December 1991 and March 1992 delivery months.

List of Subjects in 17 CFR Part 30

Commodity futures, Commodity options, Foreign commodity options.

Accordingly, 17 CFR part 30 is amended as set forth below:

PART 30—FOREIGN FUTURES AND FOREIGN OPTION TRANSACTIONS

1. The authority citation for part 30 continues to read as follows:

Authority: Secs. 2(a)(1)(A), 4, 4c, and 8a of the Commodity Exchange Act, 7 U.S.C. 2, 6, 6c and 12a.

2. Appendix B to part 30 is amended by adding the following entry alphabetically after the existing entry for "London International Financial Futures Exchange" to read as follows:

Appendix B—Option Contracts Permitted to be Offered or Sold in the U.S. Pursuant to § 30.3(a)

Exchange	Type of contract	FR date and citation
	* * * * *	
London International Financial Futures Exchange.	Option contract on Italian Government bond futures contract.	92; FR
	* * * * *	

Issued in Washington, DC on January 9, 1992.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 92-906 Filed 1-13-92; 8:45 am]

BILLING CODE 6351-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Docket No. 34-30166, International Series Release No. 357, File No. S7-32-91]

RIN 3235AEZZ

Designation of the Securities of Certain Foreign Governments as Exempted Securities Under the Securities Exchange Act of 1934 Solely for Purposes of Trading Futures Contracts on Those Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts three amendments to Rule 3a12-8 (17 CFR 240.3a12-8) ("Rule") under the Securities Exchange Act of 1934 ("Exchange Act"). The first amendment designates debt obligations issued by the Republics of Ireland and Italy as "exempted securities." The purpose of this amendment is to permit the marketing and trading of futures contracts on those securities in the United States or to U.S. persons. The second amendment replaces the reference to "West Germany" in the Rule with a reference to the "Federal Republic of Germany" to reflect the re-unificaion of East Germany and West Germany. The third amendment replaces all references to the informal names of the countries listed in the Rule with references to their official names to clarify the references made to countries in the Rule. The changes made by the second and third amendments will not result in a substantive change in the operation of the Rule.

EFFECTIVE DATE: January 14, 1992.

FOR FURTHER INFORMATION CONTACT: Monica C. Michelizzi, Esq., Branch of Options Regulation, Division of Market Regulation, Securities and Exchange Commission (Mail Stop 5-1), 450 Fifth Street, NW., Washington, DC 20549, at 202/272-2411.

SUPPLEMENTARY INFORMATION:

I. Introduction

Under the Commodity Exchange Act ("CEA"), it is unlawful to trade a futures contract on any individual security, unless the security in question is an exempted security (other than a municipal security) for the purposes of the Securities Act of 1933 ("Securities Act") for the Exchange Act.[1] Debt obligations of foreign governments are not exempted securities under either of these statutes. The Securities and Exchange Commission ("SEC" or "Commission"), however, has authority to designate securities as exempted securities for purposes of the Exchange Act.

In order to facilitate the trading of futures contracts on debt securities of certain foreign governments by United States persons, the Commission has adopted rule 3a12-8 (17 CFR 240.3a12-8) under the Exchange Act to designate debt obligations issued by certain foreign governments as exempted securities under the Exchange Act solely for the purpose of marketing and trading futures contracts on those securities in the United States or to U.S. persons.[2]

Currently, the foreign governments listed in the Rules are Great Britain, Canada, Japan, Australia, France, New Zealand, Austria, Denmark, Finland, the Netherlands, Switzerland, and West Germany (the "twelve designated countries"). As a result, futures contracts on the debt obligations of these countries may be sold to U.S. persons, as long as the other terms of the Rule are satisfied.[3]

On November 12, 1991, the Commission issued a release proposing to amend rule 3a12-8 to designate the debt obligations of the Republics of Ireland and Italy as exempt securities, solely for the purpose of futures trading, to change the country designation of "West Germany" to the "Federal Republic of Germany," and to change the names of the other countries designated in the rule to their formal names. The Commission received no comments in response to this proposal.[4]

The Commission today adopts these three amendments to the Rule. First, the amendments add the debt obligations of the Republics of Ireland and Italy (the "two newly-designated countries") to the list of countries whose debt obligations are exempted by rule 3a12-8. In order to qualify for the exemption, futures contracts on debt obligations of the two newly-designated countries would have to meet all the other existing requirements of the Rule. Second, the amendments change the country designation of "West Germany" to the "Federal Republic of Germany" to reflect the re-unification of Germany and the subsequent adoption of the name the "Federal Republic of Germany" as the official name of the unified country.[5] Third, the amendments replace all references to the informal names of the countries listed in the Rule with references to their official names.

