

**FEDERAL RETIREMENT THRIFT INVESTMENT BOARD****5 CFR Parts 1605 and 1606****Correction of Administrative Errors; Lost Earnings Attributable to Employing Agency Errors**

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

**ACTION:** Final rule.

**SUMMARY:** The Executive Director of the Federal Retirement Thrift Investment Board (Board) is amending the Board's regulations describing how an administrative error will be corrected to incorporate changes required by the Federal Erroneous Retirement Coverage Corrections Act (FERCCA). These amendments also explain changes in the TSP record keeping system which were implemented on May 1, 2001.

**EFFECTIVE DATE:** August 22, 2001.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** The Board administers the Thrift Savings Plan (TSP), which was established by the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514, codified, as amended, largely at 5 U.S.C. 8351 and 8401-8479. The TSP is a tax-deferred retirement savings plan for Federal employees, similar to a cash or deferred arrangement established under section 401(k) of the Internal Revenue Code. Sums in the Thrift Savings Plan are held in trust for TSP participants.

On September 19, 2000, Congress enacted the Federal Erroneous Retirement Coverage Corrections Act, title II of Public Law 106-265, 114 Stat. 762, which permits Federal employees and annuitants who were placed in the wrong retirement system to choose between FERS and CSRS Offset. The Office of Personnel Management (OPM) has primary responsibility for implementing FERCCA. On March 19, 2001, OPM published an interim rule in the **Federal Register** (66 FR 15606) implementing its obligations under FERCCA.

On April 19, 2001, the Board published a proposed rule with a request for comments in the **Federal Register** (66 FR 20090) regarding its obligations under FERCCA. The Board received comments from four TSP participants and from two agencies.

The first participant observed that the proposed regulation explains how participants who were misclassified as

CSRS or FERS will be corrected under FERCCA but does not explain how participants who were misclassified as FICA only will be corrected. The Board has therefore clarified this language in the final regulation by adding a new paragraph (d) to section 1605.14.

The second participant questioned how the misclassification of his retirement coverage will be corrected. However, the Board has no role in the correction of misclassification errors, and these questions must be addressed either to the employing agency or to OPM.

The third participant questioned how a retroactive TSP contribution will affect his annuity if he chooses to be reclassified as FERS. OPM, not the Board, manages the annuity portion of the Federal retirement package and this question must be addressed to OPM. He also asked whether a participant, upon being reclassified as FERS, may choose to make up contributions only for a portion of the period of misclassification, *e.g.*, for 1988 through 1999 with no contributions in 2000, and what rate of return will be paid.

Any participant who elects FERS coverage will have the same election opportunities as those afforded correctly covered FERS employees. For example, contribution elections to begin or change the amount of TSP contributions may be made during an open season and will become effective the last month of that open season. See 5 CFR 1600.13(b). Within these restrictions, a participant can make up TSP contributions for specific periods of time of less than a year.

In addition, as provided in § 1605.11(c)(5), makeup contributions are invested in accordance with the participant's contribution allocation of record at the time the makeup contributions are posted to the account; if a participant does not have a contribution allocation on file for that date, the makeup contributions will be invested in the Government Securities Investment (G) Fund. Lost earnings on makeup contributions, however, are based upon the participant's contribution allocation of record for the time the contribution would have been made had the participant been correctly covered by FERS, or, if no contribution allocation is on record for that date, on the G Fund rate.

The third commenter asked whether a participant must file an amended tax return if he or she makes retroactive contributions. Makeup contributions for FERCCA participants are treated as tax-deferred compensation for the year in which they are made. Thus, makeup contributions will reduce taxable

income for the year in which they are actually made and not for the year(s) in which they should have been made. (However, if the makeup contributions should have been made in a prior year, they are subject to that year's Internal Revenue Service elective deferral limit and not the current year's limit. 5 CFR 1605.11(c)(6).)

A fourth participant disagreed with the requirement in § 1605.16(a)(2) that contribution allocation errors occurring before May 1, 2001, may be corrected only if they are discovered within 30 days after the error occurs. However, as the Board noted in promulgating prior regulations, 65 FR 19863, participants are expected to be diligent in discovering errors in their accounts.

One agency, the Department of Defense, Civilian Personnel Management Services, requested that the Board clarify proposed § 1605.13(d) which permits a participant who prevails in a back pay case to return contributions that were previously withdrawn. Specifically, the agency asked that the Board clarify whether these contributions will be reinvested based upon the participant's contribution allocation at the time of separation or the allocation at the time the account balance is restored. The Board has clarified this paragraph by adding language that makes it clear that returned contributions will be reinvested based upon the allocation of record at the time of separation. If the participant desires a different allocation, he or she may file a Form TSP-50 to request an interfund transfer.

The agency also asks whether a participant who prevails in a back pay case and who chooses to return contributions that were previously withdrawn could also choose to reinstate a loan which was previously declared a taxable distribution. The Board has clarified this paragraph by adding a new paragraph (e) to § 1605.13 making it clear that such a participant also may reinstate a loan.

Comments were also received from a second agency, the Defense Finance and Accounting Service (DFAS). DFAS was concerned with whether the Board will continue its practice of issuing advice to agencies in the form of TSP Bulletins and cover FERCCA corrections. The Board does indeed intend to continue to issue TSP Bulletins for use by agencies.

DFAS also asks for clarification of the "as of date" and distinction between the "attributable pay date." Both terms are defined in § 1605.1. The term "as of date" is used in part 1605 to explain the procedures for reporting a late contribution, as in paragraphs 1605.11(b)(1) and (c)(4). In contrast, the

term “attributable pay date” is used only in connection with negative adjustments, as in paragraphs 1605.12(b)(1) and (c)(2).

Section 1605.14(a)(1) allows a CSRS participant who was misclassified as FERS to choose whether the employee contributions that were made during the period of misclassification should remain in the account or be returned to the participant. DFAS asks whether the Board intends to develop a new form for this transaction. The Board does not believe that a new universal form, applicable to all agencies, is required. This is a transaction between the affected participant and his or her payroll office. Agencies will have to devise a method by which to record their participants’ choices, but they do not need to advise the TSP.

