

THE THRIFT SAVINGS PLAN FOR MILITARY MEMBERS

I. DEFINITIONS AND BASICS

As of October 8, 2001,¹ military members were authorized to begin participating in the same Thrift Savings Plan (“TSP”) that has been in effect for civil service employees since 1987.² The TSP is a defined contribution type of plan for federal employees; like a private employer’s 401(k) plan, it is a mechanism for diverting pre-tax funds into retirement savings.³ Military members therefore now have both a defined benefit *and* a defined contribution type of retirement program, both of which should be addressed upon divorce.

At the outset, the military chose to call its plan “UNISERV” accounts, but it is increasingly referred to simply as “TSP” like its Civil Service equivalent. If the same person has simultaneous or consecutive military and Civil Service employment, the interplay between the two plans can be complex. It is usually possible to combine the accounts, but it takes a specific application to do so,⁴ and tax-exempt military contributions (i.e., those made as a result of a combat zone tax exclusion) in a military TSP account may not be transferred to a civilian TSP account.

The military plan was phased in by allowing ever greater percentages of basic pay to be contributed through 2005, where it reached 10%, after which only IRS regulations would govern contribution limits. If contributions are made to the TSP from basic pay, they may also be made from any incentive pay or special pay (including bonus pay) received, again subject to IRS limits.

The military service secretaries are permitted, but not required, to designate “critical specialties.” Members within those specialties serving on active duty for a minimum of six years would receive contributions by the government, matching some of the sums contributed from basic pay.⁵

There are a variety of funds in which contributions may be invested: the “Government Securities Investment” or “G” fund, the “Common Stock Index Investment” or “C” fund, the “Fixed Income

¹ Per Pub. L. No. 106-398 (Oct. 30, 2000); the regulations are found at 5 C.F.R. § 1600-1690.

² A “Thrift Savings Plan” (“TSP”) was created by the 1986 statute creating the “Federal Employees Retirement System,” or FERS, which replaced the older Civil Service Retirement System,” or CSRS. It first accepted contributions on April 1, 1987. FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them.

³ For military members, some forms of tax-exempt special compensation can be contributed, which then accrue investment returns that are also tax-exempt.

⁴ Once a participant separates from either the uniformed services or federal Civil Service, the accounts *can* be combined (by completing Form TSP-65 and sending it to the TSP Service Office). By default, military and Civil Service accounts are *not* combined, but must be separately addressed.

⁵ Matching contributions are designed to apply to the first five percent of pay contributed, dollar-for-dollar on the first three percent of pay, and 50 cents on the dollar for the next two percent of pay.

Index Investment” or “F” fund, the “Small Capitalization Stock Index Investment” or “S” fund, and the “International Stock Index Investment” or “I” fund.

The TSP is expressly *excluded* from the regulations governing the Civil Service defined benefit plans.⁶ It is administered by a Board (the Federal Retirement Thrift Investment Board),⁷ entirely separate from the Office of Personnel Management (“OPM”), and has its own governing statutory sections and regulations.⁸ The TSP Board has its own finance center.⁹

II. WITHDRAWAL AND BORROWING OF MONEY FROM THE TSP

A. During Service

The practitioner must find out whether a military member is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan.

Withdrawal of TSP funds by a participant is normally limited to those separating from service, but in-service withdrawals may be made in two categories: “age-based” withdrawals¹⁰ and special “financial hardship” withdrawals. Notably, one of the four categories for such financial hardship withdrawals is “legal expenses for separation or divorce.”¹¹ Counter-intuitively, however, if a member is married, the spouse must normally consent to an in-service withdrawal, whether or not the parties are separated.¹²

⁶ 5 C.F.R. § 838.101(d).

⁷ The Thrift Savings Plan is *not* addressed in the clause set provided by Office of Personnel Management. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) toll free at its Louisiana finance center: (1-877-968-3778).

⁸ 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

⁹ Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, new Orleans, LA 70161-1500 (TSP Service Office fax number: (504) 255-5199). The TSP Service Office is the primary contact for participants who have left federal service, and it also handles questions about loans, contribution allocations, interfund transfers, designations of beneficiaries, and withdrawals for all participants.

¹⁰ In-service withdrawals for participants who are 59½ or older. There should be very few of these in military cases.

¹¹ The other three conditions that can cause a permissible “financial hardship” withdrawal are: “negative monthly cash flow,” “medical expenses” (including household improvements needed for medical care), or “personal casualty losses.”

¹² The criteria for a claim on the basis of “exceptional circumstances” under which no spousal consent is required are very strict. The fact that there is a separation agreement, a prenuptial agreement, a protective or restraining order, or a divorce petition does not in itself support a claim of exceptional circumstances. As with everything else, there is a form (TSP-16) for making an “exceptional circumstances” application for withdrawal without a spousal consent.

