

# Authentication of Documents

This fact sheet explains how the Federal Retirement Thrift Investment Board authenticates documents for use in court proceedings.

## Background

The Federal Retirement Thrift Investment Board (Board) is an agency in the executive branch of the United States Government with the sole responsibility of administering the Thrift Savings Plan (TSP). (See 5 U.S.C. § 8472.) Congress authorized the Board's Executive Director to prescribe such regulations as may be necessary to administer the TSP. (See 5 U.S.C. § 8474(b)(5).)

## Authentication of Documents

The Board regularly receives subpoenas directing it to authenticate TSP documents for use in state court proceedings. Often, these subpoenas purport to direct the Board to authenticate these documents in accordance with state court rules or to compel the attendance of a Board employee or contractor (representative) at the state court proceeding. The Board lacks the expertise to comply with the rules of the individual 50 states, and attempting to do so would result in a misallocation of Board resources (as would sending a Board representative to the state court proceeding).

Furthermore, it is not necessary for the Board to comply with state court rules or to send a Board representative to the state court proceeding in order for Board documents to be admissible in state court. Section 1733(b) of title 28, United States Code, provides that “[p]roperly authenticated copies or transcripts

of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.”

Accordingly, on September 19, 2007, the Board's Executive Director published the following regulation in the Federal Register. (See 72 Fed. Reg. 53,414 (Sept. 19, 2007) (to be codified at 5 C.F.R. § 1631.34).)

### *Certification and Authentication of Records*

(a) Upon request, the records custodian or other qualified individual shall authenticate 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. Copies of any books, records, papers, or other documents in the Federal Retirement Thrift Investment Board shall be admitted in evidence equally with the originals thereof when authenticated in this manner.

(b) Fees for copying and certification are set forth in 5 CFR 1630.16.<sup>1</sup>

As a consequence, the Board will only authenticate documents in a manner consistent with the Federal Rules of Evidence. It will not make its representatives available to authenticate the documents. Nor will it authenticate documents in a manner consistent with state rules. Such action is unnecessary. Documents authenticated in a manner consistent with 28 U.S.C. § 1733(b) and 5 C.F.R. § 1631.34 are self-authenticating and are admissible in all state court proceedings.<sup>2</sup>

<sup>1</sup> An Agency's interpretation of a statute that Congress has authorized it to implement is binding when it is “a permissible construction of a statute.” (See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).) It is a permissible construction unless Congress has “unambiguously” addressed the precise question in a manner inconsistent with the Agency's construction. *Id.* Congress authorized the Board's Executive Director “to prescribe such regulations as may be necessary to administer the Thrift Savings Plan.” (See 5 U.S.C. § 8474(b)(5).)

Congress did not address how the Board is to authenticate documents. To the extent Congress has spoken regarding the authentication of documents held by Federal agencies in general (See 28 U.S.C. § 1733(b)), these regulations are completely consistent. Therefore, the Board's regulation is a permissible construction of a statute.

<sup>2</sup> Under the Supremacy Clause, “the Laws of the United States ... shall be the supreme Law of the Land.” U.S. Const., Art. VI, cl. 2. “The phrase ‘Laws of the Land’ encompasses ... federal regulations that are properly adopted in accordance with statutory authorization.” (See *City of New York v. Federal Communications Commission*, 486 U.S. 57, 63 (1988).) As discussed above, the Board's regulation at 5 C.F.R. § 1631.34, was “properly adopted in accordance with statutory authorization.” The regulation, therefore, is the supreme Law of the Land and preempts inconsistent state law.