DFAS also asks why the FERS participant who was erroneously classified as CSRS does not have a similar choice whether to leave his or her employee contributions in the TSP or to remove them. This determination, however, was made by Congress when it enacted FERCCA and not by the Board. The distinction is based upon the expectation that FERS employees will need their TSP contributions to make up part of their retirement income, while that is not necessarily the case with CSRS employees.

Finally, DFAS objects to the requirement, in § 1605.14(c)(3), that the TSP declare an outstanding loan to be a distribution (and therefore taxable), see § 1655.13, when a participant who was misclassified as either FERS or CSRS is reclassified as FICA only. However, FERSA does not allow persons whose retirement coverage is FICA only to participate in the TSP. Thus, these persons cannot have a TSP account or make loan repayments to a TSP account.

Other than the changes to §§ 1605.13 and 1605.14, discussed above, the Board adopts the provisions of the proposed rule as the final rule.

### 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, and 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. 801(a)(1)(A), the Board submitted a report containing these rules and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in today’s **Federal Register**. These rules are not major rules as defined at 5 U.S.C. 804(2).

### List of Subjects in 5 CFR Parts 1605 and 1606

Claims, Employment benefit plans, Government employees, Pensions, Retirement.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons set out in the preamble, 5 CFR chapter VI is amended as set forth below:

1. Part 1605 is revised to read as follows:

### PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

#### Subpart A—General

Sec.

1605.1 Definitions.

#### Subpart B—Employing Agency Errors

1605.11 Makeup of missed or insufficient contributions.

1605.12 Removal of erroneous contributions.

1605.13 Back pay awards and other retroactive pay adjustments.

1605.14 Misclassified retirement coverage.

1605.15 [Reserved]

1605.16 Claims for correction of employing agency errors; time limitations.

#### Subpart C—Board or TSP Record Keeper Errors

1605.21 Plan-paid lost earnings and other corrections.

1605.22 Claims for correction of Board or TSP record keeper error; time limitations.

### Subpart D—Miscellaneous Provisions

1605.31 Contributions missed as a result of military service.

**Authority:** 5 U.S.C. 8351 and 8474. Section 1605.14 also issued under Title II, Pub. L. 106–265, 114 Stat. 770.

### Subpart A—General

#### § 1605.1 Definitions.

As used in this part:

“*As of*” date means the date on which a TSP contribution or other transaction should have taken place.

*Attributable pay date* ordinarily means the pay date of an erroneous contribution with respect to which a negative adjustment is being made. If, however, the erroneous contribution was a makeup or late contribution, the attributable pay date is the “as of” date associated with the erroneous makeup or late contribution.

*Board error* means any act or omission by the Board which is not in accordance with applicable statutes, regulations, or administrative procedures made available to employing agencies and/or TSP participants.

*Contribution allocation of record* means the last contribution allocation on file for the participant’s account, which either will have been derived pursuant to § 1601.12 of this chapter or will result from the participant’s filing of an election pursuant to § 1601.13 of this chapter.

*Employing agency* means the organization that employs an individual eligible to contribute to the TSP and that has authority to make personnel compensation decisions for the individual.

*Employing agency error* means any act or omission by an employing agency that is not in accordance with all applicable statutes, regulations, or administrative procedures, including internal procedures promulgated by the employing agency and TSP procedures provided to employing agencies by the Board.

*FERCCA correction* means the correction of a retirement coverage error pursuant to the Federal Erroneous Retirement Coverage Corrections Act, title II, Public Law 106–265, 114 Stat. 770.

*Late contributions* means: Employee contributions that were timely deducted from a participant’s basic pay but were not timely reported to the TSP record keeper for investment; employee contributions that were timely reported to the TSP but were not posted to the participant’s account by the TSP because the payment record on which they were submitted contained errors; and attributable agency matching

contributions and agency automatic (1%) contributions that were not timely reported.

*Lost earnings record* means a data record containing information enabling the TSP system to compute lost earnings.

*Makeup contributions* are employee contributions that should have been deducted from a participant's basic pay, or employer contributions that should have been charged to an employing agency, on an earlier date but were not deducted or charged and, consequently, are being deducted or charged currently.

*Negative adjustment* means the removal of money from a participant's TSP account by an employing agency.

*Negative adjustment record* means a data record submitted by an employing agency to remove from a participant's TSP account money which was previously submitted in error.

*Pay date* means the date established by an employing agency for payment of its employees.

*Payment record* means a data record submitted by an employing agency to report contributions or loan payments to a participant's TSP account.

*Record keeper error* means any act or omission by the TSP record keeper that is not in accordance with applicable statutes, regulations, or administrative procedures made available to employing agencies and/or TSP participants.

*Source of contributions* means employee contributions, agency automatic (1%) contributions, or agency matching contributions.

*TSP record keeper* means the entity that is engaged by the Board to perform record keeping services for the Thrift Savings Plan. The TSP record keeper is the National Finance Center, United States Department of Agriculture, located in New Orleans, Louisiana.

## Subpart B—Employing Agency Errors

### § 1605.11 Makeup of missed or insufficient contributions.

(a) *Applicability.* This section applies whenever, as the result of an employing agency error, a participant does not receive all of the TSP contributions to which he or she is entitled. This includes situations in which an employing agency error prevents a participant from making an election to contribute to his or her TSP account, in which an employing agency fails to implement a contribution election properly submitted by a participant, in which an employing agency fails to make agency automatic (1%) contributions or agency matching contributions that it is required to make, or in which an employing agency

otherwise erroneously contributes less to the TSP for a participant's account than it should have. The corrections required by this section must be made in accordance with this part and the procedures provided to employing agencies by the Board in bulletins or other guidance. It is the responsibility of the employing agency to determine whether it has made an error that entitles a participant to error correction under this section.

(b) *Employer makeup contributions.* If an employing agency has failed to make agency automatic (1%) contributions that are required under 5 U.S.C. 8432(c)(1)(A), agency matching contributions that are required under section 8432(c)(2), or conversion contributions that are required under section 8432(c)(3), the following rules apply:

(1) The employing agency must promptly submit all missed contributions to the TSP record keeper on behalf of the affected participant. For each pay date involved, the employing agency must submit a separate payment record showing the "as of" date for the contributions. Employer makeup contributions will be invested in accordance with the participant's contribution allocation of record at the time the makeup contributions are posted to the account.

