



[BILLING CODE 6760-01-P]

**FEDERAL RETIREMENT THRIFT INVESTMENT BOARD**

**5 CFR Part 1631**

**Availability of Records**

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

**ACTION:** Direct final rule.

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**SUMMARY:** The Federal Retirement Thrift Investment Board (FRTIB) is amending its regulations to update the procedures by which it makes its employees and records available in response to subpoenas in legal proceedings in which the FRTIB is not a party.

**DATES:** This rule is effective without further action on [INSERT DATE 40 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], unless significant adverse comment is received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. If significant adverse comment is received, the FRTIB will publish a timely withdrawal of the rule in the Federal Register.

**ADDRESSES:** You may submit comments using one of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments.

- Mail: Office of General Counsel, Attn: Dharmesh Vashee, Federal Retirement Thrift Investment Board, 77 K Street, N.E., Suite 1000, Washington, D.C. 20002.
- Facsimile: Comments may be submitted by facsimile at (202) 942-1676.

Since March 23, 2020, the FRTIB has been operating in mandatory telework status due to the coronavirus pandemic, which has limited the ability to timely monitor mail and facsimiles. Therefore, we strongly encourage using the Federal Rulemaking Portal to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Laurissa Stokes at (202) 942-1645.

**SUPPLEMENTARY INFORMATION:** The FRTIB 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. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401-79. The TSP is a tax-deferred retirement savings plan for Federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)).

## **Background**

Federal agencies often receive formal demands (such as subpoenas) or informal requests to produce records, information, or testimony in judicial, legislative, or administrative proceedings in which those agencies are not a named party. Responding to these demands or requests may disrupt agency employees' work schedules significantly, may involve the agency in issues unrelated to its statutory mission, and may divert agency resources from accomplishing its mission-critical functions. Consequently, many Federal agencies have issued regulations to efficiently address the submission, evaluation, and processing of these demands or requests.

The United States Supreme Court upheld these types of regulations in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (holding that provisions in the federal ``housekeeping'' statute, 5 U.S.C. 301, authorize agencies to promulgate rules governing record production and employee testimony). These types of regulations, which are often referred to as *Touhy* regulations, help ensure efficient use of Federal agency resources, minimize the possibility of involving an agency in issues unrelated to its mission, promote uniformity in responding to demands or requests, and maintain the impartiality of Federal agencies in matters that are in dispute between private parties.

The FRTIB's *Touhy* regulation, currently codified at 5 CFR part 1631, subpart B, was originally published in 52 FR 92 (May 13, 1987). The FRTIB has amended subpart B only once since 1987. Specifically, in 2007, the FRTIB added a section that describes the method by which the FRTIB authenticates copies of its records for use as evidence in legal proceedings. See 72 FR 181 (September 19, 2007).

This final rule amends the FRTIB'S existing *Touhy* regulation to clarify that it applies only when the FRTIB (or the FRTIB employee to whom a demand or request is directed) is not a party to the legal proceeding. This final rule also (1) delegates authority from the Executive Director to the General Counsel to allow testimony or production of records, (2) adds a list of factors that the General Counsel will consider when deciding whether to allow testimony or production of records, (3) adds filing requirements for demands or requests for testimony, and (4) adds a provision for charging fees and expenses that the FRTIB incurs by responding to demands or requests for production or testimony.

#### **Direct Final Rulemaking**

The FRTIB is publishing this regulation as a direct final rule. In a direct final rulemaking, an agency publishes its rule in the *Federal Register* along with a

statement that the rule will become effective unless the agency receives significant adverse comment within a specified period.

The content of this direct final rule pertains to internal agency procedures rather than substantive rights or obligations. It does not create a right to obtain official records or the official testimony of an FRTIB employee, nor does it create any additional right or privilege not already available to FRTIB to deny any demand or request for testimony or documents. Therefore, pursuant to 5 U.S.C. 553, notice and comment are not required, and this rule may become effective after publication in the Federal Register without public comment.

Nevertheless, the FRTIB appreciates that members of the public may have perspectives or information that could impact the FRTIB's views with respect to its internal procedures. The FRTIB, therefore, is providing a 30-day public comment period, and intends to consider all comments submitted during that period. The FRTIB will withdraw the rule if it receives significant adverse comment. Comments that are not adverse may be considered for modifications to part 1631 at a future date. If no significant adverse comment is received, the rule will become effective 40 days after publication, without additional notice.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect Federal employees and members of the uniformed services who participate in the Thrift Savings Plan, which is a Federal defined contribution retirement savings plan created under the Federal Employees' Retirement System Act of 1986 (FERSA), Public Law 99-335, 100 Stat. 514, and which is administered by the FRTIB.

**Paperwork Reduction Act**

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act.

