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FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1601

Participants' Choices of TSP Funds

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule.

SUMMARY: The Federal Retirement Thrift Investment Board (Agency) amends its interfund transfer (IFT) regulations to limit the number of interfund transfer requests to two per calendar month. After a participant has made two interfund transfers in a calendar month, the participant may make additional interfund transfers only into the Government Securities Investment (G) Fund until the first day of the next calendar month.

DATES: This rule is effective on May 1, 2008.

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SUPPLEMENTARY INFORMATION:

Preamble

Under the Federal Employees' Retirement System Act of 1986, the Thrift Savings Plan (TSP) was created to offer passive long-term investments designed to improve the retirement security of Federal employees. As a result of analysis performed in 2007, it became clear that a small number of TSP participants were pursuing ''market timing'' active investment strategies in the TSP. These activities were diluting the earnings of the long-term investors, and adversely affecting the ability of TSP managers to replicate the performance of selected indexes as required by law.

The Chief Investment Officer reported these findings to the Executive Director on November 6, 2007. The Executive Director presented the information to the Federal Retirement Thrift Investment Board members at their public monthly meeting on November 19. Subject to the input from the Employee Thrift Advisory Council (ETAC), the Board authorized the Executive Director to put in place both interim and structural restrictions on frequent interfund transfer activity.

The 15 members of the ETAC were advised that same day and presented with the information developed by Agency staff. Under longstanding custom, ETAC members were also provided an advance copy of the Agency's interim proposed rule. Two ETAC member organizations voiced some concerns, and the Agency decided to withhold publication of the proposed interim rule until a public meeting of the ETAC and the Executive Director could be conducted on December 19. After extensive discussion at the meeting, no ETAC member objected to the Agency's implementation of its interim plan. The proposed interim rule was forwarded to the **Federal Register** on December 21, where it was published on December 27. The rule took effect on January 7, 2008.

On January 24, 2008, under the interim rule, the Executive Director sent letters to 3,775 TSP participants who had been identified as frequently requesting IFTs. The letters explained the need to reduce this activity and asked recipients to voluntarily reduce their IFT requests. The letters also warned each individual that a failure to practice self-restraint could result in the imposition of restrictions. Eighty-five percent of those who received a letter voluntarily complied. However, 549 individuals continued their frequent IFT activity during February. These individuals were subsequently notified by certified mail that they would be restricted to requesting IFTs by mail, effective April 1, 2008. Their option to request IFTs via the TSP Web site or over the Thriftline was suspended until plan-wide structural restrictions are implemented. However, some have appealed their restrictions, and, in appropriate cases, the Agency has approved their appeals.

On March 10, 2008, the Agency published a proposed rule with request for comments in the **Federal Register** (73 FR 12665, March 10, 2008). The Agency received comments from three Federal employees' unions and from 354 TSP participants. One comment purported to include the views of over 4,000 participants. Additionally, the Agency received and reviewed 110 comments prior to the Agency's publication of its January 7, 2008 interim regulation; these comments were reconsidered as a part of this rulemaking process.

Comment Summary

Summary

Commenters raised a number of issues and a detailed response to each one is provided below. By way of summary, those individual respondents who have personally made frequent interfund transfers and oppose the proposed limits display a fundamental misunderstanding of the statutory TSP design. They also present two overarching arguments which deserve discussion at the outset, because they obscure the damage which their frequent IFTs inflict on other plan participants.

Misunderstanding

By misappropriating language used in the capital markets (buys, sells, trades), some TSP participants give the impression that their frequent interfund transfers are trades in and out of the markets which affect only their own funds. This is incorrect. All TSP assets are in a pooled investment which is designated by statute as the Thrift Savings Fund.

In this regard the TSP funds are like mutual funds regulated by the Securities and Exchange Commission (SEC). In 2005 the SEC took steps to reduce activity in mutual funds. It did so after finding that: ''Excessive trading in mutual funds occurs at the expense of long-term investors, diluting the value of their shares. It may disrupt the management of a fund's portfolio and raise the fund's transaction cost because the fund manager must either hold extra cash or sell investments at inopportune times to meet redemptions.''

Congress established the Thrift Savings Fund as a long-term, passive investment. The legislative history shows that active investments were considered, but rejected. The Federal Retirement Thrift Investment Board is required by law to develop policies under which four Thrift Savings Fund offerings—commonly known as the C, S, I, and F Funds—are invested to ''replicate'' the performance of selected market indexes at a low cost. Through careful and diligent management, these goals have been achieved for more than twenty years.

Each day the Agency and its contractors tally new contributions, loan activities, disbursements, and IFTs to arrive at net amounts available for investment in each of the Thrift Savings Fund offerings that day. A similar netting process occurs in the TSP asset manager's commingled investment funds, which include the assets of many other institutional investors. Predictable cash flows and offsets due to netting minimize trading costs.

This carefully designed structure, which optimizes achievement of the statutory goals, has been challenged over the past year by a noticeable increase of IFTs by a small group of participants. The Agency's analysis has demonstrated that fewer than 1 percent of TSP participants are engaging in this activity to the detriment of more than 99 percent of participants who are long-term investors (those who requested 12 or fewer IFTs in calendar year 2007).

The actions by the small group have become less random, which suggests coordination and leads to fewer opportunities for cost savings due to offsets. The deleterious consequences of these activities in the TSP are the same as those which the SEC found occurring in mutual funds. Importantly, the clear intent of this activity—to ''beat'' the market indexes—fundamentally conflicts with statutory mandates that the Board provide passive investments which replicate the performance of market indexes.

Claim That Frequent Interfund Transfers Do Not Significantly Increase Costs Is Misleading

Commenters who oppose restrictions cite the very low TSP administrative expenses as evidence that their actions are harmless. Some concede additional costs, but argue that those additional costs are de minimus and only amount to $4 per year, per participant.

While we neither accept this number nor the process by which it is derived, the view that exceptional costs generated by 1 percent of participants should be viewed as inconsequential if they can be charged off to 100 percent of plan participants is troubling. The resulting small average cost obscures a significant problem, *i.e.*, the cost to other individual participants can be very high depending on how funds are invested on a particular day. This issue is discussed further below.