(2) If the participant is entitled to lost earnings on employer makeup contributions pursuant to 5 CFR part 1606, the employing agency must also submit lost earnings records.

(c) *Employee makeup contributions.* Within 30 days of receiving information from his or her employing agency indicating that the employing agency acknowledges that an error has occurred which has caused less in employee contributions to be made to the participant's account than should have been made, a participant may elect to establish a schedule of makeup contributions to replace the missed contributions through future payroll deductions. Employee makeup contributions can be made in addition to any TSP contributions that the participant is otherwise entitled to make. The following rules apply to employee makeup contributions:

(1) The schedule of makeup contributions elected by the participant must establish the dollar amount of the contributions to be made each pay period over the duration of the schedule. The contribution amount per pay period may vary during the course of the schedule, but the amounts to be contributed must be established when the schedule is created. The schedule may not exceed four times the number

of pay periods over which the error occurred.

(2) At its discretion, an employing agency may set a ceiling on the length of a schedule of employee makeup contributions which is less than four times the number of pay periods over which the error occurred. The ceiling may not, however, be less than twice the number of pay periods over which the error occurred.

(3) The employing agency must implement the participant's schedule of makeup contributions as soon as practicable.

(4) For each pay date involved, the employing agency must submit a separate payment record showing the "as of" date for the employee makeup contribution. An employee is not eligible to make up contributions with an "as of" date occurring within six months after a financial hardship in-service withdrawal, as provided in § 1650.33 of this chapter.

(5) Employee makeup contributions will be invested in accordance with the participant's contribution allocation of record at the time the makeup contributions are posted to the account. If no contribution allocation is on file, the contributions will be invested in the G Fund.

(6) Employee makeup contributions will not be considered in applying the maximum amount per pay period that a participant is permitted to contribute to the TSP, but will be included for purposes of applying the annual limits contained in sections 402(g) and 415(c) of the Internal Revenue Code (I.R.C.) (26 U.S.C. 402(g) and 415(c)). For purposes of applying the annual limits of sections 402(g) and 415(c) of the I.R.C., employee makeup contributions will be applied against the limit for the year in which the contributions should have been made (i.e., the year of the "as of" date).

(i) Before establishing a schedule of employee makeup contributions, the employing agency must review any schedule proposed by the affected participant, as well as the participant's prior TSP contributions, if any, to determine whether the makeup contributions, when combined with prior contributions for the same year, would exceed the annual contribution limit(s) contained in sections 402(g) and 415(c) of the I.R.C. for the year(s) with respect to which the contributions are being made.

(ii) The employing agency must not permit contributions that, when combined with prior contributions, would exceed the applicable annual contribution limits contained in sections 402(g) and 415(c) of the I.R.C.

(7) A schedule of employee makeup contributions may be suspended if a participant has insufficient net pay to permit the makeup contributions. If this happens, the period of suspension should not be counted against the maximum number of pay periods to which the participant is entitled in order to complete the schedule of makeup contributions.

(8) A participant may elect to terminate a schedule of employee makeup contributions at any time, but a termination is irrevocable. If a participant separates from Government service, the participant may elect to accelerate the payment schedule by a lump sum contribution from his or her final paycheck.

(9) At the same time that a participant makes up missed employee contributions, the employing agency must make any agency matching contributions that would have been made had the error not occurred. Agency matching contributions must be submitted pursuant to the rules set forth in paragraph (b) of this section. A participant may not receive matching contributions associated with any employee contributions that are not actually made up. If employee makeup contributions are suspended in accordance with paragraph (c)(7) of this section, the payment of agency matching contributions must also be suspended.

(10) If a participant transfers to an employing agency different from the one at which the participant was employed at the time of the missed contributions, it remains the responsibility of the former employing agency to determine whether employing agency error was responsible for the missed contributions. If it is determined that such an error has occurred, the current agency must take any necessary steps to correct the error. The current agency may seek reimbursement from the former agency of any amount that would have been paid by the former agency had the error not occurred.

(11) Employee makeup contributions may be made only by payroll deduction from basic pay. Contributions by check, money order, cash, or other form of payment directly from the participant to the TSP, or from the participant to the employing agency for deposit to the TSP, are not permitted.

(12) If the participant is entitled to lost earnings on the makeup contributions pursuant to 5 CFR part 1606, the employing agency must also submit lost earnings records.

(d) *Late contributions.* If, as a result of agency error, the TSP posts a late contribution to a participant's account

more than 30 calendar days after the "as of" date that is reported by the employing agency on the payment record, the employing agency must submit any lost earnings records pursuant to 5 CFR part 1606. Late contributions will be invested in accordance with the participant's contribution allocation of record on the posting date.

#### **§ 1605.12 Removal of erroneous contributions.**

(a) *Applicability.* This section applies to negative adjustments. These include situations in which, because of an employing agency error, employee contributions in excess of the amount elected by a participant are contributed to a participant's account, employee contributions (and any attributable agency matching contributions) are made on behalf of a participant who did not elect to make contributions, or excess employer contributions are made to a participant's account. Negative adjustments resulting from a FERCCA correction are addressed in § 1605.14.

(b) *Method of correction.* Negative adjustment records must be submitted by employing agencies in accordance with this part and with any other procedures provided by the Board.

(1) To remove money from a participant's account, the employing agency must submit, for each attributable pay date involved, a negative adjustment record stating the amount of the erroneous contribution being removed, the attributable pay date with respect to which the erroneous contribution was made, and the source(s) of the contributions. The TSP record keeper will derive the investment of the negative adjustment from the allocation of any contribution which was reported for the attributable pay date. If no contribution was submitted for the attributable pay date, the negative adjustment will not be processed.

(2) A negative adjustment record may be for all or a part of the contributions made for the attributable pay date and source of contributions; however, for each source of contributions, the negative adjustment may not exceed the amount of contributions made for that date, less any prior negative adjustments for the same date.

