Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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: Proposed rule with request for comments.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) proposes to amend 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 proposes to revise the TSP loan regulations to assess a $50.00 fee on new TSP loans, permit a participant to have a single general purpose loan at any one time, and implement a 60-day waiting period between the date a loan is repaid and a new loan application for a loan of the same type will be accepted. Finally, the Executive Director proposes to clarify the TSP regulations pertaining to powers of attorney documents, guardianship orders, and conservatorship orders.

DATES: Comments must be received on or before May 7, 2004.

ADDRESSES: Comments may be sent to Patrick J. Forrest, Federal Retirement Thrift Investment Board, 1250 H Street, NW., Washington, DC 20005. The Board's Fax number is (202) 942–1676.

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

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. 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)).

Court Orders

A state domestic relations court can award a portion of a participant's TSP account "to another person'' in an action for divorce, annulment or legal separation. 5 U.S.C. 8467(a). TSP court order regulations interpret this provision to permit a payment to the spouse, former spouse, child, or dependent of the participant, or to an attorney for the spouse, former spouse, child, or dependent of the participant. 5 CFR 1653.2(a)(4).

Section 401(k) plans are the private-sector equivalents of the TSP and they can be divided by qualified domestic relations orders (QDRO) in domestic relations actions. 26 U.S.C. 414(p); 29 U.S.C. 1056(d). Congress enacted the QDRO provisions in the Retirement Equity Act of 1984 (REA) "to safeguard the security of the employee's immediate family members in the case of divorce or separation.'' *Ablamis* v. *Roper*, 937 F.2d 1450, 1456–7 (9th Cir. 1991). In keeping with this purpose, a QDRO can make an award only to a "spouse, former spouse, child or dependent of a participant,'' not to an attorney. 26 U.S.C. 414(p)(8).

The court order provisions of FERSA serve the same purpose as the QDRO provisions of REA. When the Board first promulgated the court order regulations on March 13, 1995 (60 FR 13604), section 1653.2(b)(4) permitted a court-ordered payment to an attorney for a participant's spouse or dependent because such a payment is tantamount to paying the spouse or dependent. *See* 60 FR 13605. While this is true, the Executive Director has reevaluated this policy and determined that the security of a participant's immediate family is better preserved by conforming the TSP to the private-sector practice of limiting court order payees to the participant's immediate family members, not by making tax-deferred retirement savings available for the payment of legal fees. Proposed section 1653.4(b)(4) would codify this policy change.

The TSP honors retirement benefits court orders from the Commonwealth of Puerto Rico if they meet the requirements of FERSA and TSP regulations. *See* 5 U.S.C. 8401(7) ("court'' for TSP purposes includes a court of the Commonwealth of Puerto Rico). Those court orders are routinely written in Spanish, although the litigants can obtain a certified English translation of the order from the court. When the TSP receives a Puerto Rican court order that is not accompanied by a certified English translation, the TSP must pay for translation services before it can determine whether the court order is enforceable against the TSP.

TSP administrative expenses are borne by all of the participants. The Executive Director has determined that it is appropriate for the parties to the court order, not the TSP participants, to bear the cost of the translation. Therefore, proposed section 1653.3(b) provides that the TSP will reject a court order as incomplete if it is in a language other than English, unless it is also accompanied by a certified English language translation.

TSP Loans

A participant can gain temporary access to a portion of his TSP retirement savings through the TSP loan program. TSP loans are subject to the requirements of FERSA (5 U.S.C. 8433(g)), the Internal Revenue Code (26 U.S.C. 72(p)), and the TSP loan regulations (5 CFR part 1655). These provisions require the TSP to charge interest on loans and to establish a repayment schedule.

The loan program offers an important benefit. It encourages participants to contribute more to the TSP because they know they will have access to some of the money in their accounts to help purchase a home or pay unexpected bills. However, the TSP is not a checking or savings account; it is a long-term investment intended for retirement. Removing money from a TSP account—even when it is paid back—may diminish the amount available to the participant for retirement.

Nevertheless, the number of TSP loans outstanding has been increasing rapidly in recent years. A review of loans issued shows that many participants are paying off a loan and immediately taking another loan. Also, a significant percentage of TSP participants maintain two loans outstanding. The Executive Director has determined that it is inappropriate for participants to maintain constant loan balances, thus treating the loan program as a source of ready cash, rather than a lender of last resort.

The administrative expenses of the TSP loan program are considerable and they are borne by all of the participants as a general administrative expense. The Executive Director has determined that it is appropriate for the participants who take advantage of the loan program to bear its cost, rather than 2.7 million participants who do not use the program.

The Executive Director proposes three TSP policy changes to reinforce the importance of borrowing from the TSP only as a last resort, to ensure that the administrative expenses of the loan program are reasonable for a retirement savings plan, and to ensure that the costs of the TSP loan program are paid by the participants who use it. First, in section 1655.2, the Board proposes to establish a 60-day waiting period between paying off one loan and receiving another loan of the same type. Second, in sections 1655.4 and 1655.11, the Executive Director proposes to limit participants to having a single general purpose loan outstanding at any one time. Third, in a new section 1655.21, the Executive Director proposes to charge a $50.00 loan fee when a TSP loan is disbursed.

