states only that a participant "may apply to the Board for permission to borrow from [his or her] account." 5 U.S.C. 8433(g)(1). The Executive Director, therefore, must establish the conditions under which a loan request will be granted. 5 U.S.C. 8433(g)(2). Consistent with the purpose of the TSP, these policies must promote saving for retirement.

The Executive Director has determined that the current loan program has allowed many participants to use the TSP as a source of ready cash, which can be detrimental to long-term retirement savings. The Executive Director concluded that it is appropriate to limit access to a TSP loan to reinforce the importance of borrowing from the TSP only as a last resort.

With respect to the union's comment that participants need TSP loans to invest in real estate, the Executive Director is not changing the rules applicable to TSP residential loans.

Finally, the union commented that a \$50 loan fee was inappropriate because it makes the TSP loan program more expensive. The fee will not increase the

expense of the loan program, except to the participant who obtains a loan. Currently, every participant pays the costs of administering the loan program, even those who have never taken a loan. However, the Executive Director has determined that the costs of the loan program should, instead, be borne by the approximately 620,000 participants who use the TSP loan program, rather than by the 2.6 million participants who do not. By way of comparison, most private sector retirement plans charge loan fees. Of those that do, more than 70 percent charge a loan fee of \$50 or more.

Participant Comments

Every comment received from a participant addressed the proposed \$50 loan fee. Thirty-one participants objected to the proposed fee. Many wrote that the fee is unnecessary because they assume (incorrectly) that either the interest charged on TSP loans pays for the expenses of the loan program, that the Department of Agriculture provides recordkeeping services for the TSP free of charge, or that the Board receives an appropriation from Congress to pay the TSP's administrative expenses. Other participants oppose the fee because they assume the Board will use the extra funds to hide TSP administrative expenses or even that the Board will divert the loan fees for non-TSP purposes. As explained below, none of these assumptions is true.

Although the TSP charges each participant interest on his or her loan, the interest collected is deposited into the participant's account, it is not used to pay TSP administrative expenses. 5 CFR 1655.9(c). Furthermore, although the TSP recordkeeper is a component of a Federal agency, its Congressional appropriations do not pay the TSP's administrative expenses. Rather, the Board pays the Department of Agriculture for the cost of its services, including the costs of administering the TSP loan program. The Board does not receive an annual appropriation to pay these expenses, or any other TSP expense; rather, the Board pays all TSP expenses with funds that belong to the TSP participants. 5 U.S.C. 8437(c)(3), 8437(d), and 8439(a)(3). TSP administrative expenses cost each participant approximately .07 percent of his or her account balance each year.

Although some participants asked the Board to retain the policy of charging the loan program's expenses to all participants, as explained above, the Executive Director has determined that it is more equitable if the costs of the loan program are borne by the participants who use the program.

One participant asked if the TSP would charge the loan fee even if the loan application were rejected. The loan fee is not an application fee; it will cover the costs of processing and servicing the loan. Therefore, as explained in final § 1655.21, the TSP will deduct the loan fee from the loan proceeds only when it issues a loan. One participant also commented that the TSP should only charge the loan fee once because a participant should only pay for "underwriting" approval once. There is no underwriting approval in the TSP loan program.

In contrast, thirty-eight participants wrote that the loan fee is appropriate, primarily because it will lower the cost of administering the TSP to those who do not use the loan program. Some participants asked the Board to charge a fee greater than \$50 or to base the amount of the fee on the dollar amount of the loan. The Board will not base the loan fee on the dollar amount of the loan because the fee is intended only to pay the administrative costs of a TSP loan, which do not vary with the size of the loan. Several participants also suggested that the TSP eliminate the loan program altogether. The Board will not eliminate the loan program because it is an important benefit that the TSP is required by FERSA to provide.

Some participants asked the Board to charge fees for other TSP transactions, such as interfund transfers and in-service withdrawals. The Executive Director does not plan to charge transaction fees in addition to the loan fee; however, decreasing the cost of the program for participants is an important consideration and the Executive Director does review all costs from time to time to determine whether they are appropriate.