II. Background

Section 2(a)(1)(B)(v) of the CEA,[6] which was adopted as part of the

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[1] The term "exempted security" is defined in section 3 of the Securities Act, 15 U.S.C. 77c, and section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12).

[2] Under the Rule, the grading of futures on government securities exempted by the Rule is permitted only on or through a board of trade.

[3] *See infra* note 14 and accompanying text for a discussion of the other terms of the Rule that must be satisfied in order for these contracts to be marketed or traded in the United States.

[4] *See* Securities Exchange Act Release No. 29929 (Nov. 12, 1991), 56 FR 58194 (November 19, 1991) ("Proposal Release").

[5] In an interpretive letter to the Chicago Board of Trade ("CBOT") regarding a proposed futures contract on German government bonds, the Commission's Division of Market Regulation has stated that it interprets the reference to "West Germany" in the Rule to mean the "Federal Republic of Germany" for purposes of the Rule. *See* letter from Brandon Becker, Deputy Director, Division of Market Regulation, SEC, to William Cullen, Senior Attorney, CBOT, dated July 23, 1991.

[6] 7 U.S.C. 2(a).

Futures Trading Act of 1982,[7] provides that it is unlawful to trade a futures contract on an individual security unless that security is an exempted security under Sections 3 of the Securities Act or section 3(a)(12) of the Exchange Act.[8] These sections of the Securities Act and the Exchange Act explicitly designate certain securities, including government securities and municipal securities, as exempted securities. Securities issued by foreign governments, however, are not "government securities" within the meaning of the federal securities statutes.[9] Therefore, securities issued by foreign governments are not deemed to be exempted securities under the statutory language.

Section 3(a)(12) of the Exchange Act, however, provides the Commission with the authority to designate other securities as exempted securities, either unconditionally or for specified purposes.[10] Rule 3a12–8 was adopted in 1984 [11] pursuant to this exemptive authority in order to facilitate the trading of futures contracts on securities of foreign governments by United States person.[12] As originally adopted, the Rule provided that debt obligations of Canada and of the United Kingdom of Great Britain and Northern Ireland would be deemed to be exempted securities, solely for the purpose of permitting the offer, sale, and confirmation of "qualifying foreign futures contracts" on such securities, so long as the securities in question were neither registered under the Securities Act nor the subject of any American Depositary Receipt so registered. A futures contract on such a debt obligation is deemed under the Rule to be a "qualifying foreign futures contract" if delivery under the contract is settled outside the United States and is traded on a board of trade.[13]

The conditions imposed by the rule were intended to facilitate the trading of futures contracts on foreign government securities without sacrificing the longstanding policy under the federal securities laws of requiring foreign government securities to comply with the basic requirements of the federal securities laws in order to be marketed and traded in the United States. Accordingly, the conditions set forth in the rule were designed to ensure that, absent registration, a domestic market in foreign government securities would not develop, and that markets for futures on these instruments would not be used to avoid the registration requirements and other provisions of the federal securities laws.

At the time the Commission originally proposed rule 3a12–8, it recognized that the rule might need to be amended at some later date in order to extend its provision to debt obligations of other foreign governments.[14] Subsequently, the Commission amended the rule to include debt obligations issued by Japan, Australia, France, New Zealand, Austria, Denmark, Finland, the Netherlands, Switzerland, and West Germany within its coverage.[15]

Rule 3a12–8 has not been amended since 1988. Since that time, an Irish Government futures contract has been developed and has begun trading on the Irish Futures and Options Exchange ("IFOX").[16] The London International Financial Futures Exchange ("LIFFE") also has begun trading a futures contract on Italian government bonds.[17] In addition, the CBOT and the LIFFE have applied to the CFTC for designation as a contract market for trading in futures contracts on European Currency Unit-denominated debt securities ("ECU bonds") issued by, among others, certain foreign governments, including the government of Italy.[18] The Commission has been informed that U.S. citizens, especially institutional investors, may be interested in trading these new products, and has received requests that rule 3a12–8 be amended to facilitate such trading.[19]

