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## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### 5 CFR Parts 1604, 1651, 1653, and 1690

#### Uniformed Services Accounts; Death Benefits; Court Orders and Legal Processes Affecting Thrift Savings Plan Accounts; Thrift Savings Plan

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Retirement Thrift Investment Board (Agency) is amending its regulations regarding uniformed services accounts to conform with mandatory tax provisions as well as current recordkeeping practices and allow only for *pro rata* court-ordered payments.

The Agency amends its regulations regarding death benefits to provide for a clear process by which children of participants can establish parentage.

The Agency amends its court order regulations so that when a court order directs that a payment includes earnings, the Agency is able to make a payment which calculates the payee's award amount based on the current price of the shares he/she was awarded.

The Agency amends its court order regulations to remove a provision which permits courts to direct payment from only the tax-exempt balance of a uniformed services account.

The Agency amends its regulations at part 1690, subpart B, to add a regulation outlining the circumstances under which a TSP account may be frozen.

**DATES:** This final rule is effective December 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Tim Carey at 202-942-1666 or Laurissa Stokes at 202-942-1645.

**SUPPLEMENTARY INFORMATION:** The Agency 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 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 October 22, 2009, the Agency published a proposed rule with request for comments in the **Federal Register** (74 FR 54491). The Agency received one comment on the proposed rule and that comment supported the Agency's proposed change to its method of calculating court order awards. Therefore, the Agency is publishing the proposed rule as final without change.

#### Uniformed Services Accounts

The Agency amends its regulations regarding uniformed services accounts, and, specifically, its provisions relating to the division of a uniformed services account pursuant to a court order or legal process. The amendment removes a provision suggesting that courts could direct the Plan to make a court-ordered payment other than one that is *pro rata* from both taxable and tax-exempt contributions.

Uniformed services accounts are unique in that some or all of a uniformed services member's contributions may derive from tax-exempt income as a result of the combat zone tax exclusion. In 2001, the Agency issued final regulations regarding the uniformed services' participation in the TSP. Among many changes, the Agency determined that "the TSP can honor a court order or legal process that apportions combat zone (tax-exempt) contributions between the participant and the payee," and, therefore, the final version of 5 CFR 1604.9(b) regarding court-ordered payments from a uniformed services member's account stated that payment will be made *pro rata* from all sources "unless the court order or legal process directs otherwise." (66 FR 50716, October 4, 2001).

The Agency recently analyzed its authority and record keeping capability to issue payments from, as the regulation suggests, only one source of contributions in a uniformed services participant's account. The Agency has

concluded that the Internal Revenue Code (I.R.C.) permits only *pro rata* payments from both taxable and tax-exempt funds, and that a court cannot direct the Plan to make a payment from, for example, only tax-exempt funds.

Specifically, I.R.C. sections 72 and 402(e)(1)(A) preclude an allocation of basis pursuant to a court order if such allocation is other than *pro rata*. In particular, for purposes of determining tax liability, a spousal alternate payee is treated the same as the participant and, therefore, a distribution to a spouse or former spouse made pursuant to a court order must be made *pro rata* from taxable and tax-exempt amounts in a uniformed services account. 26 U.S.C. 402(e)(1)(A). Therefore, the Agency's regulation permitting courts to order a payment other than *pro rata* is not permitted by the I.R.C. and is amended.

Additionally, the Agency's record keeping system cannot issue a payment from only one source of funds because it is programmed to make all payments from uniformed services accounts on a *pro rata* basis from taxable and tax-exempt balances. Therefore, changing this regulation to remove the language which suggests a court could direct the Agency to issue a payment other than one which is *pro rata* is not only technically correct but also reflects current record keeping processes.

#### Death Benefits

The Agency amends its regulations regarding death benefits, and, in particular, its regulation regarding payment to a participant's child or children. Specifically, the amendment clarifies the documentation children should submit in the event that the identity of their father or mother is in dispute or unclear.

As familial matters, including guidelines related to parentage, are rooted in state, not Federal, law, the Agency cannot adjudicate or otherwise determine matters of paternity or maternity. In support of their contention that they are the proper beneficiary of their parent's account, children of deceased participants often submit insufficient or otherwise unclear documentation (e.g., copies of obituaries and personal mementos). A lack of guidance regarding which documents to submit in support of parentage adds unnecessary time and inconvenience to the processing of death benefit determinations.