Forty-three participants commented on the Executive Director's proposal to limit participants to a single general purpose loan; thirty-three objected to the change. Most wrote that the Board should not impose any restrictions on their ability to use their own money. As explained in the answer to the union comment, the Executive Director's proposal is consistent with the purpose of the TSP, which is to grow retirement savings.

Many commenters oppose limiting participants to a single general purpose loan because they want to borrow from their TSP accounts to pay for medical and dental expenses, home repair or improvement, car repairs, or school tuition. Other participants oppose the changes because they want to use TSP loans to pay off high interest credit cards or as capital to start a business. The loan program changes will not

prevent a participant from obtaining a TSP loan to pay such expenses. Rather, the changes will limit a participant to a single general purpose loan. This purpose of this limitation is to promote the use of the TSP as a retirement savings plan and to reinforce the importance of borrowing from the TSP as a last resort. The TSP is a retirement savings plan, not a savings account that should be used to finance short-term needs, refinance consumer debt or start a business. A participant who may need money in the near future and who does not have adequate savings should consider those short-term needs carefully before deciding how much to contribute to the TSP.

Several commenters who oppose limiting participants to a single general purpose loan also wrote that the TSP is a necessary source of emergency funds in the case of financial hardship. However, TSP funds remain available if a participant can qualify for financial hardship in-service withdrawals.

Forty participants commented on the 60-day waiting period between paying off a loan and receiving another of the same type; thirty-one of them oppose the change. Those who stated a reason for opposing the change (other than those reasons discussed above) believe it unreasonably limits their ability to obtain a loan or is simply designed to discourage loans.

Before proposing the 60 day waiting period, the Executive Director undertook a study of the loan program; that study revealed that an increasing number of participants repeatedly pay off one loan and simultaneously apply for another. These participants are apparently using the TSP as an ongoing vehicle for financing their living expenses, rather than as a retirement savings plan. The waiting period is designed to correct this abusive practice.

The waiting period also solves an administrative problem. Many participants simultaneously submit a new loan application with a loan payoff check. In such a case, the TSP cannot process the new loan application until it processes and deposits the loan payoff check, waits for it to clear, posts the funds to the participant's account, and closes the loan. Given the enormous volume (900,000) of TSP loans that are in existence, it is not administratively reasonable to manually manage large numbers of pending loan applications until the outstanding loan is closed and a new loan request can be processed. A limited waiting period, clearly communicated to participants and equitably applied, provides a systematic solution to this administrative problem.

Several commenters questioned the Board's decision to advertise an implementation date for the loan program changes before receiving comments on the proposed rule. Others asked the Board to delay implementation of the new rules. The Executive Director publicly announced the loan program changes in mid-2003 for a mid-2004 implementation date; since then, he has made numerous public statements about his intent to change the loan program. In addition, the Board announced the changes on the TSP Web site, the Thriftline, and in a one-time written notice mailed to every participant with an outstanding TSP loan. Before publishing the proposed loan regulations in the **Federal Register**, the Executive Director discussed the changes in Congressional hearings, the January 2004 TSP *Highlights* (a TSP publication), the April 2004 TSP *Highlights*, numerous press interviews, and sought the advice of the Employee Thrift Advisory Council (ETAC). The ETAC is a 15-member body established by FERSA to advise the Board on TSP matters. ETAC members represent members of the Uniformed Services and Federal and postal employees, both active and retired, at all levels of government, from wage earners to senior executives.

The Board also welcomes the opportunity to review and respond to comments from participants who take an active interest in the TSP and wish to offer suggestions. Some participants who read the *Highlights* or news reports wrote letters to the Agency and the Agency fully considered their comments. Additionally, the Executive Director formally solicited comments from participants when he published the proposed loan regulations. The comment process allows the Board to address any misunderstandings about the proposed loan changes, to learn if there are unanticipated legal or policy impediments to the proposed changes, and to hear suggestions about how better to implement the proposed changes. Although the comments received did not cause the Executive Director to make any changes to the proposed loan rules, he did carefully consider all comments received.