Moreover, the Agency rejects the argument that $16 million in trading costs is small. The entire budget for the TSP in 2007 was just $87 million. In the context of how the TSP fiduciaries run the TSP, this additional $16 million is a very large number.

Costs remain low in the TSP because the Board, exercising due diligence, looks behind broad averages. Indeed, diligent examination led to the discovery last summer of frequent interfund transfer activity by this very small but determined cohort of participants.

As noted above, individual TSP interfund transfers are not ''trades'' and transferees are not ''traders.'' However, frequent IFTs can and do generate expenses which include trading costs at the Fund level. The Agency and its asset manager endeavor to minimize trading costs through offsets, netting, and cost free ''cross-trading.'' Ultimately, if the asset manager must go to the market to buy or sell securities, the associated transaction costs (including commissions paid to the brokers, transfer taxes, and market impact) are borne by all participants in the Fund. These costs are not reflected in the highly publicized and very low TSP expense ratio. Further discussion of transaction costs is featured below.

Recommendation That Interfund Transfer Restrictions Apply Only to the I Fund Obscures Significant Abuse

A number of commenters acknowledge that the analysis presented by the Agency staff makes a compelling case to restrict interfund transfers in the I Fund. However, they argue that the analysis is not as compelling for the other TSP funds. The Agency has decided to apply the restrictions to all TSP offerings for two reasons:

First, the Agency's analysis does demonstrate measurable and growing adverse effects of frequent IFT activity in the S Fund. Moreover, since the analysis was performed, interfund activity in the F Fund increased as well.

Second, the G Fund has been subjected to a frequent transfer/market timing practice that is particularly insidious.

The G Fund is invested in specially-issued Treasury securities which provide a fixed rate of return established monthly. It is considered the TSP ''stable value'' fund, and is especially important to those cautious investors who seek security of principle and interest.

Some of the frequent interfund transferors have determined that by making one-day round trips in and out of the G Fund three to five times each month, they are able to effectively collect a full month's worth of G Fund earnings for just three to five days of actual G Fund investment. The windfall they secure comes at the direct expense of long-term G Fund investors who never anticipated that their safe retirement investment would be subjected to such mercenary treatment by their fellow TSP participants.

Practitioners visit a Web site in order to compare notes and calculations to assist each other in the execution of this scheme. They congregate at a message board which they have aptly titled ''G Fund Payday.'' Indeed, like ghost workers, these individuals only show up in the G Fund on the days when their calculations show that G Fund shares will increase in value. With a finite amount of earnings to be allocated, these individuals unquestionably dilute G Fund value at the expense of long-term investors.

This indefensible practice will be severely curtailed by the limit on interfund transfers. Additionally, the Agency will make a structural change beyond the purview of this rulemaking which will totally eradicate this particularly abusive form of frequent interfund transfer activity.

Union Comments

The Agency received three comments from Federal employees' unions. All acknowledged that frequent IFT activity is detrimental to the performance of the funds and that some action to restrict it is necessary.

One union supports the regulation as written.

One union commented that changes that have already been made address the frequent transfer problem and no further changes are needed. This union is referring to the interim regulation implemented by the TSP in January 2008, whereby the Executive Director identified 3,775 participants who were making excessive IFT requests, thus driving up costs for the participants who are using the TSP in the way it was intended, as a long-term retirement vehicle. Letters were sent to those participants requesting that they voluntarily restrict their IFTs to fewer than four in the month of February. The letter noted that, if the participant did not voluntarily comply, s(he) could be limited to making IFT requests by mail only. This limitation would remain in effect until the Agency implemented structural changes that would automatically apply to all participants.

Thus, the Agency's actions so far were only approved as a temporary measure, to deal with an immediate problem, until the longer-term solution could be put in place. It was an extremely labor-intensive process to identify these individuals, notify them by mail, identify those who did not voluntarily comply, send them certified letters, restrict their online access, and handle their appeals.

Additionally, in all fairness to those individuals, the Agency would have to continue to apply that same labor-intensive process to all participants on a monthly basis.

With this final regulation, the Agency will implement a structural, automated process. While the union asserted that the interim measure was less ''Draconian'' than the proposed regulation, the Agency sees it as the opposite. Under the interim regulation, affected participants must submit IFT requests by mail and, as the Agency processes mail requests in the order received (not necessarily in the order mailed), participants have reduced control over what order their IFTs are executed. (One participant commented against the union proposal and noted that the interim regulation is ''Draconian.'')

This union also suggested that if a change is necessary, it should be ''to allow two transfers per month and after two transfers (if other than the G Fund), attach a fee for servicing the transfer.'' ''While it may be 'impossible to correctly assign the exact costs,' we can follow the leads of other such funds in arriving at a figure.''

In its research, the TSP found no mutual fund or defined contribution plan which allows participants to make a certain number of free transfers and then charges a fee for additional transfers. In fact, fund managers who use trading limitations and fees, do so as a double deterrent, not as a way to accommodate more transfer activity. In recommending this approach at an ETAC meeting, the union noted that TIAA–CREF pursued a similar policy. The Agency contacted TIAA–CREF, and its policy is: A participant who transfers from any fund, transfers back, and then sells it within 60 days may not repurchase that fund for 90 days and, if the transaction involves the international (similar to I Fund), high yield, or small-cap (similar to S Fund) funds, a 2 percent fee is assessed. The TSP regulation is far less restrictive.

The TSP also looked to Vanguard, the largest mutual fund index manager in the country. Holders who redeem shares in any Vanguard mutual fund must wait 60 days before repurchase. For some funds, including the fund that is similar to the TSP's I Fund, if the shareholder redeems a fund that has not been held for 60 days, the shareholder cannot repurchase the fund for 60 days, *and* must pay a redemption fee, which would be 2 percent for the international fund. Again, the TSP regulation is far less restrictive.