The Commission today amends rule 3a12–8 to add the Republics of Italy and Ireland to the list of countries whose debt obligations already are deemed to be "exempted securities" under the terms of the rule. Under this amendment, the existing conditions set forth in the rule (*i.e.*, that the underlying securities not be registered in the United States, that the futures contracts require delivery outside the United States, and

[7] Pub. L. No. 97–444, 96 Stat. 2294, 7 U.S.C. 1 *et seq.*

[8] Section 2(a)(1)(B)(v) of the CEA, 7 U.S.C. 2a(v), provides that "[n]o person shall offer to enter into, enter into, or confirm the execution of any contract of sale (or option on such contract) for future delivery of any security or interest therein or based on the value thereof, except an exempted security under section 3 of the Securities Act * * * or section 3(a)(12) of the (Exchange Act) * * *"

[9] *See* Section 3(a)(42) of the Exchange Act, 15 U.S.C. 78c(a)(42) (defining the term "government security" for purposes of the Exchange Act).

[10] Section 3(a)(12) of the Exchange Act provides that the term "exempted security" includes "such other securities * * * as the Commission may by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this title which by their terms do not apply to an 'exempted security' or to exempted securities.' " 15 U.S.C. 78c(a)(12).

[11] *See* Securities Exchange Act Release Nos. 20708 ("Adopting Release") (March 2, 1984), 49 FR 8595 (March 8, 1984) and 19811 ("Proposing Release") (May 25, 1983), 48 FR 24725 (June 2, 1983).

[12] The marketing and trading of foreign futures contracts to United States persons is subject to regulation by the CFTC. In particular, Section 4b of the CEA authorizes the CFTC to regulate the offer and sale of foreign futures contracts to United States persons, and rule 9 (17 CFR 30.9), promulgated under section 2(a)(1)(A) of the CEA, is intended to prohibit fraud in connection with the offer and sale to United States persons of futures contracts executed on foreign exchanges. Additional rules promulgated under 2(a)(1)(A) of the CEA govern the domestic offer and sale of futures and options contracts traded on foreign boards of trade. These rules require, among other things, that the domestic offer and sale of foreign futures be effected through CFTC registrants or through entities subject to a foreign regulatory framework comparable to that governing domestic futures trading. *See* 17 CFR 30.3, 30.4, and 30.5 (1991). In enacting the Futures Trading Act of 1982, Congress expressed its understanding that neither the SEC nor the Commodity Futures Trading Commission ("CFTC") had intended to bar the sale of futures contracts on debt obligations of the United Kingdom of Great Britain and Northern Ireland to United States persons, and its expectation that administrative action would be taken to allow the sale of such futures contracts in the United States. *See* Proposing Release, *supra* note 11, 48 FR at 24725 (citing 128 Cong. Rec. H7492 (daily ed. September 23, 1982) (statements of Representatives Daschle and Wirth)).

[13] As originally adopted, the Rule required that the board of trade be located in the country that issued the underlying securities. This requirement was eliminated in 1987 *See* Securities Exchange Act Release No. 24209 (March 12, 1987), 52 FR 8875 (March 20, 1987).

[14] *See* Proposing Release, *supra* note 11, 48 FR at 24726–27

[15] As noted above, the rule as originally adopted applied only to debt obligations of Canada and of the United Kingdom of Great Britain and Northern Ireland. *See* Adopting Release, *supra* note 11 In 1986, the rule was amended to include debt obligations of Japan. *See* Securities Exchange Act Release No. 23423 (July 11, 1986), 51 FR 29596 (July 18, 1986). In 1987, the rule was amended to include debt obligations of Australia, France, and New Zealand. *See* Securities Exchange Act Release No. 25072 (October 29, 1987), 52 FR 42277 (November 4, 1987). In 1988, the rule was again amended to include debt obligations of Austria, Denmark, Finland, the Netherlands, Switzerland, and West Germany. *See* Securities Exchange Act Release No. 26217 (October 26, 1988), 53 FR 43860 (October 31, 1988).

[16] Reuters, Money Report (April 28, 1989).

[17] Reuters, Money Report (June 11, 1991).

[18] The CBOT ECU bonds futures contract also would include debt obligations of certain supranational organizations in the basket of securities underlying the proposed futures contract. The Commission has under consideration a petition by the CBOT requesting that these securities be deemed exempted securities under section 3(a)(12) of the Exchange Act for the purpose of trading futures contracts on these securities. *See* letter from Thomas R. Donovan, President and Chief Executive Officer CBOT, to Howard Kramer, Assistant Director, Division of Market Regulation, SEC, dated May 29, 1991 ("CBOT ECU Bond Letter").