Section 1655.2

Proposed § 1655.2(c) explains the general rule that a participant must be eligible to contribute to the TSP before he or she can apply for a TSP loan. It also explains an exception to that rule (a participant can apply for a loan if his or her TSP contributions were suspended when he or she obtained a financial hardship in-service

withdrawal). However, proposed § 1655.2(c) did not explain a second exception. Specifically, a participant can apply for a loan if he or she is not eligible to make TSP contributions because the participant stopped contributing to the TSP and is not yet eligible to resume contributing. Final § 1655.2(c) explains this exception.

The Executive Director is publishing the proposed rule as a final rule with several other clarifying changes to proposed sections 1655.21, 1690.12 and 1690.13.

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 § 1532 is not required.

Submission to Congress and the General Accounting Office

Pursuant to 5 U.S.C. 810(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 the **Federal Register**. This rule is not a major rule as defined at 5 U.S.C. 814(2).

List of Subjects

5 CFR Parts 1650, 1653 and 1690

Employee benefit plans, Government employees, Pensions, Retirement.

5 CFR Part 1655

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

Dated: May 20, 2004.

Gary A. Amelio,

Executive Director Federal Retirement Thrift Investment Board.

■ For the reasons set forth in the preamble, the Board amends 5 CFR chapter VI as follows:

PART 1650—METHODS OF WITHDRAWING FUNDS FROM THE THRIFT SAVINGS PLAN

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

Authority: 5 U.S.C. 8351, 8433, 8434, 8435, 8474(b)(5), and 8474(c)(1).

Subpart G—Spousal Rights

§ 1650.61 [Amended]

■ 2. Amend § 1650.61 by removing “§ 1650.64” from paragraph (b) and “§ 1650.65” from paragraph (c)(1), and adding in their places “this subpart”.

§ 1650.62 [Amended]

■ 3. Amend § 1650.62 by removing “§ 1650.64” from paragraph (b) and “§ 1650.65” from paragraph (c), and adding in their places “this subpart”.

§ 1650.64 [Amended]

■ 4. Amend § 1650.64 by removing “§ 1650.64” from paragraph (a)(1) and adding in its place “this subpart”.

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

■ 5. The authority citation for part 1653 is revised to read as follows:

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

Subpart A—Retirement Benefits Court Orders

■ 6. Amend section 1653.2 by revising paragraph (a)(4) to read as follows:

§ 1653.2 Qualifying retirement benefits court orders.

(a) * * *

(4) A court order can require a payment only to a spouse, former spouse, child or dependent of a participant.

* * * * *

■ 7. Amend section 1653.3 by revising the last sentence of paragraph (b) introductory text to read as follows:

§ 1653.3 Processing retirement benefits court orders.

* * * * *

(b) * * * To be complete, a court order must be written in English or be accompanied by a certified English translation and contain all pages and

attachments; it must also provide (or be accompanied by a document that provides):

* * * * *

PART 1655—LOAN PROGRAM

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

Authority: 5 U.S.C. 8433(g), 8439(a)(3) and 8474.

■ 9. Revise section 1655.2 to read as follows:

§ 1655.2 Eligibility for loans.

A participant can apply for a TSP general purpose or residential loan if:

(a) More than 60 calendar days have elapsed since the participant has repaid in full a TSP loan of the same type.

(b) The participant is in pay status;

(c) The participant is eligible to contribute to the TSP (or would be eligible to contribute but for the suspension of the participant's contributions because he or she obtained a financial hardship in-service withdrawal or because he or she stopped contributing to the TSP and is not yet eligible to resume contributing);

(d) The participant has at least \$1,000 in employee contributions and attributable earnings in his or her account; and

(e) The participant has not had a TSP loan declared a taxable distribution within the last 12 months for any reason other than a separation from Government service.

■ 10. Amend section 1655.4 by revising the second sentence to read as follows:

§ 1655.4 Number of loans.

* * * One of the two outstanding loans may be a residential loan and the other one may be a general purpose loan. * * *

■ 11. Revise paragraph (b) of section 1655.11 to read as follows:

§ 1655.11 Loan acceptance.

