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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1600

Employee Contribution Elections and Contribution Allocations

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Federal Retirement Thrift Investment Board (Agency) is amending its regulations at 5 CFR part 1600. These changes implement the Agency's automatic enrollment program as authorized by the Thrift Savings Plan Enhancement Act of 2009.

DATES: This rule is effective August 1, 2010.

FOR FURTHER INFORMATION CONTACT:

Megan G. Grumbine at 202-942-1644 or Laurissa Stokes at 202-942-1645.

SUPPLEMENTARY INFORMATION: The Agency administers the Thrift Savings Plan (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 are 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 June 17, 2010, the Agency published a proposed rule with request for comments in the **Federal Register** (75 FR 34388, June 17, 2010). The Agency received comments from one Federal employees' union, three participants, and one other party.

The Federal employees' union endorsed the proposed changes. The union, however, expressed concern that employing agencies may fail to provide

clear and timely notice to newly hired or rehired employees regarding their rights and obligations under the Agency's automatic enrollment program. In response to this comment, the Agency has provided employing agencies with a sample notice to send to newly hired or rehired employees who are automatically enrolled. The Agency promulgated separate guidance that directs employing agencies to provide this notice so that employees can take action within the first automatic enrollment pay period.

In addition, the Agency will directly notify new enrollees of their right to opt out of the automatic enrollment program and to request a refund of default employee contributions. This information will be provided in the TSP Welcome Letter sent to all employees upon receipt of their first contribution.

One participant objected to the forfeiture of agency matching contributions attributable to refunded default employee contributions. The Internal Revenue Service (IRS) mandates forfeiture of matching contributions attributable to refunded default employee contributions. *See* "Automatic Contribution Arrangements" 74 FR 8200, 8206 (February 24, 2009). The TSP must follow applicable IRS guidance such as this to the extent that it is consistent with FERSA. *See* 5 U.S.C. § 8440; 26 U.S.C. 7701(j).

Another participant suggested that the Agency should not require a participant's notarized signature in order to request a refund of default employee contributions. The proposed rule does not require a notarized signature in order to request a refund of default employee contributions. In practice, however, the Agency will soon require a notarized signature for all withdrawal requests, including a request for a refund of default employee contributions, as a measure to protect participants' TSP accounts from fraudulent withdrawals.

One commenter requested affirmation that contribution elections and contribution allocations differ with respect to their effect on a participant's continued coverage under the automatic enrollment program. A participant who makes only a contribution allocation will continue to receive default employee contributions until he or she files a contribution election or elects not to have any default employee

contributions made on his or her behalf. In contrast, section 1600.34(b) of the proposed rule provides that a participant will no longer be considered to be covered by the automatic enrollment program if the participant makes a contribution election, i.e., elects to have contributions made in a different amount or percentage of basic pay. Section 1600.34(b) of the proposed rule reflects section 1.414(w)-1(e)(2)(ii) of the Internal Revenue Service's regulation governing refunds from automatic contribution arrangements. 26 CFR § 1.414(w)-1(e)(2)(ii).

A participant who is no longer automatically enrolled by reason of having made a contribution election will retain the right to request a refund within 90 days following the date of the first default employee contribution made to his or her account. However, the amount of the refund will be limited to the amount of the default employee contributions (adjusted for allocable gains and losses) made during the period in which the participant was considered automatically enrolled.

One participant recommended that the TSP provide participants with options to self direct investment of their retirement funds. This comment is outside the scope of the proposed rule.

The Agency appreciates the opportunity to review and respond to comments from participants who take an active interest in the TSP and offer suggestions. The comment process allowed the Agency to address any misunderstandings about the proposed change, to learn if there are unanticipated legal or policy impediments to the proposed change, and to hear suggestions about how better to implement the proposed change. Although the comments received did not cause the Executive Director to make any changes to the text of the proposed rule, he did carefully consider all comments received and addressed some of the concerns through other Agency guidance. Therefore, the Agency is publishing the proposed rule as final without change.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan

created under the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514, and administered by the Agency.

Paperwork Reduction Act

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

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 Agency 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 in 5 CFR Part 1600

Government employees, Pensions, Retirement.

Gregory T. Long,

Executive Director, Federal Retirement Thrift Investment Board.