**Unfunded Mandates Reform Act of 1995**

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501-1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under section 1532 is not required.

**Submission to Congress and the General Accounting Office**

Pursuant to 5 U.S.C. 810(a)(1)(A), the FRTIB 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 1631**

Courts, Freedom of information, Government employees.

Ravindra Deo,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons stated in the preamble, the FRTIB revises 5 CFR part 1631, subpart B, to read as follows:

**PART 1631-AVAILABILITY OF RECORDS**

**Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities**

Sec.

1631.30 Applicability.

1631.31 Definitions.

1631.32 General prohibition.

1631.33 Factors the General Counsel will consider.

1631.34 Filing requirements for demands or requests for testimony.

1631.35 Certification (authentication) of copies of records.

1631.36 Fees.

Authority: 5 U.S.C. 301, 522, and 8474(b).

**§ 1631.30 Applicability.**

This subpart applies to demands and requests to a Board employee for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which neither the Board or nor the Board employee is a named party. However, it does not apply to:

(a) Demands upon, or requests for, a current Board employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the Board;

(b) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552(a); and

(c) Congressional demands and requests for testimony of records.

**§ 1631.31 Definitions.**

*Demand* means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and

testimony of a Board employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of the Board or his or her delegatee.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*Board employee or employee* means:

- (1) Any current or former officer or employee of the Board;
- (2) Any other individual hired through contractual agreement by or on behalf of the Board or who has performed or is performing services under such an agreement for the Board; and
- (3) Any individual who served or is serving in any consulting or advisory capacity to the Board, whether formal or informal.
- (4) Provided, that this definition does not include persons who are no longer employed by the Board and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the Board.

*Records or official records and information* mean:

- (1) All documents and materials which are Board records under the Freedom of Information Act, 5 U.S.C. 552;
- (2) All other documents and materials contained in Board files; and
- (3) All other information or materials acquired by a Board employee in the performance of his or her official duties or because of his or her official status.

*Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

**§ 1631.32 General prohibition.**

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

**§ 1631.33 Factors the General Counsel will consider.**

(a) The General Counsel, in his or her sole discretion, may grant an employee permission to testify on

matters relating to official information, or produce official records and information, in response to an appropriate demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(1) Allowing such testimony or production of records would assist or hinder the Board in performing its statutory duties or use Board resources in a way that will interfere with the ability of Board employees to do their regular work;

(2) Allowing such testimony or production of records would be in the best interest of Thrift Savings Plan participants and beneficiaries;

(3) The records or testimony can be obtained from other sources;

(4) The Board has an interest in the decision that may be rendered in the legal proceeding;

(5) The demand improperly seeks to compel a Board employee to serve as an expert witness for a private interest;

(6) The demand improperly seeks to compel a Board employee to testify as to a matter of law;

(7) Disclosure would result in the Board appearing to favor one private litigant over another private litigant;

(8) Disclosure relates to documents that were produced by another government agency; and

(9) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose.

(b) The factors listed in paragraph (a) of this section are illustrative and not exhaustive.

**§ 1631.34 Filing requirements for demands or requests for testimony.**

You must comply with the following requirements whenever you send a demand or request for testimony to the Board or a Board employee. If you serve a subpoena on the Board or a Board employee that is not accompanied by a written request that complies with the requirements in this section, the General Counsel may oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(a) Your request must be in writing and must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved.

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A specific description of the substance of the testimony sought;

(4) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a Board employee, such as a retained expert;

(5) An explanation as to why no document could be provided and used in lieu of testimony;

(6) If oral testimony is sought, an explanation as to why a written declaration or affidavit cannot be used in lieu of oral testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each Board employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(b) The Board reserves the right to require additional information to complete your request where appropriate.

(c) Your request should be submitted at least 45 days before the date that the testimony is required. Requests submitted in less than 45 days before testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for requesting expedited processing.

(d) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

**§ 1631.35 Certification (authentication) of copies of records.**

The Board may certify that copies of records are true copies in order to facilitate their use as evidence. The records custodian or other qualified individual shall certify copies of books, records, papers, writings, and documents by attaching a written declaration that complies with current Federal Rules of Evidence. No seal or notarization shall be required.

**§ 1631.36 Fees.**

(a) *Generally.* The Board may condition the production, disclosure, or release of records or the appearance and

testimony of a Board employee upon advance payment of a reasonable estimate of the costs to the Board.

(b) *Fees for records.* Fees for the production, disclosure, or release of records are the same as those charged by the Board in its Freedom of Information Act regulations in subpart A of this part.

(c) *Fees for oral testimony.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Fees for written testimony.* For time spent by each employee preparing affidavits or declarations (including declarations to authenticate records), the Board may assess charges at the rate described in § 1631.14(a).

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