The third union suggested two proposals. The first was addressed in the preceding paragraph. Alternatively, it proposed four instead of two unrestricted IFTs per month. TSP studies showed that allowing four IFTs per month would not result in any meaningful reduction in the dollar amount of the daily trades. Allowing three IFTs per month would result in a 31 percent reduction in the dollar value and two per month would result in a 53 percent reduction. Thus, the TSP is expecting a reduction in dollar value of between 31 percent and 53 percent, after factoring in some activity related to unlimited transfers to the safe harbor of the G Fund. TSP research has shown that less than 1 percent of participants make more than 12 IFTs per year. Therefore, the regulation will not affect 99 percent of participants. It will allow participants to rebalance their accounts twice per month, which, in the view of the Plan's two investment consultants, is more than adequate.

Participant Comments

Support for Proposed Regulation

Thirty participants supported the regulation.

Opposition to Proposed Regulation

Some participants suggested there should be a certain number of ''free'' IFTs per month and then a fee per transaction. This proposal was addressed under the union comments discussed above.

Many participants commented that TSP expenses are already very low or that costs are going down. Some noted that TSP Funds are already outperforming their underlying indexes.

TSP expenses are very low. The TSP's enabling legislation requires the Board to develop investment policies which provide for low administrative costs. 5 U.S.C. 8475. Due to efforts by the Board, the net expense ratio for the TSP Funds declined to 1.5 (0.00015%) basis points last year.

However, the Funds also incur transaction costs, which are directly related to the dollar amount of IFTs requested by participants. These transaction costs are investment expenses that reduce investment income *before* deductions for administrative expenses and *are not* included in the expense ratio.

TSP net administrative expenses in 2007 were reduced to $31,392,286. However, costs from trading activity were an additional $13,880,098. Although more than 99 percent of participants made 12 or fewer IFTs last year, all participants shared the full cost of executing the interfund transfers generated by those who made numerous IFTs.

Numerous IFTs increase the dollar amounts of the orders that are given to the investment manager on a daily basis. The investment manager must therefore hold more cash to meet potential redemptions, leading to a greater chance of differences in performance from the indexes tracked by the funds. This difference (tracking error) can be positive or negative, but the TSP is charged by statute to keep this tracking error as low as possible since the funds must, by law, ''replicate'' their respective indexes. 5 U.S.C. 8438. It is indisputable that reducing the dollar amount of IFTs will lower transaction costs and the amount of cash the investment manager must hold and will, therefore, reduce tracking error.

Several participants noted that ''there is no problem;'' that trading costs are going down; that trading costs the average participant $3, $3.55, $3.56, $4, or $4.60. They asked ''Why does it cost $240 to trade a $300,000 account?'' ''Why can't you determine the exact cost and charge participants accordingly?''

The TSP has avoided using averages when averaging can obscure important distinctions. For example, over the years, some have suggested that the Agency develop an average cost per participant. One could devise a simple calculation, i.e., in 2007, net administrative expenses at approximately $32 million spread over approximately four million participants would yield an average annual cost of $8 per participant.

However, this is misleading because costs are borne pro-rata, and increase based on account size. So in order to be precise, the Agency expresses costs in terms of basis points. Thus, with last year's net expense ratio of 1.5 basis points, a new participant with $1,000 on account can easily determine that his cost was 15 cents, while a veteran participant with $1 million on account can quickly know that her share of these expenses was $1,500.

With regard to IFTs, because there are several moving parts each day, an average would obscure important distinctions. For example, on August 16, 2007, participants redeemed 22,219,762 shares of the I Fund. The price they received was $22.48 based on a 4 p.m. market pricing. When the securities were sold at the opening of the foreign markets later that evening and the following morning, they were sold for $9,554,497 less than the prices used to determine the $22.48 share price. This equates to a $0.43 per share trading cost. That is, if the Agency could have determined this in advance, the share price would have been only $22.05. Instead, the $9,554,497 difference was charged to the remaining holders of the I Fund. That is in one DAY, not in one year.

Each day is unique, and the timing of participants' redemptions affects how much of the cost is borne by any given participant. A participant who would have redeemed the day before would not have been impacted at all by this transaction. One who transferred funds into the I Fund just before August 16 and transferred out just after would have experienced the full effect.

On August 16, almost half of the dollar amount of the trade was from participants who were requesting frequent IFTs. The Agency knows from its analysis that a large number of the participants who make frequent interfund transfers were moving $250,000 or more. Each participant who redeemed $250,000 on that day would have sold 11,121 shares, and therefore would have made *an extra $4,782.* (11,121 shares sold multiplied by $0.43 per share trading cost.) *These ''extra'' funds did not come from the market. Rather, they came from the accounts of other participants who remained in the I Fund.* When examined this way, it becomes clear why frequent IFTers would prefer to express this cost as an annual average spread over all participants.

Additionally, because the investment manager's liquidity pool had been depleted on August 16, $452 million of that trade settled on August 21 instead of August 17. That cost the G Fund $235,000 in foregone interest.

The Agency also cannot measure the cost to participants that results from increased tracking error because the investment manager has to keep a larger liquidity pool to meet frequent redemptions.

Every day is different, and different participants are impacted in different ways depending on the timing of their interfund transfer activity. Stating an average cost per participant would be misleading. The goal of this regulation is to reduce IFT activity in order to control the costs borne by the other participants, costs which are different for every participant depending on what days they may be invested in, or not invested in, any particular fund and that are impossible to determine in advance.

Several participants noted that money could be saved by eliminating mailed IFT confirmations and that the DVD for the L Funds was very expensive. Those costs are reflected in the already low expense ratio, which is assigned pro rata to all TSP participants. The trading expenses are not borne pro rata. In fact, a participant, who transfers out of a fund on a day when the cost to complete that trade is very high, bears none of the cost of that trade, while those who remain in the fund bear it all. It is the inequity of the allocation of the trading expenses which the TSP seeks to address, and which, as discussed in the proposed regulation (73 FR 12667, March 10, 2008), the SEC has identified as a problem for mutual funds.