■ For the reasons stated in the preamble, the Agency amends 5 CFR part 1600 as follows:

PART 1600—EMPLOYEE CONTRIBUTION ELECTIONS AND CONTRIBUTION ALLOCATIONS

■ 1. The authority citation for part 1600 continues to read as follows:

Authority: 5 U.S.C. 8351, 8432(a), 8432(b), 8432(c), 8432(j), 8474(b)(5) and (c)(1), Thrift Savings Plan Enhancement Act of 2009, section 102.

■ 2. Revise the heading to part 1600 to read as follows:

PART 1600—EMPLOYEE CONTRIBUTION ELECTIONS, CONTRIBUTION ALLOCATIONS, AND AUTOMATIC ENROLLMENT PROGRAM

■ 3. Add subpart E to read as follows:

Subpart E—Automatic Enrollment Program

1600.34 Automatic Enrollment Program
1600.35 Refunds
1600.36 Matching Contributions
1600.37 Employing Agency Notice

Authority: Sec. 102, Pub. L. 111-31, div. B, tit. I, 123 Stat. 1776, 1853 (5 U.S.C. 8432(b)(2)(A)).

§ 1600.34 Automatic Enrollment Program.

(a) All newly hired Federal employees who are eligible to participate in the Thrift Savings Plan and those Federal employees who are rehired after a separation in service of 31 or more calendar days and who are eligible to participate in the TSP will automatically have 3 percent of their basic pay contributed to the TSP (default employee contribution) unless they elect to not contribute or elect to contribute at some other level by the end of the employee's first pay period (subject to the agency's processing timeframes).

(b) After being automatically enrolled, a participant may elect to terminate default employee contributions or change his or her contribution percentage or amount at any time.

§ 1600.35 Refunds of default employee contributions.

(a) A participant may request a refund of any default employee contributions made on his or her behalf (*i.e.*, the contributions made while under the automatic enrollment program) provided the request is received within 90 days after the date that the first default employee contribution was processed. The election must be made on the TSP's refund request form and must be received by the TSP's record keeper prior to the expiration of the 90-day period.

(1) The distribution of a refund will be reported as income to the participant on IRS Form 1099-R, but it will not be subject to the additional tax under 26 U.S.C. 72(t) (the early withdrawal penalty tax).

(2) A participant who requests a refund will receive the amount of any default employee contributions (adjusted for allocable gains and losses).

(3) Processing of refunds will be subject to the rules set out at 5 CFR part 1650.

(b) A participant will no longer be considered to be covered by the automatic enrollment program if the participant files a contribution election. Consequently, if a participant makes a contribution election during the 90-day period, the participant will only be eligible to receive as a refund an amount equal to his or her default employee

contributions (adjusted for allocable gains and losses).

(c) After the expiration of the period allowed for the refund, any withdrawal must be made pursuant to 5 U.S.C. 8433 and 5 CFR part 1650.

(d) A married participant may request a refund of default employee contributions without obtaining the consent of his or her spouse or having the TSP notify the spouse of the request.

(e) The rules applicable to frozen accounts (5 CFR 1650.3) and applicable to deceased participants (5 CFR 1650.6) also apply to refunds of the default employee contributions.

§ 1600.36 Matching Contributions.

(a) A participant is not entitled to keep the matching contributions and their associated earnings that are attributable to refunded default employee contributions.

(b) The matching contributions and associated earnings attributable to refunded default employee contributions shall be forfeited to the TSP and used to offset administrative expenses.

§ 1600.37 Employing Agency Notice.

Employing agencies shall furnish all new employees and all rehired employees covered by the automatic enrollment program a notice that accurately describes:

(a) That default employee contributions equal to 3 percent of the employee's basic pay will be deducted from his or her pay and contributed to the TSP on the employee's behalf if the employee does not make an affirmative election;

(b) The employee's right to elect to not have default employee contributions made to the TSP on his or her behalf or to elect to have a different percentage or amount of basic pay contributed to the TSP;

(c) That the default employee contributions will be invested in the G Fund unless the employee makes a contribution allocation and/or an interfund transfer; and

(d) The employee's ability to request a refund of any default employee contributions (adjusted for allocable gains and losses) and the procedures to request such a refund.

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