The Agency, therefore, augments its death benefits regulations to describe the documentation it requires in support of a purported child's claim that a participant was his or her parent. Specifically, the Agency requests that affected children submit a court order or administrative finding or documentation which would establish parentage in the state in which the participant resided prior to his death.

#### **Court Orders and Legal Processes Affecting Thrift Savings Plan Accounts**

The Agency amends its court order regulations to allow for court-awarded payments which account for investment earnings and losses as well as to reflect the previously-discussed requirement that all payments from participants' accounts be paid *pro rata*.

Currently, in order for the Agency to take into account investment losses, a court order has to divide the account as of the date of distribution or identify a fixed amount that the parties agreed upon. Further, per the Agency's regulations, if a court order specifies that earnings are to be awarded and no specific rate is provided, even when an account experiences investment losses, the Agency awards earnings using its Government Securities Investment (G) Fund rate. 5 CFR 1653.4(f)(3).

The Agency, which receives many court orders directing that payments reflect earnings and losses until the date of distribution, amends its regulations so that the division of an account factors in the current price of those shares included in a payee's award amount.

In particular, if earnings, defined to include losses, are requested and a rate is not specified, the Agency will determine the amount to be awarded by determining the payee's award amount (e.g., the percentage or fraction of the participant's account), and, based on the participant's investment allocation as of the effective date of the court order, the number and composition of shares that the payee's award amount would have purchased as of the effective date. (Determining the shares as of the effective date of the court order, and not a later date, preserves the court's intent and protects the payee from investment decisions made by the participant after the effective date of the court order.) The Agency will then multiply the price per share as of the payment date, which is generally two business days prior to the date of the award's disbursement, by the number and composition of shares comprising the payee's award amount as of the court order's effective date.

The Agency believes that this calculation will result in more equitable awards as well as more efficient court

order processing as parties are not required to return to court for additional or clarifying language.

As previously discussed, the Agency also amends its court order and legal process regulations in order to conform with the I.R.C. and current record keeping procedures. In particular, the Agency removes language from § 1653.5(d) which states that a court may specify a particular payment from the tax-exempt balance of a uniformed services account. Please see the **SUPPLEMENTARY INFORMATION** discussion regarding Uniformed Services Accounts for an overview as to why the Agency is removing such language.

#### **Thrift Savings Plan**

The Agency adds a regulation outlining the circumstances under which a participant's account may be frozen and when access to the Agency's Web site and ThriftLine may be blocked. Though uncommon, freezes (or administrative holds) prevent a participant from withdrawing funds, including loans, from his or her account, and, therefore, the Agency is providing regulatory notice to its participants regarding the circumstances under which such a hold may occur and also the consequences of such a hold.

#### **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 and members of the uniformed services 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 (FERSA), Public Law 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 section 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. 804(2).

#### **List of Subjects**

##### **5 CFR Part 1604**

Military personnel, Pensions, Retirement.

##### **5 CFR Part 1651**

Claims, Government employees, Pensions, Retirement.

##### **5 CFR Part 1653**

Alimony, Child support, Claims, Government employees, Pensions, Retirement.

##### **5 CFR Part 1690**

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 chapter VI as follows:

#### **PART 1604—UNIFORMED SERVICES ACCOUNTS**

■ 1. The authority citation for part 1604 continues to read as follows:

**Authority:** 5 U.S.C. 8440e, 8474(b)(5) and (c)(1).

■ 2. Amend § 1604.9 to revise paragraph (b) to read as follows:

##### **§ 1604.9 Court orders and legal processes.**

\* \* \* \* \*

(b) *Combat zone contributions.* If a service member account contains combat zone contributions, the payment will be made pro rata from all sources.

\* \* \* \* \*

#### **PART 1651—DEATH BENEFITS**

■ 3. The authority citation for part 1651 continues 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).

■ 4. Amend § 1651.1 to add the definition of "Administrative finding", in alphabetical order, in paragraph (b) to read as follows:

##### **§ 1651.1 Definitions.**

\* \* \* \* \*

(b) \* \* \*

*Administrative finding* means an evidence-based determination reached by a hearing, inquiry, investigation, or trial before an administrative agency of competent jurisdiction in any State, territory or possession of the United States.