[19] *See, e.g.*, letter from Raymond Guan, Vice President, The First Boston Corporation, to Jonathan G. Katz, Secretary, SEC, and Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated June 29, 1989, and CBOT ECU Bond Letter, *supra* note 18.

that the contracts be traded on a board of trade) would continue to apply. This should ensure that a domestic market in the unregistered foreign sovereign debt of the Republics of Ireland or Italy does not develop. Therefore, the amendment should pose no risk for investors in the U.S. securities market.

The Commission also amends rule 3a12–8 to replace the reference to "West Germany" in the rule with a reference to the "Federal Republic of Germany," and to replace all references to the informal names of the countries listed in the rule with references to their official names. Both of these amendments clarify the terms of the rule, but do not result in a substantive change in the operation of the rule.

III. Discussion

In the Proposal Release, the Commission solicited comments on whether there are any legal or policy reasons for determining that debt obligations issued by Ireland or Italy should not be accorded the same treatment under the rule for the purpose of trading futures contracts on these securities in the U.S. or to U.S. persons as debt obligations issued by the twelve designated countries.[20] The Commission received no comment in response to its request for comment.

For the reasons discussed below, the Commission has determined that rule 3a12–8 should be amended to include the debt obligations of Ireland and Italy. The Commission also has decided to replace the reference to "West Germany" in the rule with a reference to the "Federal Republic of Germany," and to replace all references to the informal names of the countries listed in the Rule with references to their official names.

First, the Commission believes that the debt obligations of the two newly-designated countries should be subject to the same regulatory treatment under the rule as the debt obligations of the twelve designated countries for purposes of trading futures contracts on such debt obligations by United States persons. Like the debt obligations of the twelve designated countries,[21] the long-term debt obligations of each of the two newly-designated countries are rated in one of the two highest rating categories by at least two nationally recognized statistical rating organizations.[22] For purposes of the Rule, the Commission is aware of no material differences between the debt obligations of the two newly-designated countries and the debt obligations of the twelve designated countries.

Additionally, the Commission believes that there are no valid legal or policy reasons for denying U.S. investors the ability to trade futures on debt obligations of the two newly-designated sovereign issuers. Moreover, the availability to United States investors of these hedging vehicles will allow such investors to take advantage of the growing globalization of the securities markets.

Second, the Commission believes that amending the rule to replace the reference to "West Germany" in the rule with a reference to the "Federal Republic of Germany," and to replace all references to the informal names of the countries listed in the Rule with references to their official names is appropriate to clarify the terms of the rule. The first amendment reflects the fact that West Germany no longer exists as a separate country as a result of the re-unification of East Germany and West Germany, and codifies the Commission's Division of Market Regulation's interpretation that the reference to "West Germany" in the rule should be understood to mean the "Federal Republic of Germany."

In the same manner, the second amendment further clarifies the provisions of the rule by replacing all references to the informal names of the countries listed in the rule with references to their official names. Both of these amendments clarify the terms of the rule, but do not result in a substantive change in the operation of the rule.

IV. Regulatory Flexibility Act Consideration

The Chairman of the Commission certified in connection with the Release proposing the amendments to the rule [23] that these amendments, if adopted, would not have a significant economic impact on a substantial number of small entities. The Commission received no comments on this certification.

V. Effects on Competition and Other Findings

Section 23(a)(2) of the Act [24] requires the Commission, in adopting rules under the Act, to consider the competitive effects of such rules, if any, and to balance any impact against the regulatory benefits gained in terms of furthering the purposes of the Act. The Commission has considered the amendments to the rule in light of the standards cited in section 23(a)(2) and believes that adoption of the amendments will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As stated above, the amendment is designed to assure the lawful availability in this country of Irish and Italian government bond futures that otherwise would not be permitted to be marketed under the terms of the CEA. The amendment thus serves to expand the range of financial products available in the United States and enhances competition in financial markets. Insofar as the rule contains limitations, they are designed to promote the purposes of the Act by ensuring that futures trading on Irish and Italian government securities is