(c) *Processing negative adjustments.* Negative adjustments will be processed in accordance with the following rules:

(1) Negative adjustment records received and accepted by the TSP record keeper by the second-to-last business day of a month will be processed effective as of the end of that month. Negative adjustment records

accepted by the TSP record keeper after the second-to-last business day of a month will be processed effective as of the end of the following month; and

(2) For each negative adjustment record, the TSP record keeper will determine attributable earnings on the amount of the adjustment by source of contribution and investment fund. Thus, earnings and losses from different sources will not be netted against each other, and earnings and losses from different investment funds will not be netted against each other. Further, interfund transfers occurring between the attributable pay date of the negative adjustment and the date the adjustment is processed by the TSP record keeper will not be considered.

(d) *Employee contributions.* The following rules apply to negative adjustments involving employee contributions:

(1) If, on the posting date, the amount calculated under paragraph (c) of this section is greater than the amount of the proposed negative adjustment, the full amount of the adjustment will be returned to the employing agency. Subject to paragraph (d)(4) of this section, the earnings on the erroneous contribution will remain in the participant's account;

(2) If, on the posting date, the amount calculated under paragraph (c) of this section is less than the amount of the proposed negative adjustment, the amount of the adjustment, reduced by the investment loss, will be returned to the employing agency. However, an investment loss will not affect the employing agency's obligation to refund to the participant the full amount of the erroneous contribution;

(3) If an employing agency removes erroneous employee contributions from a participant's account, it must also remove, under paragraph (e) of this section, any attributable agency matching contributions; and

(4) If all employee contributions are removed from a participant's account under the rules set forth in this section, the participant may choose to leave any earnings in the account unless he or she was not eligible to have an account in the TSP at the time earnings were credited to the account, and remains ineligible. If the participant was ineligible for a TSP account (and remains ineligible), the earnings will be paid to the participant. If earnings remain in the account, upon the participant's separation from Government service, they will be subject to the same withdrawal rules as apply to any other funds in a participant's account.

(e) *Employer contributions.* The following rules apply to negative adjustments involving erroneous employer contributions:

(1) Erroneous employer contributions will be returned to the employing agency only if the negative adjustment record is posted by the TSP record keeper within one year of the date the erroneous contribution was posted. If one year or more has elapsed when the negative adjustment record is posted, the amount computed under paragraph (c) of this section will be removed from the participant's account and used to offset TSP administrative expenses;

(2) If the erroneous contribution has been in the participant's account for less than one year when the negative adjustment record is posted and the amount computed under paragraph (c) of this section is greater than the amount of the adjustment, the employing agency will receive the full amount of the erroneous contribution. Any earnings attributable to the erroneous contribution will be removed from the participant's account and used to offset TSP administrative expenses;

(3) If the erroneous contribution has been in the participant's account for less than one year when the negative adjustment record is posted and the amount computed under paragraph (c) of this section is less than the amount of the adjustment, the employing agency will receive the amount of the erroneous contribution reduced by the investment loss; and

(4) An employing agency's obligation to submit negative adjustment records to remove erroneous contributions from a participant's account is not affected by the length of time the contributions have been in the account.

(f) *Each negative adjustment to be processed separately.* For purposes of paragraphs (d) and (e) of this section—

(1) If multiple negative adjustments for a participant are posted on the same business day, the amount removed from the participant's account and/or returned to the employing agency will be determined separately for each adjustment, for each source of contributions, and for each investment fund. Earnings and losses for erroneous contributions made on different dates will not be netted against each other. Instead, each source of contributions and each fund will be treated as separate for purposes of these calculations;

(2) The amount computed by application of the rules in this section will be removed from the participant's account pro rata from all investment funds, by source, based on the allocation of the participant's most

recent month-end valued account balance; and

(3) If there is insufficient money in the same source of contributions to cover the amount to be removed, the negative adjustment record will be rejected.

#### **§ 1605.13 Back pay awards and other retroactive pay adjustments.**

(a) *Participant not employed.* The following rules apply to participants who receive a back pay award or other retroactive pay adjustment for a period during which the participant was separated from Government employment:

(1) If the participant is reinstated to Government employment, immediately upon reinstatement the employing agency must give the participant the opportunity to submit a contribution election to make current contributions. The contribution election will be effective as soon as administratively feasible, but no later than the first day of the first full pay period after it is received;

(2) The employing agency must give the participant the following options for electing makeup contributions:

(i) If the participant had a contribution election on file when he or she separated, upon the participant's reinstatement to Government employment, that election will be reinstated for purposes of the makeup contributions; or

(ii) Instead of making contributions for the period of separation in accordance with the reinstated contribution election, the participant may submit a new contribution election for any open season(s) that occurred during the period of separation;

(3) All makeup contributions under this section will be invested based on the participant's contribution allocation of record at the time the makeup contributions are posted to the account; and

(4) The employing agency must submit lost earnings records pursuant to 5 CFR part 1606. Lost earnings will be calculated and credited to a participant's account in accordance with 5 CFR part 1606 using the rates of return for the G Fund unless otherwise requested by the agency (with the concurrence of the participant), or as ordered by a court or other tribunal with jurisdiction over the participant's back pay case.

(b) *Participant employed.* The following rules apply to participants who receive a back pay award or other retroactive pay adjustment for a period during which the participant was not

separated from Government employment:

(1) The participant will be entitled to make up contributions for the period covered by the back pay award or retroactive pay adjustment only if for that period—

(i) The participant had designated a percentage of basic pay to be contributed to the TSP; or

(ii) The participant had designated a dollar amount of contributions each pay period which equaled the applicable ceiling (FERS or CSRS) on contributions per pay period, and which, therefore, was limited as a result of the reduction in pay that is made up by the back pay award or other retroactive pay adjustment;

(2) The employing agency must compute the amount of additional employee contributions, agency matching contributions, and agency automatic (1%) contributions that would have been contributed to the participant's account had the reduction in pay leading to the back pay award or other retroactive pay adjustment not occurred; and

(3) If the participant is entitled to lost earnings pursuant to 5 CFR part 1606, the employing agency must also submit lost earnings records.

(c) *Contributions to be deducted before payment or other retroactive pay adjustment.* Employee makeup contributions required under paragraphs (a) and (b) of this section:

(1) Must be computed before the back pay award or other retroactive pay adjustment is paid, deducted from the back pay or other retroactive pay adjustment, and submitted to the TSP record keeper;

(2) Must not cause the participant to exceed the annual contribution limit(s) contained in sections 402(g) and 415(c) of the I.R.C. (26 U.S.C. 402(g) and 415(c)) for the year(s) with respect to which the contributions are being made, taking into consideration the TSP contributions already made in (or with respect to) that year; and

(3) Must be accompanied by attributable agency matching contributions. In any event, regardless of whether a participant elects to make up employee contributions, the employing agency must make all appropriate agency automatic (1%) contributions associated with the back pay award or other retroactive pay adjustment.