Several participants said (incorrectly) that the L Funds are responsible for the transactions costs and that these funds should also be limited. The dollar amount of trade activity attributable to the L Funds, especially when compared to the dollar amount of trading activity attributable to participants making frequent IFT requests, is very small. For example, in the I Fund, for September and October 2007, the average daily dollar amount attributable to the L Funds' rebalancing accounted for just 7 percent of the total daily trade, while the average daily dollar amount attributable to those making frequent IFTs (defined in this instance as participants who made IFTs into or out of the I Fund eight or more times in the prior 60 days) was 63 percent. The impact of the L Funds' rebalancing is demonstrably minimal. The Agency monitors the L Funds, as it does all its funds, and, in the unlikely event that the dollar volume of the L Funds' rebalancing becomes costly, the Agency can take steps to reduce the frequency or amount of the rebalancings.

Many participants requested that a fee be charged instead of limiting the number of IFT requests. Some of these participants recommended a ''$10 flat fee.'' Others noted that the Agency charges a fee for loans, and therefore, should be able to charge a fee for interfund IFTs. This comment was addressed in the proposed regulation as explained below:

Many fund families charge redemption fees for shares which are redeemed within 30, 60, or 90 days of purchase. T. Rowe Price, for example, levies fees on 27 funds, including a 2 percent redemption fee on shares of its International Index Fund (similar to the I Fund) and a 0.5 percent fee on shares of its Equity Index 500 (similar to the C Fund) and Extended Equity Market Index Funds (similar to the S Fund), if they are sold within 90 days of purchase. TIAA–CREF (with $400 billion of assets under management and 3 million participants) charges a redemption fee of 2 percent on shares of its International Equity, International Equity Index, High Yield II, Small-Cap Equity, Small-Cap Growth Index, Small-Cap Value Index or Small-Cap Blend Index Funds redeemed within 60 days of purchase. We noted particularly that the fee is a percentage of the dollar amount transacted, not a flat processing charge.

When brokerage firms charge $10 to execute a stock trade, they know how much it costs them to make that transaction. Mutual fund managers (and the TSP) cannot determine the exact amount of costs to the plan from IFT activity for the following reasons. First, each day, a price for each fund is determined based on closing stock prices for that day. However, the fund manager does not execute every stock trade at that closing price. Any difference is market impact and is charged or credited to the fund, thus impacting the returns of the long-term holders. Second, to accommodate the large trades which result from frequent IFT activity, managers must keep a larger liquidity pool, which causes performance to deviate from that of the index. Lastly, for the TSP, when the liquidity pool is depleted as a result of a number of large trades in a row, cash due to the TSP is not received for up to three days, costing participants foregone interest. None of these three costs is calculable in advance, and all three are different every single day. Because it is impossible to determine how much to charge for each transaction, mutual fund families assess a percentage of the dollar amount transacted, which is then credited back to the Fund.

Many fund families employ trading restrictions similar to Vanguard's whereby an investor may not repurchase any fund within 60 days after a redemption.

We would also note that both TIAA–CREF and Vanguard, among others, use a double-barreled approach by charging a fee on top of the trading restrictions for some funds. For example, if an investor sells the Vanguard Developed Markets Index Fund (similar to the TSP's I Fund) within 60 days of purchasing it, that investor is charged a 2 percent fee and cannot repurchase the fund for 60 days.

In developing its recommendation, the Agency chose not to pursue redemption fees because it is impossible to correctly assign the exact costs to those who are making IFTs. Additionally, imposing a percentage fee would deny our participants the ability to go to the safe harbor of the G Fund at any time for no charge. The Agency considers that capability to be of paramount importance. A fee-based system would especially punish an infrequent trader who may wish to redeem within 30, 60, or 90 days (depending on the policy) because the market is declining. In this situation, the participant could face losing 2 percent of his/her investment in addition to the market decline, a worst case scenario.

The FRTIB is implementing a procedure to reduce costs to participants. The SEC recommends that all mutual funds take such actions, and according to a 2007 study by Hewitt and Associates, 73 percent of defined contribution plans have adopted policies designed to minimize transaction activities in their funds.

Several participants expressed wanting more than two (e.g., three, four, or more) IFTs per month. Others noted that the Agency should gradually implement its policy (e.g., have a ''trial period'') and start with a limit greater than two. Further, several participants asked ''why two'' trades and stated that the number seemed ''arbitrary.'' According to data compiled by the Agency, limits of four IFTs per month will have very little impact on the dollar volume of daily trades, three IFTs would reduce volume by just 31 percent while two IFTs would reduce volume by approximately half. The Funds in the Plan are index funds. Therefore, the Agency examined the trading policies of the largest index fund manager, Vanguard, and of numerous other mutual fund managers and defined contribution plans. An investor in any Vanguard fund who redeems shares of a Vanguard fund may not purchase any shares of that fund for 60 days. Additionally, in Vanguard's Developed Markets Index Fund (similar to the TSP's I Fund), if the redeemed shares have not been held for 60 days, the investor is charged a 2 percent redemption fee. Thus the approach of two IFTs per month, with unlimited redemptions to the G Fund, is demonstrably more liberal than that provided by the largest provider of index funds.

Some participants expressed a desire to have 24 (or, as suggested by one participant, 12) trades available across the year, as opposed to two per month. The purpose of the regulation is to reduce costs to TSP participants. Transaction costs are highest when the markets are the most volatile. The Agency is seeking to minimize the dollar volume of trades, especially during those times. TIAA–CREF, a very large defined contribution plan provider, tried allowing a certain number of transactions per year and found that it experienced a ''bunching'' of trades during volatile times, precisely the opposite of the intention of the transfer restrictions. That provider then amended its policy to read, ''A participant who transfers from ANY fund, transfers back, and then sells it within 60 days may not repurchase that fund for 90 days,'' *and,* if the transaction involves the international, high yield, or small-cap funds, a 2 percent fee will be assessed.