[20] In addition, the Commission solicited comments on whether the information available in English regarding the newly-eligible futures contracts and the underlying sovereign debt obligations would be adequate to permit U.S. investors to make informed investment decisions. In adopting rule 3a12–8, the Commission decided not to require, as a condition to the exemption, that such information be available. *See* Adopting Release, *supra* note 11, 49 FR at 8597–98. At the time rule 3a12–8 was adopted, both the United Kingdom and Canada had government debt issues registered in the United States. As a result, although those particular issues were not the subject of futures trading, U.S. investors had relevant disclosure material concerning the issuers, *i.e.*, the governments of Canada and the United Kingdom. In addition, Australia, New Zealand, Austria, and Denmark had government debt tissues registered in the United States when they were added to the rule. Japan, France, Finland, the Netherlands, Switzerland, and West Germany did not have government debt issues registered in the United States when they were added to the rule. Thus, to a large measure the availability of information in English has not been a determinative factor when expanding the list of countries designated in rule 3a12–8. Currently, Ireland has government debt issues registered in the United States. (These issues are not the subject of futures trading on the IFOX.) Italy does not have government debt issues registered in the United States.

[21] In amending the Rule to exempt the debt securities of Austria, Denmark, Finland, the Netherlands, Switzerland, and West Germany, the Commission noted that the long-term sovereign debt of those countries was rated in one of the two highest rating categories by at least two nationally recognized statistical rating organizations. *See* Securities Exchange Act Release No. 26217 (October 26, 1988), 53 FR 43860 (October 31, 1988).

[22] Ireland's long-term sovereign debt is rated Aa3 by Moody's Investors Service ("Moody's") and AA- by Standard and Poor's ("S&P"). Italy's long-term sovereign debt is rated Aaa by Moody's and AA+ by S&P. Under Moody's rating criteria, debt which is rated Aaa is judged to be of the highest quality and debt which is rated Aa is judged to be of high quality by all standards. Aa-rated debt is judged to be of lower quality than Aaa-rated debt because: (1) The margins of protection for debt rated Aa may not be as large as in the highest rated debt (Aaa); (2) the fluctuation of protective elements may be of greater amplitude for Aa-rated instruments; or (3) other elements may be present which make the long-term risk appear somewhat larger than the Aaa securities. Under S&P's criteria, an issuer of debt which is rated AAA has an extremely strong capacity to pay interest and repay principal and an issuer of debt which is rated AA has a very strong capacity to pay interest and repay principal. A debt issue that is rated AA differs from the highest rated issues (AAA) only to a small degree.

[23] *See* Proposal Release *supra* note 4.

[24] 15 U.S.C. 78w(a)(2) (1988).

consistent with the goals and purposes of the federal securities laws by minimizing the impact of the rule on securities trading and distribution in the United States.

The Commission finds, in accordance with the Administrative Procedure Act,[25] that the amendments to the rule are exemptive in nature. Accordingly, the commission has determined to make the foregoing action effective immediately upon publication in the Federal Register.

VI. Statutory Basis

The amendments to rule 3a12–8 are being adopted pursuant to 15 U.S.C. 78a *et seq.*, particularly sections 3(a)(12) and 23(a), 15 U.S.C. 78c(a)(12) and 78w(a).

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

VII. Text of the Adopted Amendments

For the reasons set forth above, the Commission is amending part 240 of chapter II, title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c 77d, 77s, 77ttt, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 79q, 79t, 80a–29, 80a–37, unless otherwise noted.

2. § 240.3a12–8 is amended by revising paragraphs (a)(1)(iv) through (a)(1)(xii), and by adding paragraphs (a)(1)(xiii) through (xiv) as follows:

§ 240.3a12–8 Exemption for designated foreign government securities for purposes of futures trading.

(a) * * *

(1) * * *

(iv) the Commonwealth of Australia;

(v) the Republic of France;

(vi) New Zealand;

(vii) the Republic of Austria;

(viii) the Kingdom of Denmark;

(ix) the Republic of Finland;

(x) the Kingdom of the Netherlands;

(xi) Switzerland;

(xii) the Federal Republic of Germany;

(xiii) the Republic of Ireland; or

(xiv) the Republic of Italy.

* * * * *

By the Commission.

Dated: January 8, 1992.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92–848 Filed 1–13–92; 8:45 am]

BILLING CODE 8010-01-M

[25] 15 U.S.C. 553(d) (1988).

RAILROAD RETIREMENT BOARD

20 CFR Part 340

RIN 3220–AA77

Recovery of Benefits

AGENCY: Railroad Retirement Board.