* * * * *

(b) The participant has the maximum number of loans outstanding under § 1655.4;

* * * * *

■ 12. Add a new section 1655.21 to read as follows:

§ 1655.21 Loan fee.

The TSP will charge a participant a \$50.00 loan fee when it disburses the loan and will deduct the fee from the proceeds of the loan.

PART 1690—THRIFT SAVINGS PLAN

■ 13. The authority citation for Part 1690 continues to read as follows:

Authority: 5 U.S.C. 8474.

■ 14. Revise section 1690.12 to read as follows:

§ 1690.12 Power of attorney.

(a) A participant or beneficiary can appoint an agent to conduct business with the TSP on his or her behalf by using a power of attorney (POA). The agent is called an attorney-in-fact. The TSP must approve a POA before the agent can conduct business with the TSP; however, the TSP will accept a document that was signed by the agent before the TSP approved the POA. The TSP will approve a POA if it meets the following conditions:

(1) The POA must give the agent either general or specific powers, as explained in paragraphs (b) and (c) of this section;

(2) A notary public or other official authorized by law to administer oaths or affirmations must authenticate, attest, acknowledge, or certify the participant's or beneficiary's signature on the POA; and

(3) The POA must be submitted to the TSP recordkeeper for approval.

(b) *General power of attorney.* A general POA gives an agent unlimited authority to conduct business with the TSP, including the authority to sign any TSP-related document. By way of example, a POA grants such authority by authorizing the agent to act on behalf of the participant or beneficiary with respect to "all matters," "personal property," "Federal Government retirement benefits," or "business transactions."

(c) *Specific power of attorney.* A specific power of attorney gives an agent the authority to conduct specific TSP transactions. A specific POA must expressly describe the authority it grants. By way of example, a specific POA may authorize an agent to "obtain information about my TSP account" or "borrow or withdraw funds from my TSP account."

■ 15. Revise section 1690.13 to read as follows:

§ 1690.13 Guardianship and conservatorship orders.

(a) A court order can authorize an agent to conduct business with the TSP on behalf of an incapacitated participant or beneficiary. The agent is called a guardian or conservator and the incapacitated person is called a ward. The TSP must approve a court order before an agent can conduct business with the TSP; however, the TSP will accept a document that was signed by the agent before the TSP approved the court order. The TSP will approve a

court order appointing an agent if the following conditions are met:

(1) A court of competent jurisdiction (as defined at 5 CFR 1690.1) must have issued the court order;

(2) The court order must give the agent either general or specific powers, as explained in paragraphs (b) and (c) of this section;

(3) The agent must satisfy the TSP that he or she meets any precondition specified in the court order, such as a bonding requirement;

(4) The court order must be submitted to the TSP record keeper for approval.

(b) *General grant of authority.* A general grant of authority gives a guardian or conservator unlimited authority to conduct business with the TSP, including the authority to sign any TSP-related document. By way of example, an order gives a general grant authority by appointing a "guardian of the ward's estate," by permitting a guardian to "conduct business transactions" for the ward, or by authorizing a guardian to care for the ward's "personal property" or "Federal Government retirement benefits."

(c) *Specific grant of authority.* A specific grant of authority gives a guardian or conservator authority to conduct specific TSP transactions. Such an order must expressly describe the authority it grants. By way of example, an order may authorize an agent to "obtain information about the ward's TSP account" or "borrow or withdraw funds from the ward's TSP account."

[FR Doc. 04-11844 Filed 5-25-04; 8:45 am]

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FARM CREDIT ADMINISTRATION

12 CFR Parts 614 and 615

RIN 3052-AB96

Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; OFI Lending

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, agency, or we) adopts a final rule that amends regulations governing other financing institutions (OFIs). The purpose of the final rule is to make it easier for OFIs to obtain funding for short- and intermediate-term loans to farmers, ranchers, aquatic producers, farm-related businesses, and rural homeowners through Farm Credit System (FCS, Farm Credit, or System) banks. The FCA believes that these