Some participants commented that it is their money in the TSP and, therefore, the Agency can't limit their activities. Some contend that the policy will prevent them from maximizing their retirement income. Others stated that the TSP is changing the rules mid-course. Some felt it is unfair to younger TSP participants, they assert, who need to be more aggressive; some felt it was unfair to TSP participants who are close to retirement and, they assert, need to be more aggressive. The SEC and 73 percent of defined contribution plans (according to the 2007 Hewitt Associates study) have acknowledged that market timing (frequent IFT) activity is harmful to the performance of funds. The SEC found that this activity ''dilutes'' value for all investors, and has mandated that mutual funds take action to discourage or eliminate such activity. Additionally, 73 percent of defined contribution plans have taken actions to reduce this activity. The Agency's research has indicated that its proposed limits are more liberal than those of many mutual funds and defined contribution plans. For example, the Thrift Plan for the Employees of the Federal Reserve System does not allow participants to redeem shares of any fund for 14 days after purchase.

Several participants commented that the proposed change would prevent them from engaging in dollar cost averaging. Dollar cost averaging is spending a fixed amount at regular intervals (e.g., monthly) on a particular investment *regardless of share price.* Dollar cost averaging is, by definition, not driven by the level of the market. A participant can most certainly employ a systematic investment plan, making IFTs every two weeks regardless of the performance of the market, just as dollar cost averaging is intended. In fact, this would essentially be the same frequency of dollar cost averaging into the TSP via withholding from biweekly paychecks.

Several participants stated that, if the Agency changes its IFT policy, they should be allowed to take their money out of the Plan. Congress has established the circumstances under which a participant may withdraw money from his/her account. According to a survey by Hewitt Associates, 73 percent of defined contribution plans have implemented policies to discourage market timing activities because such activities are detrimental to the performance of the plans. None of the affected participants was permitted a special withdrawal of funds from these plans. Further, the Agency is confident that its proposal is more liberal than most and furthers the TSP's status as a world class retirement vehicle.

Some participants wrote that the new rule should apply to new participants only; current participants should remain under current rules. The Agency's objective in promulgating this regulation was to reduce the impact of frequent IFT activity. Allowing current participants to rebalance using current rules would likely mean that IFT requests would remain at high levels. Thus, this would not reduce the impact of market trading activities and would also be very difficult to program and administer.

Several participants stated that there is no evidence that frequent IFT activity in the C, S, and F Funds has any measurable impact on participants as a whole and that the Agency should restrict only the I Fund. Further still, a handful of participants stated that frequent IFT activity benefits shareholders. While the I Fund transaction costs were the highest, at $16.5 million, the F and C Funds incurred measurable costs of $1.1 million and $605,000, respectively, in 2007. Moreover, the Agency is committed to eradicating the abusive frequent transfer activity in and out of the G fund by which some participants extract earnings which rightfully belong to long-term G fund investors.

As noted above, the TSP cannot determine the exact amount of costs to the plan from IFT activity for the following reasons. First, each day, a price for each fund is determined based on closing stock prices for that day. However, the fund manager does not execute every stock trade at that closing price. Any difference is market impact and is *charged or credited* to the fund, thus impacting the returns of the long-term holders. Second, to accommodate the large trades which result from frequent IFT activity, managers must keep a larger liquidity pool, which causes performance to deviate from that of the index. Lastly, for the TSP, when the liquidity pool is depleted as a result of a number of large trades in a row, cash due to the TSP is not received for up to three days, costing participants foregone interest. None of those three costs is calculable in advance, and all three are different every single day.

Note from above that trading costs may actually be credits. In fact, trading costs in the S Fund in 2007 did benefit the Fund by $4.3 million. However, it is extremely important to highlight that that number could just as easily have been a cost. There is no way for the Agency to control the size of such costs or whether they are costs versus credits. It can only work to minimize the exposure of the TSP to the potential costs by reducing the dollar amount of the trade. The manager of the S Fund did need to increase the liquidity pool for the Fund, and there were several times during the year that the TSP and its participants lost interest income because cash payment was delayed. Due to these uncertainties, the restrictions must be applied to the TSP Funds as a whole.

Many participants suggested changing the time that the I Fund is priced. By statute, the I Fund must be designed to replicate the performance of an international index (5 U.S.C. 8438(b)(4)(B)). The index is priced at 4 p.m. Eastern Time. Therefore, the I Fund must be priced at 4 p.m.

Some participants commented that fair valuation of the I Fund is increasing costs. On the contrary, costs would be even higher without fair valuation. All of the TSP stock funds are priced at 4 p.m. Eastern Time. For the C and S Funds, the prices used are the 4 p.m. closing prices of the stocks. The I Fund comprises international stocks in countries such as Japan and England. Although the I Fund is priced at 4 p.m., the Japanese market actually closed 13 hours earlier, at 3 a.m. Eastern Time, and the British market closed four and half hours earlier at 11:30 a.m. On most days, those closing prices are used to price the I Fund. However, in times of market turbulence, it can become obvious that if the securities had still been trading at 4 p.m. Eastern Time, the prices would be materially different. Fair value pricing is a process (recommended by the SEC) to update those ''stale'' prices to make them a more accurate reflection of the current market environment.

When the investment manager receives the daily trade order from the TSP, the foreign markets are closed. The investment manager cannot process the order until the markets reopen, and any differences in the opening stock prices from the closing stock prices (market impact) are charged back to the I Fund, affecting its performance. Since fair valuation updates the prices, it brings them closer to where the trades are actually executed, thereby lowering the cost to the Fund. Without fair valuation, the exposure to market impact costs would be greater. Fair valuation is an estimate of prices at 4 p.m. It is not meant to be an estimation of where the foreign markets will open.

Some participants said it was misleading to compare the TSP to a mutual fund. Others said TSP funds are more like electronically (the Agency assumes the participant meant exchange) traded indexed funds (or ETFs) that are traded through brokers. Others noted the TSP should not be compared to private sector funds because they have active managers. While the TSP Funds are not mutual funds, they are invested in collective trust funds (CTFs) which are virtually identical to mutual funds in the way they are priced and the way that trades are executed. Collective trusts differ from mutual funds in the following ways. In general, only eligible, tax-exempt assets such as a 401(k) or defined benefit plan can invest in a CTF. CTFs are regulated by the Comptroller of the Currency, not the SEC and Financial Industry Regulatory Authority (FINRA) (which oversee mutual funds). CTFs do not need to provide prospectuses to investors. Management fees tend to be lower with CTFs. This is in part because CTFs, as the preferred institutional account structure, can offer significant scale advantages to the investment manager. CTFs offer absolute fee transparency. There is a single management fee, unlike the multiple layers of fees associated with mutual funds.