ACTION: Final rule.

SUMMARY: The Railroad Retirement Board (Board) hereby amends its regulations by adding three instances in which recoveries of overpayments of benefits under the Railroad Unemployment Insurance Act will not be subject to waiver, and to clarify certain procedures relating to the recovery of overpayments under that statute.

EFFECTIVE DATE: January 14, 1992.

FOR FURTHER INFORMATION CONTACT: Thomas W. Sadler, Assistant General Counsel, Bureau of Law, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751–4513 (FTS 386–4513), TDD (312) 751–4701, TDD (FTS 386–4701).

SUPPLEMENTARY INFORMATION: Section 2(d) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. 352(d)) provides that the Board may waive recovery of an overpayment of benefits under that Act if the overpaid individual was not at fault in causing the overpayment and if recovery of the overpayment would be contrary to the purpose of the RUIA (financial hardship test) or would be against equity or good conscience.

On January 28, 1988, the Board published regulations explaining how an overpaid individual may request waiver and how the Board applies waiver under the RUIA (20 CFR parts 320 and 340, appearing at 53 FR 2485). Section 340.10(e) provided that an overpayment will not be waived when the recovery of the overpayment is sought from an individual other than the overpaid employee. The Board now amends § 340.10(e) by adding three situations in which waiver also will not be available. Section 340.10(e)(1) merely restates the previous rule as subsection (1). Section 340.10(e)(2) provides that where the overpayment is equal to or less than 10 times the current maximum daily benefit rate under the RUIA (presently $31) such an overpayment will not be waived. In such cases it is the judgment of the Board that recovery of this large overpayment would not be contrary to the purpose of the RUIA nor would recovery be against equity or good conscience. The Board notes that the individual will have had the use of the overpayment, interest free, for a period of time and that he or she will be able to ease financial difficulty by repaying in installments. The rule thus provides that where the overpayment is equal to or less than 10 times the daily benefit rate that there be a conclusive presumption that it is not contrary to the purpose of the RUIA or against equity or good conscience to recover such payments. Consequently, in such an instance there will be no right to request waiver of the overpayment.

Section 340.10(e)(3) provides that there shall be no waiver where the overpayment of RUIA benefits may be recovered from an accrual of a retroactive award of annuities under the Railroad Retirement Act (RRA). A sick or disabled railroad employee who is receiving benefits under the RUIA may eventually become entitled to a disability annuity under the RRA for the same period that he or she received the RUIA benefits. In such an instance an overpayment of benefits under the RUIA is created since section 4(a–1)(ii) of the RUIA (45 U.S.C. 354(a–1)(ii)) prohibits the payment of benefits under that statute for any period in which the employee is also receiving benefits under the RRA. In such an instance the Board usually recovers the overpaid benefits under the RUIA from the accrual of benefits under the RRA. The rule provides that where the overpayment of benefits under the RUIA may be recovered in such a manner there shall be no right to waiver by the overpaid employee. In such a case the employee cannot show that recovery of the overpayment will cause financial hardship since no future benefits are being taken away nor is he or she being asked to pay anything out-of-pocket. His or her accrual of benefits under the RRA is simply being reduced to recover the overpayment.

Section 340.10(e)(4) provides that waiver will not be granted to the extent that the overpaid individual is due a retroactive accrual payment from any Federal government agency. The Board considers recovery in such cases to be neither contrary to the purpose of the RUIA nor against equity and good conscience. Accordingly, waiver of recovery would not be appropriate. Of course, in instances in which the overpayment exceeds the accrual, the employee would be able to request waiver of the remaining overpayment subject to the provisions of § 320.11 of title 20. In addition, any accrual of benefits payable by the United States is considered in determining whether the employee is financially able to repay the overpayment (see § 340.10(c)(3)).

In addition, the Board amends § 340.7 to make it clear that all overpayments, even those waived under this part, are still deducted from any residual lump sum death payment under the Railroad Retirement Act. Section 340.8 is amended to clarify when recovery by actuarial adjustment is effective to recover an overpayment. Finally, § 340.10(d) is amended by changing the word "and" in the phrase "equity and good conscience" to "or" to conform to the language in the RUIA.

This rule was published in proposed form on June 20, 1989 (54 FR 25877), and again as a proposed rule on July 17, 1991 (56 FR 32523). In neither case were any comments received within the respective comment periods.