(d) *Prior withdrawal of TSP account.* If a participant has withdrawn his or her TSP account, other than by purchasing an annuity, and the separation from Government employment upon which the withdrawal was based is reversed,

resulting in reinstatement of the participant without a break in service, the participant will have the option to restore the amount withdrawn to his or her TSP account. The right to restore the withdrawn funds will expire if notice is not provided by the participant to the Board within 90 days of reinstatement. If the participant returns the funds that were withdrawn, they will be posted to the participant's account based on his or her contribution allocation of record at the time of separation. If no contribution allocation is on file, the contributions will be invested in the G Fund. No lost earnings will be paid on any restored funds.

(e) Participants who are covered by paragraph (d) of this section and who elect to return funds that were withdrawn may also elect to reinstate a loan which was previously declared to be a taxable distribution.

#### **§ 1605.14 Misclassified retirement coverage.**

(a) If a CSRS participant is misclassified by an employing agency as a FERS participant, when the misclassification is corrected:

(1) Employee contributions that exceed the applicable contribution percentage for the pay period(s) involved may remain in the participant's account. However, the participant may choose to have such employee contributions or all of the employee contributions made during the period of misclassification removed from his or her account and refunded to the participant. If the participant requests a refund of employee contributions, the employing agency must submit negative adjustment records, under the procedures of § 1605.12, to request removal of these funds;

(2) The employing agency must, under the procedures of § 1605.12, remove all employer contributions made to the participant's account during the period of misclassification. Employer contributions that have been in the account for less than one year will be returned to the employing agency; employer contributions that have been in the participant's account for one year or more will be removed from the account and used to offset TSP administrative expenses; and

(3) If the employing agency fails to submit a negative adjustment record under the procedures of § 1605.12(b) to remove employer contributions, after all such contributions have been in the participant's account for more than one year the TSP recordkeeper will remove them from the account and use such

amounts to offset TSP administrative expenses.

(b) If a FERS participant is misclassified by an employing agency as a CSRS participant, when the misclassification is corrected:

(1) The participant may not elect to have the contributions made while classified as CSRS removed from his or her account;

(2) The participant may, under the rules of § 1605.11, elect to make up contributions that he or she would have been eligible to make as a FERS participant during the period of misclassification;

(3) The employing agency must, under the rules of § 1605.11, make agency automatic (1%) contributions and agency matching contributions on employee contributions that were made while the participant was misclassified;

(4) The employing agency must submit lost earnings records for makeup employer contributions pursuant to 5 CFR part 1606; and

(5) If the retirement coverage correction is a FERCCA correction, the participant is entitled to lost earnings on makeup employee contributions and the employing agency must submit lost earnings records pursuant to 5 CFR part 1606. However, if employee contributions were made up before the Office of Personnel Management implements its regulations on FERCCA corrections, the amount of lost earnings will be calculated by the Office of Personnel Management, pursuant to its regulations, and provided to the employing agency for transmission to the TSP record keeper.

(c) If a participant was misclassified as either FERS or CSRS and the retirement coverage is corrected to FICA only, the participant is no longer eligible to participate in the TSP.

(1) Employee contributions in the account are subject to the rules in paragraph (a)(1) of this section.

(2) Employer contributions in the account are subject to the rules in paragraphs (a)(2) and (a)(3) of this section.

(3) The participant will be deemed to be separated from Federal service for all TSP purposes. If the participant has an outstanding loan, it will be subject to the provisions of 5 CFR 1655.13. The participant may make a TSP post-employment withdrawal election pursuant to 5 CFR part 1650, subpart B, and the withdrawal will be subject to the provisions of 5 CFR 1650.60(b).

(d) If a FERS or CSRS participant is misclassified by an employing agency as FICA only, when the misclassification is corrected the participant may, pursuant to § 1605.11 of this part, elect to make

up contributions that he or she would have been eligible to make as a FERS or CSRS participant during the period of misclassification. If the participant makes up employee contributions, the rules in paragraph (b)(5) of this section apply. If the participant is corrected to FERS, the rules in paragraphs (b)(3) and (b)(4) of this section also apply.

#### **§ 1605.15 [Reserved]**

#### **§ 1605.16 Claims for correction of employing agency errors; time limitations.**

(a) *Agency's discovery of error.* (1) Upon discovery of an error made within the past six months involving the correct or timely remittance of payments to the TSP (other than a contribution allocation error as covered in paragraph (a)(2) of this section or a retirement system misclassification error, as covered in paragraph (c) of this section), an employing agency must promptly correct the error on its own initiative. If the error was made more than six months before its discovery, the agency may exercise sound discretion in deciding whether to correct it, but, in any event, the agency must act promptly in doing so.

(2) An employing agency must promptly correct a contribution allocation error that occurred before May 1, 2001, on its own initiative if it is discovered within 30 days of its first occurrence. No contribution allocation error that occurred before May 1, 2001, may be corrected if it is not the subject of a timely discovery.

(b) *Participant's discovery of error.* (1) If an agency fails to discover an error of which a participant has knowledge involving the correct or timely remittance of a payment to the TSP (other than a contribution allocation error as covered by paragraph (b)(2) of this section, or a retirement system misclassification error as covered by paragraph (c) of this section), the participant may file a claim for correction of the error with his or her employing agency without a time limit. The agency must promptly correct any such error for which the participant files a claim within six months of its occurrence; the correction of any such error for which the participant files a claim after that time is in the agency's sound discretion.

(2) A participant may file a claim for correction of a contribution allocation error made before May 1, 2001, with his or her employing agency no later than 30 days after the participant receives a TSP participant statement first reflecting the error. The agency must promptly correct such errors.

(3) If a participant fails to file a claim for correction of an error described in paragraph (b)(2) of this section in a timely manner, the error will not be corrected.

(c) *Retirement system misclassification error.* Errors arising from retirement system misclassification must be corrected no matter when they are discovered, whether by an agency or a participant.