There is a marked trend towards using CTFs in the 401(k) industry, particularly among large plans. Furthermore, low-cost transparent vehicles are entirely consistent with the spirit of the Pension Protection Act of 2006. Unlike commingled funds and mutual funds, ETFs can be bought or sold on an exchange throughout the trading day. They can also be shorted. The TSP Funds have an entirely different structure from that of ETFs. While it is true that ETFs track indexes, the first actively-managed ETF was introduced on March 25, 2008. While it is true that there are actively-managed mutual funds, there are also passively-managed mutual funds which track index performance. Like mutual funds, the TSP Funds are priced once per day, and unlike ETFs, they are not traded on an exchange throughout the day.

Hence, the Agency looks to 401(k) plans, the SEC, and the best practices of mutual fund managers when developing policy. The Agency cited figures from passively-managed index funds whenever possible since these most closely resemble the TSP.

Some participants commented that individual retirement accounts (IRAs) do not have trading restrictions. The TSP is not an IRA and is not similar in structure to an IRA.

The Agency received a number of comments about the rulemaking process. Some participants stated that the Agency's notice of proposed rulemaking was deficient because it stated it would not affect either small business entities or members of the uniformed services. This comment is unfounded. The Executive Director certified that ''this regulation will not have a significant economic impact on a substantial number of small entities'' but that it could affect ''members of the uniformed services.'' 73 FR 12668, March 10, 2008. He further certified the regulation would affect ''an insubstantial number of financial advisors who may provide advice in connection with the Fund.'' Id.

Some participants asked ''aren't individual shareholders considered small entities.'' They are not. Small entities are defined at 5 U.S.C. 601(6) as a ''small business,'' a ''small organization,'' and a ''small governmental jurisdiction.''

Some participants commented that the Agency's notice of proposed rulemaking was deficient because the proposed regulation is a major rule. A major rule is one that is likely to result in: (A) An annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804(2). The proposed rule is not a major rule under this definition.

Some participants asked how the Agency could impose IFT restrictions on some participants when the regulation was still proposed. The interim IFT restrictions are based on a regulation which took effect on January 7, 2008. 72 FR 73251, December 27, 2007. Other participants asked how the interim regulation could be enforced against frequent requestors of IFTs when the comments from the interim regulation had not been posted or considered. The Agency's Executive Director did consider comments submitted in connection with the interim regulation. Additionally, the proposed regulation notes ''[c]omments submitted in response to the interim regulation need not be resubmitted; they will be considered as part of this rulemaking process.'' 73 FR 12665, March 10, 2008. The Agency is not required to post comments in connection with an interim regulation.

One participant commented that the proposed regulation should be published at ''regulations.gov.'' The proposed regulation was published at *www.regulations.gov* and also published at *www.gpoaccess.gov, www.tsp.gov,* and *www.frtib.gov.* This participant also noted that the Agency should participate in the Federal Docket Management System (FDMS) functionality provided at regulations.gov. Because the Agency is cost-conscience (Agency research indicates a fee may be associated with the FDMS starting in 2010) and also because the Agency publishes regulations relatively infrequently, the Agency has not analyzed whether this optional functionality would benefit the Agency. However, the Agency may inquire into this functionality in the future. Regardless of these issues, as each participant was individually notified (in the Executive Director's February 2008 letter) regarding this regulation change, and as the Agency received hundreds of comments, the Agency does not believe participating in this optional functionality impacted the rulemaking process.

Some participants commented that the Agency sent out its regulation during a quiet time so that no one would notice. This comment likely refers to the Agency's interim regulation, which was published in the **Federal Register** on December 27, 2007. On November 19, 2007, at an open Board meeting, the Agency's Board heard a presentation from the Agency's Chief Investment Officer. In response, the Board approved a policy to limit interfund transfers. The Board's decision was the subject of extensive press coverage. Additionally, not long after this November 2007 meeting, the Chief Investment Officer's PowerPoint presentation and policy memorandum and the minutes of this meeting were posted on the Agency's Web site. Further, on November 27, 2007, links to additional information about the interfund transfer restrictions were prominently displayed on the TSP website. Before adopting the Board's policy, the Agency sought the advice of the Employee Thrift Advisory Counsel (ETAC) and on December 19, 2007 held an open meeting with the representatives to discuss the proposed approach of using an initial interim regulation followed by a structural limit. This meeting was also subject to extensive press coverage. As soon as practicable after the ETAC meeting, the Agency submitted its interim regulation to the **Federal Register** which published the interim rule on December 27, 2007. The Agency also forwarded a copy of the interim rule to the President of the Senate, the Speaker of the House of Representatives, the Government Accountability Office, and the U.S. Small Business Administration. Continuing with this spirit of openness, the Agency's Executive Director notified every participant about the proposed regulation in his letter that accompanied the annual participant statement mailed in February of 2008.

Some participants questioned whether this regulation was consistent with the Board's fiduciary obligation. The Board's IFT policy decision is completely consistent with, and, more accurately, mandated by, its fiduciary duty. By law, the Board must adopt investment policies that provide for low administrative costs. 5 U.S.C. 8475. The Board's IFT decision helps it to keep costs low.

A few participants stated that the costs explained in the proposed regulation were not persuasive and suggested that the Agency hire an outside company to do an audit. Some participants also challenged the experience and motivations of the Agency's Chief Investment Officer, Tracey Ray. Ms. Ray graduated summa cum laude from Washington College. She was immediately hired by Merrill Lynch and worked there as an account executive for six years, providing investment advice about stocks, bonds, options and mutual funds to clients. After her tenure at Merrill Lynch, she spent 16 years in the investment department of USF&G Corporation, a Baltimore-based *Fortune 500* insurance company, which was purchased by St. Paul Companies in 1998. While there, she served as a Vice President, portfolio manager and trader for stock, bond, option and short-term cash portfolios, and was responsible for the derivatives program. She also completed the program to earn the designation of Chartered Financial Analyst. She left St. Paul Companies in 2001 to take the position of Deputy Chief Investment Officer for the State of Maryland Pension Fund, where she spent four years evaluating, hiring and firing active money managers until she was hired by the Thrift Savings Plan in 2005. She also serves on the Advisory Committee for the Virginia Retirement System's Defined Contribution Plans.