The Board has determined that this is not a major rule for purposes of Executive Order 12291. In addition, no requirements for the collection of information within the meaning of the Paperwork Reduction Act of 1980 are imposed.

List of Subjects in 20 CFR Part 340

Railroad employees, Railroad unemployment insurance.

For the reasons set out in the preamble, title 20, chapter II of the Code of Federal Regulations is amended as follows:

PART 340—RECOVERY OF BENEFITS.

1. The authority for part 340 continues to read as follows:

Authority: 45 U.S.C. 362(1).

2. Section 340.7 is revised to read as follows:

§ 340.7 Deduction in computation of death benefit.

In computing the residual lump sum provided for in part 234, subpart D, of this chapter, the Board shall include in the benefits to be deducted from the gross residual all amounts recoverable under this part, but not recovered, including amounts where recovery was waived, that were paid to the individual or paid to others as benefits accrued to the individual but not paid at death.

3. Section 340.8 is revised to read as follows:

§ 340.8 Recovery by adjustment in connection with subsequent payments under the Railroad Retirement Act.

Recovery under this part may be made by permanently reducing the amount of any annuity payable to the overpaid individual (or an individual receiving an annuity based upon the same compensation record as that of the overpaid individual) under the Railroad Retirement Act. This method of recovery is called an actuarial adjustment of the annuity. The Board cannot require any individual to take an actuarial adjustment in order to recover an overpayment nor is an actuarial adjustment available as a matter of right. An actuarial adjustment does not become effective until the overpaid individual negotiates the first annuity check which reflects the annuity rate after actuarial adjustment.

Example. An individual agrees to recovery of a $5,000 overpayment made to him by actuarial adjustment to an annuity awarded him under the Railroad Retirement Act. However, he dies before negotiating the first annuity check reflecting his actuarially reduced rate. The $5,000 is not considered recovered.

4. Section 340.10 is amended by revising paragraphs (c)(3), (d), and (e), to read as follows:

§ 340.10 Waiver of recovery of erroneous payments.

* * * * *

(c) * * *

(3) For purposes of this section, resources include, but are not limited to, liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, any accrual benefit payable by the United States of America or any other source.

* * * * *

(d) *When recovery is against equity or good conscience.* Recovery is considered to be against equity or good conscience when a person, in reliance on such payments or on notice that such payment would be made, relinquished a valuable right or changed his or her position for the worse.

(e) *Recoveries not subject to waiver.* (1) Where an amount is recoverable pursuant to section 2(f) of the Act from remuneration payable to an employee by a person or company, or where a lien for reimbursement of sickness benefits has arisen pursuant to section 12(o) of the Act, and in either case recovery is sought from a person other than the employee, no right to waiver of recovery exists.

(2) Where the amount recoverable is equal to or less than 10 times the current maximum daily benefit rate under the Railroad Unemployment Insurance Act it shall not be considered contrary to the purpose of the Act or against equity or good conscience to recover such payment. Consequently, the amount recoverable is not subject to waiver under this part.

(3) Where the amount recoverable is the result of an overpayment of benefits payable under the Railroad Unemployment Insurance Act due to entitlement to annuities under the Railroad Retirement Act for the same days for which benefits were payable, and recovery of such overpayment may be made by offset against an accrual of the annuities, it shall not be considered contrary to the purpose of the Act or against equity or good conscience to recover the erroneous payment by offset against such accrual. Consequently, the amount recoverable is not subject to waiver under this part.

(4) Where there exists accumulated Federal benefits payable by any executive agency of the United States, any amount recoverable which is equal to or less than the accumulated Federal benefits is not subject to waiver. Any amount recoverable which is greater than the identified accumulated Federal benefits may be considered for waiver in accordance with the provisions of this part and part 320 of this chapter.

Dated: January 6, 1992.

By authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

RIN 0960-AD04

Federal Old-Age, Survivors, and Disability Insurance Benefits; Inclusion of Certain Deferred Compensation in Determination of Wage-Based Adjustments

AGENCY: Social Security Administration, HHS.

ACTION: Final rules.

SUMMARY: These final regulations reflect changes made as a result of section 10208 of Public Law (Pub. L.) 101-239, the Omnibus Budget Reconciliation Act of 1989. That statute provides for inclusion of contributions to certain deferred compensation plans in the determination of the national average wage indexing series, beginning with average wages for 1991.

The legislative change to the calculation of the average wage index