(d) *Agency procedures.* Each employing agency must establish procedures for participants to submit claims for correction under this subpart. Each employing agency's procedures must include the following:

(1) The employing agency must provide the participant with a decision on any claim within 30 days of its receipt, unless the employing agency provides the participant with good cause for requiring a longer period to decide the claim. A decision to deny a claim in whole or in part must be in writing and must include the reasons for the denial, citations to any applicable statutes, regulations, or procedures, a description of any additional material that would enable the participant to perfect the claim, and a statement of the steps necessary to appeal the denial;

(2) The employing agency must permit a participant at least 30 days to appeal the employing agency's denial of all or any part of a claim for correction under this subpart. The appeal must be in writing and addressed to the agency official designated in the initial decision or in procedures promulgated by the agency. The participant may include with his or her appeal any documentation or comments that the participant deems relevant to the claim;

(3) The employing agency must issue a written decision on a timely appeal within 30 days of receipt of the appeal, unless the employing agency provides the participant with good cause for requiring a longer period to decide the appeal. The employing agency decision must include the reasons for the decision, as well as citations to any applicable statutes, regulations, or procedures; and

(4) If the agency decision on the appeal is not issued in a timely manner, or if the appeal is denied in whole or in part, the participant will be deemed to have exhausted his or her administrative remedies and will be eligible to file suit against the employing agency under 5 U.S.C. 8477. There is no administrative appeal to the Board of a final agency decision.

### Subpart C—Board or TSP Record Keeper Errors

#### § 1605.21 Plan-paid lost earnings and other corrections.

(a) *Plan-paid lost earnings.* (1) Subject to paragraph (a)(3) of this section, if, because of an error committed by the Board or the TSP record keeper, a participant's account is not credited or charged with the earnings or losses that he or she would have received had the error not occurred, the participant's TSP account will be credited (or charged) with the difference between the earnings (or losses) it actually received and the earnings (or losses) it would have received had the error not occurred.

(2) Errors that warrant the crediting of earnings or charging of investment losses under paragraph (a)(1) of this section include, but are not limited to:

(i) Delay in crediting contributions or other monies to a participant's account;

(ii) Improper issuance of a loan or withdrawal payment to a participant or beneficiary which requires the money to be restored to the participant's account; and

(iii) Investment of all or part of a participant's account in the wrong investment fund(s).

(3) A participant will not be entitled to earnings under paragraph (a)(1) of this section if, during the period the participant's account received credit for less earnings than it would have received but for Board or record keeper error, the participant had the use of the money on which the earnings would have accrued.

(4) If the participant continued to have a TSP account, or would have continued to have a TSP account but for the Board or TSP record keeper error, earnings or losses under paragraph (a)(1) of this section will be computed for the relevant period based upon the investment funds in which the affected monies would have been invested had the error not occurred. If the participant did not have, and should not have had, an account in the TSP during this period, then the earnings will be computed using the G Fund rate of return for the relevant period and the monies returned to the participant.

(b) *Other corrections.* The Executive Director may, in his discretion and consistent with the requirements of applicable law, correct any other errors not specifically addressed in this section, including payment of lost earnings, if the Executive Director determines that the correction would serve the interests of justice and fairness and equity among all participants of the TSP.

#### § 1605.22 Claims for correction of Board or TSP record keeper errors; time limitations.

(a) *Filing claims.* Claims for correction of Board or TSP record keeper errors under this subpart may be submitted initially either to the TSP record keeper or the Board. The claim must be in writing and may be from the affected participant or beneficiary.

(b) *Board's or TSP record keeper's discovery of error.* (1) Upon discovery of an error made within the past six months involving a receipt or a disbursement, the Board or TSP record keeper must promptly correct the error on its own initiative. If the error was made more than six months before its discovery, the Board or the TSP record keeper may exercise sound discretion in deciding whether to correct the error, but, in any event, must act promptly in doing so.

(2) For errors concerning contribution allocations or interfund transfers, the Board or the TSP record keeper must promptly correct the error if it is discovered before 30 days after the issuance of the earlier of the most recent TSP participant (or loan) statement or transaction confirmation that reflected the error. If it is discovered after that time, the Board or TSP record keeper may use its sound discretion in deciding whether to correct it, but, in any event, must act promptly in doing so.

(c) *Participant's or beneficiary's discovery of error.* (1) If the Board or TSP record keeper fails to discover an error of which a participant or beneficiary has knowledge involving a receipt or a disbursement, the participant or beneficiary may file a claim for correction of the error with the Board or the TSP record keeper without time limit. The Board or the TSP record keeper must promptly correct any such error for which the participant or beneficiary filed a claim within six months of its occurrence; the correction of any such error for which the participant or beneficiary filed a claim after that time is in the sound discretion of the Board or TSP record keeper.

(2) For errors involving contribution allocations or interfund transfers of which a participant or beneficiary has knowledge, he or she may file a claim for correction with the Board or TSP record keeper no later than 30 days after receipt of the earlier of a TSP participant (or loan) statement or transaction confirmation reflecting the error. The Board or TSP record keeper must promptly correct such errors.

(3) If a participant or beneficiary fails to file a claim for correction of contribution allocations or interfund transfers in a timely manner, the Board

or TSP record keeper may nevertheless, in its sound discretion, correct any such error that is brought to its attention.

(d) *Processing claims.* (1) If the initial claim is submitted to the TSP record keeper, the TSP record keeper may either respond directly to the claimant, or may forward the claim to the Board for response. If the TSP record keeper responds to a claim, and all or any part of the claim is denied, the claimant may request review by the Board within 90 days of the date of the record keeper's response.

(2) If the Board denies all or any part of a claim (whether upon review of a TSP record keeper denial or upon an initial review by the Board), the claimant will be deemed to have exhausted his or her administrative remedy and may file suit under 5 U.S.C. 8477. If the claimant does not submit a request to the Board for review of a claim denial by the TSP record keeper within the 90 days permitted under paragraph (d)(1) of this section, the claimant will be deemed to have accepted the TSP record keeper's decision.