\* \* \* \* \*

■ 5. Amend § 1651.6 to add a paragraph (d) to read as follows:

**§ 1651.6 Child or children.**

\* \* \* \* \*

(d) *Parentage disputes.* If the identity of the father or mother of a child is in dispute or otherwise unclear (e.g., only one parent is listed on a birth certificate), the purported child must submit to the TSP either:

(1) A court order or other administrative finding establishing parentage; or

(2) Documentation sufficient for establishing parentage under the law of the state in which the participant was domiciled at the time of death.

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

■ 6. The authority citation for part 1653 continues 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).

■ 7. Amend § 1653.1 to add the definitions of “Payment date” and “TSP investment earnings or earnings”, in alphabetical order, in paragraph (b) to read as follows:

**§ 1653.1 Definitions.**

\* \* \* \* \*

(b) \* \* \*

\* \* \* \* \*

*Payment date* refers to the date on which earnings are determined and is generally two business days prior to the date of an award’s disbursement.

\* \* \* \* \*

*TSP investment earnings or earnings* means both positive and negative fund performance attributable to differences in TSP fund share prices.

■ 8. Amend § 1653.4 to revise paragraph (f)(3) and remove paragraph (f)(4) to read as follows:

**§ 1653.4 Calculating entitlements.**

\* \* \* \* \*

(f) \* \* \*

(3) If earnings are awarded and the rate is not specified, the Agency will calculate the amount to be awarded by:

(i) Determining the payee’s award amount (e.g., the percentage or fraction of the participant’s account);

(ii) Determining, based on the participant’s investment allocation as of

the effective date of the court order, the number and composition of shares that the amount in paragraph (f)(3)(i) of this section would have purchased as of the effective date; and

(iii) Multiplying the price per share as of the payment date by the number and composition of shares calculated in paragraph (f)(3)(ii) of this section.

\* \* \* \* \*

**§ 1653.5 [Amended]**

■ 9. Amend § 1653.5 by removing the last sentence of paragraph (d).

**PART 1690—THRIFT SAVINGS PLAN**

■ 10. The authority citation for part 1690 continues to read as follows:

**Authority:** 5 U.S.C. 8474.

■ 11. Add § 1690.15 to read as follows:

**§ 1690.15 Freezing an account—administrative holds.**

(a) The TSP may freeze (e.g., place an administrative hold on) a participant’s account for any of the following reasons:

(1) Pursuant to a qualifying retirement benefits court order as set forth in part 1653 of this chapter;

(2) Pursuant to a request from the Department of Justice under the Mandatory Victims Restitution Act;

(3) Upon the death of a participant;

(4) Upon suspicion or knowledge of fraudulent account activity or identity theft;

(5) In response to litigation pertaining to an account;

(6) For operational reasons (e.g. to correct a processing error or to stop payment on a check when account funds are insufficient);

(7) Pursuant to a written request from a participant; and

(8) For any other reason the TSP deems prudent.

(b) An account freeze (i.e., administrative hold) prohibits a participant from withdrawing funds, including loans, from his or her account. The participant continues to have the capability to conduct all other transactions including making contributions, changing contribution allocations, and making interfund transfers.

(c) The Agency will notify the participant that his or her account has been frozen unless it determines it prudent to not notify the participant that his or her account has been frozen.

(d) A participant may block on-line and ThriftLine access to his or her account by writing to the TSP or by submitting a request at <http://www.tsp.gov>.

(e) A participant may remove a participant-initiated freeze

(administrative hold) by submitting a notarized request to the TSP.

[FR Doc. E9–28752 Filed 12–1–09; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA–2009–0915; Directorate Identifier 2009–NM–224–AD; Amendment 39–16049; AD 2009–21–10]

RIN 2120–AA64

**Airworthiness Directives; AVOX Systems and B/E Aerospace Oxygen Cylinder Assemblies, as Installed on Various Transport Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain AVOX Systems and B/E Aerospace oxygen cylinder assemblies, as installed on various transport airplanes. This AD requires removing certain oxygen cylinder assemblies from the airplane. This AD was prompted by the reported rupture of a high-pressure gaseous oxygen cylinder, which had insufficient strength characteristics due to improper heat treatment. We are issuing this AD to prevent an oxygen cylinder from rupturing, which, depending on the location, could result in structural damage and rapid decompression of the airplane, damage to adjacent essential flight equipment, deprivation of the necessary oxygen supply for the flightcrew, and injury to cabin occupants or maintenance or other support personnel.

**DATES:** This AD is effective December 17, 2009.

We must receive comments on this AD by January 19, 2010.

**ADDRESSES:** You may send comments by any of the following methods:

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE.,