Powers of Attorney, and Guardianship and Conservatorship Orders

A participant can make TSP transactions through an agent by appointing an attorney-in-fact with a power of attorney (POA). In addition, a court order can appoint a guardian or conservator for an incapacitated participant to act as his or her agent for TSP purposes. Current sections 1690.12 and 1690.13 state that the TSP must approve the POA or the court order before the agent can sign a form on the participant's behalf. The Executive Director proposes to amend sections 1690.12 and 1690.13 to state that the TSP will accept a document that was signed by an agent before the date on which the TSP approved the POA or the court order, as long as the agent was authorized under the conditions of his or her appointment to sign the document.

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.

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.

Gary A. Amelio,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons set forth in the preamble, the Board proposes to amend 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 § 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 § 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 § 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 hardship in-service withdrawal);

(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; and

10. Amend § 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. * * *

11–12. Revise paragraph (b) of § 1655.11 to read as follows:

§ 1655.11 Loan acceptance.

* * * * *

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

* * * * *

13. Add a new § 1655.21 to read as follows:

§ 1655.21 Loan fee.

A participant will be charged a $50.00 loan fee when a TSP loan is disbursed, which will be deducted from the proceeds of the loan.

PART 1690—THRIFT SAVINGS PLAN

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

Authority: 5 U.S.C. 8474.

15. Revise § 1690.12 to read as follows:

§ 1690.12 Power of attorney.

A TSP participant or beneficiary can authorize an individual to conduct business with the TSP on his or her behalf by appointing an agent (*i.e.*, an attorney-in-fact). Before the TSP will allow an agent to conduct business for the participant, the TSP must approve the power of attorney (POA) granting such authority. The TSP will accept a general POA that authorizes the agent to act on behalf of the participant with respect to the participant's personal property, Federal Government retirement benefits, or business transactions. A general POA will give the agent unlimited authority with the TSP, including the authority to sign any TSP-related document. The TSP will also accept a specific POA authorizing the agent to effect TSP transactions. If the participant or beneficiary desires to limit the agent's authority to specified TSP transactions, the POA must expressly state the limitation on the agency's authority. To be accepted by the TSP, a POA must be authenticated, attested, acknowledged, or certified by the principal before a notary public or other official authorized by law to administer oaths or affirmations. The TSP will advise the person submitting the POA whether it is valid to effect TSP transactions.

16. Revise § 1690.13 to read as follows:

§ 1690.13 Guardianship and conservatorship orders.

A court can authorize an agent to conduct business with the TSP on behalf of an incapacitated TSP participant or beneficiary by appointing a guardian or conservator. Before the TSP will allow a guardian or conservator to conduct business with the TSP, the TSP must approve the guardianship or conservatorship order issued by a court of competent jurisdiction as defined in § 1690.1. The TSP will accept a general appointment of guardianship or conservatorship that authorizes the agent to act on behalf of the participant with respect to the participant's personal property, Federal Government retirement benefits, or business transactions. A general appointment will give the agent unlimited authority with the TSP, including the authority to sign any TSP-related document. The TSP will also accept a specific appointment of guardianship or conservatorship authorizing the agent to effect TSP transactions. If the court desires to limit the agent's authority to specific TSP transactions, the court order must expressly state the limitation on the agent's authority. In addition, before the TSP will accept a guardianship or conservatorship order, the agent must establish to the satisfaction of the TSP that any bonding requirement or other preconditions specified in the court order have been satisfied. The TSP will advise the guardian or conservator whether the order is valid to effect transactions in the TSP.

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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

19 CFR Part 24

RIN 1651–AA51

Overtime Compensation and Premium Pay for Customs Officers

AGENCY: Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the definition of "customs officer'' for the purpose of eligibility for overtime compensation and premium pay. In addition, a conforming change is made to the definition of "immigration officer''. These revisions are necessary to reflect recent changes in the functions and organizational structure of U.S. Customs and Border Protection consistent with the Homeland Security Act of 2002.

DATES: Comments must be received by May 7, 2004.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, and may be inspected at 799 9th Street, NW., 5th Floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Richard Balaban, Financial Analyst, Office of Field Operations, (202) 927–0031.

SUPPLEMENTARY INFORMATION:

Background

Section 24.16 of the Customs Regulations (19 CFR 24.16) sets forth the procedure that U.S. Customs and Border Protection (CBP) must follow to furnish overtime and premium pay to customs officers, as required by the Customs Officer Pay Reform Act ("COPRA''; 19 U.S.C. 267). The statutory language at 19 U.S.C. 267(e)(1) provides that overtime compensation and premium pay may be paid to an individual performing those functions specified by regulation by the Secretary of the Treasury for a customs inspector or canine enforcement officer. Since the enactment of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*), these regulations are promulgated by the Secretary of Homeland Security.

The enabling regulation, specifically § 24.16(b)(7), Customs Regulations, defines those eligible for COPRA coverage by specifying only four position descriptions: "Customs Inspector,'' "Supervisory Customs Inspector,'' "Canine Enforcement Officer,'' and "Supervisory Canine Enforcement Officer.'' This definition does not encompass the expanded border security and inspection functions brought into CBP by the government reorganization consistent with the Homeland Security Act of 2002. (See Homeland Security Act and the President's Reorganization Plan of November 25, 2002, as amended by the President's January 30, 2003 modification.)

When CBP was established on March 1, 2003, it brought together some 18,000 inspection personnel from different agencies and disciplines at the nation's ports of entry, with the priority mission of preventing terrorists and terrorist weapons from entering the United States. At present, three different overtime and premium pay systems are