#### Subpart D—Miscellaneous Provisions

##### **§ 1605.31 Contributions missed as a result of military service.**

(a) *Applicability.* This section applies to employees who meet the conditions specified at § 1620.40 of this chapter and who are eligible to receive or to make up contributions missed as a result of military service.

(1) *Missed employee contributions.* Eligibility for making up missed employee contributions will be determined in accordance with the rules specified at 5 CFR part 1620, subpart E. Missed employee contributions will be made up in accordance with the rules specified in § 1605.20(c).

(2) *Missed employer contributions.* Missed agency automatic (1%) contributions will be determined in accordance with the rules specified at 5 CFR part 1620, subpart E.

(i) If an employee makes up missed employee contributions, attributable agency matching contributions must be made accordingly.

(ii) The employing agency must submit lost earnings records for missed employer contributions pursuant to 5 CFR part 1606. Lost earnings may be calculated using the rates of return based on the contribution allocation(s) on file for the participant during the period of military service or using the rates of return for the G Fund; the participant must make this election at the same time his or her makeup

schedule is established pursuant to § 1605.11(c).

(b) [Reserved]

#### **PART 1606—LOST EARNINGS ATTRIBUTABLE TO EMPLOYING AGENCY ERRORS**

2. The authority citation for part 1606 is revised to read as follows:

**Authority:** 5 U.S.C. 8432a, 8474(b)(3), and (c)(1). Section 1606.5 also issued under Title II, Pub. L. 106–265, 114 Stat. 770.

3. Section 1606.2 is revised to read as follows:

##### **§ 1606.2 Definitions.**

As used in this part:

*Agency automatic (1%) contributions* means any contributions made under 5 U.S.C. 8432(c)(1) and (c)(3).

*Agency matching contributions* means any contributions made under 5 U.S.C. 8432(c)(2).

*“As of” date* means the date on which TSP contributions or other transactions should have been made.

*Board error* means any act or omission by the Board that is not in accordance with applicable statutes, regulations, or administrative procedures made available to employing agencies and/or TSP participants.

*Employee contributions* means any contributions to the Thrift Savings Plan made under 5 U.S.C. 8351(a), 8432(a), or 8440a through 8440e.

*Employer contributions* means agency automatic (1%) contributions under 5 U.S.C. 8432(c)(1) or 8432(c)(3) and agency matching contributions under 5 U.S.C. 8432(c)(2).

*Employing agency* means the organization that employs an individual eligible to contribute to the TSP and that has authority to make personnel compensation decisions for the individual.

*Employing agency error* means any act or omission by an employing agency that is not in accordance with all applicable statutes, regulations, or administrative procedures, including internal procedures promulgated by the employing agency and TSP procedures provided to employing agencies by the Board.

*FERCCA correction* means the correction of a retirement coverage error pursuant to the Federal Erroneous Retirement Coverage Corrections Act, Public Law 106–265, 114 Stat. 770.

*Late contributions* means employee contributions that were timely deducted from a participant's basic pay but were not timely reported to the TSP record keeper for investment; employee contributions that were timely reported to the TSP but were not posted to the

participant's account by the TSP because the payment record on which they were submitted contained errors; and attributable agency matching contributions and agency automatic (1%) contributions that were not timely reported.

*Lost earnings record* means a data record containing information enabling the TSP system to compute lost earnings.

*Makeup contributions* are employee contributions that should have been deducted from a participant's basic pay, or employer contributions that should have been charged to an employing agency, on an earlier date but were not deducted or charged and, consequently, are being deducted or charged currently.

*Negative adjustment* means the removal of money from a participant's TSP account by an employing agency.

*Negative adjustment record* means a data record submitted by an employing agency to remove money from a participant's TSP account previously submitted in error.

*Pay date* means the date established by an employing agency for payment of its employees.

*Payment record* means a data record submitted by an employing agency to report contributions or loan payments to a participant's TSP account.

*Record keeper error* means any act or omission by the TSP record keeper that is not in accordance with applicable statutes, regulations, or administrative procedures made available to employing agencies and/or TSP participants.

*TSP record keeper* means the entity that is engaged by the Board to perform record keeping services for the Thrift Savings Plan. The TSP record keeper is the National Finance Center, United States Department of Agriculture, located in New Orleans, Louisiana.

4. Section 1606.5 is revised to read as follows:

##### **§ 1606.5 Failure to timely make or deduct TSP contributions when participant received pay.**

(a) If a participant receives pay, but as the result of an employing agency error all or any part of the agency automatic (1%) contribution associated with that pay to which the participant is entitled is not timely received by the TSP record keeper, then the makeup or late contributions will be subject to lost earnings. In such cases:

(1) The employing agency must, for each pay period involved, submit to the TSP record keeper a lost earnings record indicating the pay date for which the contributions would have been made had the error not occurred (i.e., the beginning date), the investment fund to

which the contributions would have been deposited had the error not occurred if the beginning date on the record was before May 1, 2001, the amount of the contributions, and the pay date for which the contributions were actually made. If the beginning date on the record was on or after May 1, 2001, the TSP record keeper will use the contribution allocation of record for the beginning date and calculate lost earnings;

(2) The TSP record keeper will compute the amount of lost earnings associated with each lost earnings record submitted by the employing agency pursuant to paragraph (a)(1) of this section. In performing the computation, the TSP record keeper will not take into consideration any interfund transfers;

(3) Where the lost earnings computed in accordance with paragraph (a)(2) of this section are positive, the TSP record keeper will charge that amount to the appropriate employing agency and will credit the participant's TSP account. If the lost earnings are negative, the amount computed will be removed from the participant's account and used to offset TSP administrative expenses; and

(4) The lost earnings will be posted to the participant's account pro rata to all investment funds within the same source of contributions based on the most recent valued account balance.

(b) If a participant receives pay from which employee contributions were properly deducted, but as a result of an employing agency error all or any part of the associated agency matching contributions to which the participant is entitled were not timely received by the TSP record keeper, then the makeup agency contributions will be subject to lost earnings. In such cases, the procedures described in paragraphs (a)(1) through (a)(4) of this section will apply to the makeup agency matching contributions.

(c) If a participant receives pay from which employee contributions were properly deducted, but as the result of an employing agency error all or any part of those employee contributions were not timely received by the TSP record keeper, or if the employee contributions were received in connection with a FERCCA correction, the makeup employee contributions will be subject to the procedures described in paragraphs (a)(1) through (a)(4) of this section.