Spousal consent is also required for any loans borrowed against the TSP. Again, a specific category of “hardship” for loan purposes is “unpaid legal costs associated with a separation or divorce.” Such a loan, if taken, accrues interest at the same rate paid on the “G” category of investments.

As to both loans and withdrawals, the Federal Retirement Thrift Investment Board will honor “most” court orders restricting distribution (such as preliminary injunctions prohibiting withdrawals) or safeguarding funds for other purposes (such as child support or alimony awards). Thus, in divorce cases or successive spouse cases, there could be some element of a “race to the courthouse,” with one party trying to get a restraining order on file and served on the TSP before the employee can withdraw the funds.¹³

Obviously, if the employee manages to reduce or eliminate the value of the TSP prior to a court-ordered division, that fact should be discovered and taken into account.

B. After Retirement

Upon separation from service, a tangle of other rules spring into effect. First, TSP accounts of less than \$200 are automatically distributed at the time of separation. If between \$200 and \$3,500, the sums may be left in the TSP, or withdrawn in a single payment or multiple payments (cashed, or rolled over into an IRA or other retirement account). For accounts containing more than \$3,500, the TSP balance can be partially or fully withdrawn in a single payment, or by way of a series of monthly payments, *or* by way of a life annuity. Any combination of the full withdrawal options is called a “mixed withdrawal.”

The spousal rights provisions only apply only if the TSP account contains more than \$3,500. If the participant is married and wants to make a *partial* withdrawal of funds, the spouse’s notarized written consent to the withdrawal is required.

If a *full* withdrawal is desired, the default is for the funding of a joint and survivor annuity with the “survivor” being the spouse at the time of withdrawal. The default annuity funded pays a 50 percent survivor benefit, has level payments, and does not include a cash refund feature. If the participant chooses any full withdrawal method other than the default (“prescribed”) annuity, the spouse must make a written, notarized waiver of his or her right to the prescribed annuity.¹⁴ It is also possible in some circumstances to obtain a joint life annuity with someone other than the spouse.¹⁵

¹³ This is yet another illustration of why it is almost *always* a good idea to get any orders concerning division of retirement assets on file at the same time that a decree of divorce is entered.

¹⁴ As with in-service withdrawals, a participant who is not able to locate his or her spouse, or claims “exceptional circumstances” making it inappropriate for the spouse to sign a waiver, can seek an exception by submitting a Form TSP-U-16 (“Exception to Spousal Requirements”), and providing the requisite supporting documentation.

¹⁵ Generally, with a former spouse or other person with an insurable interest in the life of the participant; not all options are available with each form of annuity.

All of these withdrawals presume that the TSP Board had not previously been served with a valid court order awarding a portion of a TSP account to a current or former spouse or one that requires payment for enforcement of child support or alimony obligations. If such an order was served on the TSP Board, it will comply with the court order before permitting purchase of an annuity or other withdrawal.

III. COURT-ORDERED DIVISIONS OF THE TSP

Although the agency administering the TSP has proven more flexible than either the military or the OPM, its regulations did spawn yet another acronym for a court order dividing benefits – “RBCO,” for “Retirement Benefits Court Order.”

No QDRO is required for a TSP distribution; the TSP will honor any order that expressly relates to the TSP account of the participant, has a clearly determinable entitlement to be paid, and provides for payment to some person other than the TSP participant. This includes payments directly to the attorney for the former spouse. Attorneys drafting TSP orders should note that plan balances are always calculated on the last day of the month.

A spousal share may be rolled over to an IRA or other eligible plan, in which case no taxes are withheld. Otherwise, the spouse is taxed on the distribution, and 20% is withheld.

If the money is paid to a third party, however, such as a child (or, presumably, either party’s attorney), the *participant* is stuck with the amount of the distribution as part of gross income for that year, and 10% is withheld. These rules provide a way of shifting the tax burden of funds to be withdrawn and used to pay attorney’s fees, just by changing the payee of the withdrawal.

The attorney for a spouse seeking a portion of a TSP account should specify that the award is to be paid along with interest and earnings on that award. If such language *is* in the order, the spouse will receive the same accumulations attributable to the spousal share that the participant receives as to the account; if such language is *not* included in the order, the spouse will receive no accumulations, interest, or earnings on the defined share through the date of distribution. A court order may also specify an interest rate to be applied to a distribution from a given date.

The TSP will also honor post-decree orders, which it refers to as “amendatory court orders,” and which presumably include *nunc pro tunc* amendments to decrees and partition judgments relating to omitted assets.

IV. SURVIVORSHIP BENEFITS FOR THE TSP

There are no “survivorship” benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k). However, plan participants can and should designate beneficiaries to receive the account balance in

the event of the participant's death.¹⁶ In the absence of the form, regular intestate succession rules determine the distribution of the TSP account.

¹⁶ By means of Form TSP-U-3 ("Designation of Beneficiary").