While Ms. Ray's credentials are impeccable, and her study of the problem facing the TSP was diligent, thoughtful, and thorough, it is important to note that the decision to move forward with IFT restrictions was made by the Board members, after careful consideration and acting in their capacity as fiduciaries for the TSP. The Agency, in its notice of proposed rulemaking, explained in great detail the adverse effects of frequent IFT activity. The Agency also made available, on the TSP Web site, the memorandum and presentation that led its Board to adopt such a policy. Since these comments neither critique the Agency's methodology nor make substantive challenges to the accuracy of its conclusion, the Agency determined it would not be prudent to spend TSP money to have an outside auditor verify its determinations.

Several participants wrote that, as of March 31, the Agency will be effectively discriminating against a select group of TSP members and that all TSP members should be treated equally under the current TSP rules. Others wrote that it discriminated against members of the military (many of whom are stationed overseas where mail service takes longer). This comment is directed at the interim regulation which allowed the Executive Director to require those participants who engaged in excessive trading to request IFTs by mail only. Pursuant to the interim regulation, the Agency analyzed the trading activity of all participants in October, November, and December 2007. In January, the Agency sent a letter to all participants who made more than three IFTs each month. The letter warned that if they made more than three IFTs in February, or the following months, the Agency could require them to request IFTs by mail only. Thus, it is not accurate to state that the Agency is discriminating against a select group. The Agency scanned the IFT activity of all participants and warned those who made four or more IFTs in three consecutive months that they must stop. Only those participants who failed to heed the warning have been restricted. Although the Investment Allocation form used for IFTs is not generally available on the TSP Web site, restricted participants are able to access it via the TSP Web site; the Agency has also mailed a copy of the IFT transfer form to participants and they can reproduce it as necessary (or call the ThriftLine to obtain more copies).

Several participants mentioned that the proposed regulation is against the Agency's policy of encouraging participants to make their own retirement decisions. For example, some characterized the regulation as ''paternalistic'' or ''patronizing.'' Further, several participants stated that this move takes away employees' control over their retirement and cited the Thrift Savings Plan Open Elections Act of 2004 (Act). This Act allowed Federal employees and members of the uniformed services to begin or alter their TSP contributions at any time instead of limiting such changes to biannual open-season periods. The Act did not alter the requirement in 5 U.S.C. 8438(d) that the Executive Director prescribe regulations allowing at least two interfund transfers per year. This regulation affords participants many more opportunities to make IFTs than the minimum Congress determined necessary and, further, does not change the Agency's continuing policy of educating its participants so that they can control their own retirement.

Several participants commented that the proposed regulation was contrary to an existing Federal regulation. Section 1601.32(b) of title 5, Code of Federal Regulations does currently provide that there is no limit on the number of IFT requests that may be made by a participant. In 2003, the Executive Director published this regulation pursuant to his authority to prescribe such regulations as may be necessary to administer the Thrift Savings Plan. 5 U.S.C. 8474(b)(5). The Executive Director has determined that, in order to effectively administer the TSP, it is necessary to amend this regulation in order to address the impact of frequent transfers on the TSP.

Several participants stated that the TSP spent millions of dollars upgrading its systems to handle daily interfund transfers, and wasting that investment is inconsistent with the Board's fiduciary duty. The Agency did not move to a daily-valued record-keeping platform in order to facilitate frequent IFTs. This upgrade improved efficiency by spreading the volume of IFTs over the course of a full month, rather than requiring a one-time ''batch-process'' at month's end. This upgrade also eliminated the previous 15-day waiting period between IFT requests and execution. The daily-valued platform also enabled participants to have immediate account information access on the Web site and reduced paper statement costs (thus saving the participants over $3 million per year). Thus, the enhancement to the record-keeping system was not intended to facilitate frequent IFTs. In fact, the Agency's Executive Director and Board have expressed concern over the potential for misuse of the daily-valued platform both before and since its implementation.

In 2004, Agency staff reviewed the TSP's IFT records to determine if the newly enhanced system was being misused. The level of frequent IFT activity was de minimus at the time and there was no need to put restrictions in place.

Since fielding the daily-valued platform, the Agency has added toll-free telephone service, reduced processing and transaction timing, added dual/simultaneous call centers with extended hours, enhanced participant education materials, added a back-up state-of-the-art data center, and implemented the lifecycle funds. During this four-year period, the Agency's budget actually decreased on an annual basis.

In short, the Board takes its fiduciary duty very seriously. It has improved service while decreasing costs. It has adopted this IFT policy because the costs associated with frequent transfers have harmed TSP participants. By law, the Board must adopt investment policies that provide for low administrative costs. 5 U.S.C. 8475. The Board's IFT policy decision is completely consistent with this duty.

One participant wrote that the frequent transferors must be making money or else Congress would have stepped in to prevent these people from harming their retirement accounts. The Board, not Congress, has the statutory authority and duty to act solely in the interest of the Plan's participants and beneficiaries. 5 U.S.C. 8477(b)(1). Although the Agency advised the Congress of its plan to limit IFTs, Agency fiduciaries were solely responsible for this decision.

A participant asked if rebalancing a portfolio which may include adjusting the balances of 10 funds constitutes a single IFT. The answer is yes.

A participant suggested that the TSP ''should buy the EFA index which can be bought and sold with a low fee.'' The Agency believes this participant meant the exchange-traded fund (ETF) which tracks the Europe, Australia and Far East (EAFE) Index and has a stock symbol ''EFA.'' EFA is actually not a low cost alternative as it has an expense ratio of 34 basis points versus the TSP's expense ratio of 1.5 basis points.