(d) Except for employee contributions received in connection with a FERCCA correction, if a participant receives pay from which employee contributions should have been deducted but, as the result of employing agency error, all or

any part of those deductions were not made, the makeup employee contributions will not be subject to lost earnings even if the participant makes up the employee contributions pursuant to part 1605 of this chapter. However, where the participant makes up the employee contributions pursuant to part 1605 of this chapter, the agency matching contributions associated with the makeup employee contributions (which must be made in accordance with part 1605 of this chapter) will be subject to lost earnings. With respect to such makeup agency matching contributions the procedures described in paragraphs (a)(1) through (a)(4) of this section will apply.

5. Section 1606.7 is revised to read as follows:

**§ 1606.7 Contributions to incorrect investment fund made before May 1, 2001.**

Where, as the result of an employing agency error, money was deposited to a participant's TSP account in an incorrect investment fund(s), the erroneous contribution will be subject to lost earnings if a claim is submitted within the time limits set forth in § 1605.16(a)(2) of this chapter. In such cases:

(a) The employing agency must submit a lost earnings record indicating the amount of the contributions submitted to the incorrect investment fund(s), the pay date for which it was submitted, the investment fund(s) to which it would have been deposited had the employing agency error not occurred, and the investment fund(s) to which it was actually deposited;

(b) The TSP record keeper will compute the amount of lost earnings associated with each lost earnings record submitted by the employing agency pursuant to paragraph (a)(1) of this section. The TSP record keeper will not take into consideration any interfund transfers;

(c) Where the lost earnings computed in accordance with paragraph (a)(2) of this section are positive, the TSP record keeper will charge the amount of lost earnings computed to the appropriate employing agency and will credit that amount to the account of the participant involved. If the earnings computed are negative, the amount computed will be removed from the participant's account and used to offset TSP administrative expenses; and

(d) The lost earnings will be posted to the participant's account pro rata to all investment funds within the same source of contributions based on the most recent valued account balance.

6. Section 1606.8 is revised to read as follows:

**§ 1606.8 Late payroll submissions.**

All contributions on payment records contained in a payroll submission received from an employing agency and processed by the TSP record keeper more than 30 days after the pay date associated with the payroll submission (as reported on Form TSP-2, Certification of Transfer of Funds and Journal Voucher) will be subject to lost earnings, as follows:

(a) The TSP record keeper will generate a lost earnings record for each payment record contained in the late payroll submission. The lost earnings records generated by the TSP record keeper will reflect that the contributions on the payment records should have been made on the pay date associated with the payroll submission, that the contributions should have been deposited to the investment fund(s) indicated on the payment records if the pay date was before May 1, 2001, or based on the participant's contribution allocation on file as of the pay date if the pay date was on or after May 1, 2001, and that the contributions were actually made on the date the late payroll submission was processed.

(b) The procedures applicable to lost earnings records submitted by employing agencies which are set forth in § 1606.5(a)(2) through (a)(4) will be applied to lost earnings records generated by the TSP record keeper pursuant to paragraph (a)(1) of this section.

7. Section 1606.9 is amended by revising paragraph (a)(3) to read as follows:

**§ 1606.9 Loan allotments.**

(a) \* \* \*

(3) The lost earnings will be posted to the participant's account pro rata to all investment funds within the same source of contributions based on the most recent month-end valued account balance.

\* \* \* \* \*

8. Section 1606.11 is amended by revising paragraphs (c), (d), and (e) and by adding a new paragraph (f) to read as follows:

**§ 1606.11 Agency submission of lost earnings records.**

\* \* \* \* \*

(c) Where this part requires the employing agency to indicate on a lost earnings record the investment fund to which a contribution would have been deposited had an employing agency error not occurred, that determination must be made solely on the basis of a properly completed allocation election that was accepted by the employing

agency before the date the contribution should have been made, and that was still in effect as of that date. Where no such allocation election was in effect as of the date the contribution would have been made had the error not occurred, the lost earnings record submitted by the employing agency must indicate that the contributions should have been made to the G Fund.

(d) With respect to employing agency errors that cause money not to be invested in the Thrift Savings Fund, lost earnings records may not be submitted until the money to which the lost earnings relate has been invested in the Thrift Savings Fund. Where the employing agency error involved delayed TSP contributions, no lost earnings will be payable unless the associated payment records are submitted in accordance with the provisions of 5 CFR part 1605. Lost earnings records and the delayed payment records to which they relate should be submitted simultaneously.

(e) Where an employing agency erroneously submits a lost earnings record that is processed by the TSP record keeper, the employing agency

must consult with the Board or TSP record keeper to determine the method to be used in removing the erroneous lost earnings.

(f) Lost earnings records that contain contributions for which lost earnings must be determined at the G Fund rate of return pursuant to §§ 1605.22(a)(4) or 1605.41(a)(3) of this chapter must be accompanied by the special Journal Voucher, Form TSP-2-EG.

9. Section 1606.13 is amended by removing paragraph (g), by removing the semicolon at the end of paragraphs (d) and (e) and adding a period in its place, and by revising paragraphs (a), (b), and (c) to read as follows:

**§ 1606.13 Calculation and crediting of lost earnings.**

(a) Lost earnings records submitted or generated pursuant to this part will be processed by the TSP record keeper monthly.

(b) Lost earnings records received, edited, and accepted by the TSP record keeper by the next-to-last business day of a month will be processed in the processing cycle for the month following acceptance. Lost earnings records received, edited, and accepted

by the TSP record keeper on the last business day of a month will be processed in the processing cycle for the second month following acceptance.

(c) In calculating lost earnings attributable to a lost earnings record, earnings and losses for different sources of contributions or investment funds within a source will not be offset against each other.

\* \* \* \* \*

10. Section 1606.15 is amended by revising paragraph (a) to read as follows:

**§ 1606.15 Time limits on participant claims.**

(a) Participant claims for lost earnings pursuant to § 1606.14 must be filed within six months of the participant's receipt of the earliest of a TSP participant statement, TSP loan statement, employing agency earnings and leave statement, or any other document that indicates that an employing agency error has affected the participant's TSP account.

\* \* \* \* \*

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