A participant noted that comparison to other funds is ''meaningless'' as the TSP had unlimited transfers. Other funds also had unlimited transfers prior to 73 percent of them implementing curbs to reduce market timing activity.

A participant noted that Barclay's should make more use of EAFE futures to offset I Fund transactions. Barclays does make use of EAFE and country futures to offset a portion of I Fund transactions. The same participant noted that the Agency should balance out IFT requests to a single order to buy or sell. The Agency does that. That same participant noted that the Agency needs to evaluate whether total I Fund transactions in 2007 produced net positive or net negative trading costs, on what days and in what amounts. The Agency has that information for each day. The total cost for 2007 was $16,513,454.

Several participants commented they thought the G Fund should not be favored because it is not a good investment and does not keep up with inflation. The Agency is allowing unlimited redemptions to the G Fund to provide a safe harbor for participants who may wish to exit the stock market during times of financial distress. The Agency would also like to note that, by virtue of the fact that the G Fund rate adjusts every month and is based on longer-term Treasury rates, the G Fund is an inflation hedge because interest rates generally rise when inflation rises.

Several participants commented that the TSP should have more investment options. In 2006, the TSP hired an investment consultant to review the TSP's investment choices. The conclusion of that study was that participants were well served by the current fund lineup. The TSP will conduct similar reviews periodically in the future.

Some participants suggested that Agency comparisons to Fidelity, T. Rowe Price, and Vanguard (among others) are imperfect because these plans offer more diverse investment vehicles and that they are for-profit organizations. It is true that those fund families do offer more choices than the TSP, but defined contribution plans do not offer all available Fidelity, Vanguard, or T. Rowe Price funds. In 2006, the Board hired an investment consultant, Ennis Knupp and Associates, to review the plan. The consultant noted that 70 percent of defined contribution plans with more than 5,000 participants offer 15 or fewer investment options. Additionally, as cited before, over 73 percent of defined contribution plans have some type of trading restrictions. Mutual fund families are for-profit organizations, but all redemption fees are credited back to the funds, not to the profits of the companies. Additionally, why would a profit-oriented company, such as Vanguard, prohibit shareholders from repurchasing funds for 60 days unless it truly believed that market timing was detrimental to fund performance? It does so because the company is attempting to maximize performance of the funds by minimizing costs due to market timing activity.

Based on several comments, there seems to be a misconception that when a participant requests an IFT that his or her entire account is sold and repurchased to reflect the new percentages. In fact only the difference between the original percentage and the new percentage is traded, and that is netted against all other participant activity. The investment manager is then given a single dollar amount for each fund each day.

Some participants commented that there is a problem with the contract with Barclays, the investment manager, or that the fund should be managed by a firm better able to control the fees. The Barclays contract is extremely competitive. All of the costs related to the administration of that contract are included in the TSP's 1.5 basis point net administrative expense ratio. Every manager, who participated in the request for proposal process to manage the Funds of the TSP, charges trading costs back to their clients' funds, just as Barclays does for the TSP Funds.

A participant noted that he could not find information on the Vanguard Web site that Vanguard funds could not be repurchased within 60 days of redemption. On the site, in the search function, typing ''frequent trading policy'' will display that information.

The Agency appreciated the opportunity to review and respond to comments from participants who take an active interest in the TSP and wish to offer suggestions. The comment process allowed the Agency to address any misunderstandings about the proposed interfund transfer 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 proposed interfund transfer rule, he did carefully consider all comments received. 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. It will affect only Thrift Savings Plan participants and beneficiaries. To the extent that limiting interfund transfers is necessary to curb excessive trading, very few, if any, ''small entities,'' as defined in 5 U.S.C. 601(6), will be affected by the final rule. This is because the Thrift Savings Plan is sponsored by the U.S. Government and because the interfund transfer limitations are likely to affect primarily Federal employees, members of the uniformed services, and an insubstantial number of financial advisors who may provide advice in connection with the TSP.

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 Government Accountability 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 in 5 CFR Part 1601

Government employees, Pensions, Retirement.

Gregory T. Long,

Executive Director, Federal Retirement Thrift Investment Board.

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

PART 1601—PARTICIPANTS' CHOICES OF TSP FUNDS

■ 1. The authority citation for part 1601 continues to read as follows:

Authority: 5 U.S.C. 8351, 8438, 8474(b)(5) and (c)(1).

■ 2. Amend § 1601.32, by revising paragraph (b) to read as follows:

§ 1601.32 Timing and posting dates.

* * * * *

(b) *Limit.* There is no limit on the number of contribution allocation requests. A participant may make two unrestricted interfund transfers (account rebalancings) per account (e.g., civilian or uniformed services), per calendar month. An interfund transfer will count toward the monthly total on the date posted by the TSP and not on the date requested by a participant. After a participant has made two interfund transfers in a calendar month, the participant may make additional interfund transfers only into the G Fund until the first day of the next calendar month.

[FR Doc. E8–8957 Filed 4–23–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–0367; FRL–8552–4]

Approval and Promulgation of Air Quality Implementation Plans; Montana; Whitefish PM_{10} Nonattainment Area Control Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving State Implementation Plan (SIP) revisions submitted by the Governor of Montana on June 26, 1997, and June 13, 2000. (Portions of the June 26, 1997 submittal were withdrawn by the Governor of Montana on February 8, 1999). These revisions contain an inventory of emissions for Whitefish and establish and require continuation of all control measures adopted and implemented for reductions of particulate aerodynamic diameter less than or equal to 10 micrometers (PM_{10}) in order to attain the PM_{10} National Ambient Air Quality Standards (NAAQS) in Whitefish. Using the PM_{10} clean data areas approach, we are approving the control measures and the emissions inventory that were submitted as part of the PM_{10} nonattainment area SIP for Whitefish. This action is being taken under section 110 of the Clean Air Act (CAA or Act).

DATES: This rule is effective on June 23, 2008 without further notice, unless EPA receives adverse comment by May 27, 2008. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–0367, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: dygowski.laurel@epa.gov* and *ostrand.laurie@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER**