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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 950

RIN 3206–AK 71

Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations—Sanctions Compliance Certification

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final regulation for the Combined Federal Campaign (CFC). This regulation requires that each federation and unaffiliated organization applying to participate in the CFC must, as a condition of participation, certify that it is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, and individuals subject to economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC).

DATES: This rule is effective November 7, 2005.

FOR FURTHER INFORMATION CONTACT: Mark W. Lambert, Senior Compliance Officer for the Office of CFC Operations, by telephone on (202) 606–2564, by FAX on (202) 606–0902, or by e-mail at *cfc@opm.gov.*

SUPPLEMENTARY INFORMATION:

I. Background of This Rulemaking

As a condition of participating in the 2005 CFC, OPM required organizations to certify that they do not knowingly employ individuals, or contribute funds to entities or persons, on either the Department of the Treasury's Office of Foreign Assets Control's Specially Designated Nationals List or the Terrorist Exclusion List. OPM's Office of CFC Operations issued guidance on compliance with that certification, CFC Memorandum 2004–12, which described the rationale for the certification and set forth instructions for checking these lists.

On March 29, 2005, OPM issued a Notice of Proposed Rulemaking (70 FR 15783 (March 29, 2005)) (NPRM) to modify the certification. The proposed rule governs the solicitation of Federal civilian and uniformed services personnel at the workplace for contributions to private non-profit organizations through the CFC under the authority of Executive Order 12353 (March 23, 1982). OPM has plenary authority under 5 CFR part 950 to administer the CFC in compliance with legal standards.

As explained in the NPRM, the proposed regulation requires that each federation and unaffiliated organization applying to participate in the CFC must, as a condition of participation, certify that it is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, and individuals subject to economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC).

OFAC is the office principally responsible for administering and enforcing U.S. economic sanctions programs imposed pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) and other authorities. These programs further U.S. foreign policy and national security goals and are directed primarily against foreign states and nationals, including sponsors of global terrorism and foreign narcotics traffickers. OFAC acts, pursuant to delegated authority, under Presidential wartime and peacetime national emergency powers. The programs administered by OFAC restrict or prohibit U.S. persons from engaging in transactions and dealings with targeted countries, entities, and individuals. OFAC publishes a list of Specially Designated Nationals and Blocked Persons (SDN List). The persons on the SDN List are subject to economic sanctions. The SDN List and additional information relating to the economic sanctions programs that OFAC administers are available at *http://www.treas.gov/ofac.* A link to the SDN List is available on the CFC Web site (*http://www.opm.gov/cfc*).

The vulnerability of the charitable sector to abuse by terrorists and others underscores the importance of due diligence within the charitable sector. For example, between October 2001 and December 2004, the United States: (i) Imposed sanctions against five U.S.-based charities and thirty-five non-U.S. charities for terrorist financing activity under the authority of Executive Order 13224 (Sept. 23, 2001) and the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.*; (ii) convicted and sentenced the leader of a U.S.-based charity for racketeering and fraud owing to terrorist-related support; (iii) indicted more than one U.S.-based charity and its leadership under pending terrorist financing charges; and (iv) investigated numerous other charities operating in the U.S. that were suspected of involvement in supporting terrorist activities.

Accordingly, in order to further the purposes of the economic sanctions imposed by the President, to ensure that organizations participating in the CFC are exercising appropriate diligence, and to help safeguard the integrity of the CFC and the interests of Federal employees who contribute to the CFC, the final regulation requires that each federation, federation member, and unaffiliated organization applying to participate in the CFC must, as a condition of participation, complete the following certification:

I certify that the organization named in this application is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, or individuals subject to economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control. The organization named in this application is aware that a list of countries subject to such sanctions, a list of Specially Designated Nationals and Blocked Persons subject to such sanctions, and overviews and guidelines for each such sanctions program can be found at http://www.treas.gov/ofac. Should any change in circumstances pertaining to this certification occur at any time, the organization will notify OPM's Office of CFC Operations immediately.

II. Explanation of Changes

OPM received 13 written comments in response to the NPRM from: four Local Federal Coordinating Committees, which oversee local campaign activities; two Principal Combined Fund Organizations, which administer local campaigns on behalf of Federal employees; four charitable organizations that participate or have participated in the CFC; one Federal agency; one Federal employee; and one citizen. OPM has found these comments very helpful, and, in several important respects, the final rule contains revisions made in response to these comments.

In general, each of the 13 commenters believed that the certification and regulatory changes proposed in the NPRM were improvements over the 2005 certification and OPM guidance. Five of the 13 commenters voiced their concurrence with the regulatory changes and certification proposed in the NPRM.

One of the commenters wanted to know how the propositions in the NPRM would affect the American Red Cross. OPM believes that the regulatory change and certification will affect all organizations in the same manner. Each organization wishing to participate in the CFC will need to determine the steps necessary to ensure that it can accurately certify to the sanctions compliance statement in order to participate in the CFC.

Another commenter suggested clarifying the NPRM wording of 5 CFR § 950.605 to specify that federation members, as well as federations and unaffiliated organizations, must certify to the sanctions compliance statement. OPM agrees and has made the change to 5 CFR § 950.605.

One commenter recommended that we implement the proposed certification in the NPRM for the 2005 CFC. OPM disagrees with the commenter, because the certification in the NPRM was not finalized as of the application deadline for the 2005 CFC. The proposed regulation remained subject to change based on comments from stakeholders during the time period that decisions needed to be made on the eligibility of CFC applicants for the 2005 CFC.

One commenter stated that the proposed certification in the NPRM continued to contain ambiguities and recommended that OPM clarify these ambiguities prior to finalizing the regulation. The primary concern of the commenter was that it was not clear what an organization must do to be compliant and whether or not checking government sanctions lists would still be mandatory, as was required by the 2005 certification and OPM guidance. The commenter asserted that if list-checking was mandatory, OPM should clarify whether CFC Memorandum 2004–12 applies in whole or in part to the proposed NPRM certification. The commenter requested that these clarifications be made prior to the adoption of the final rule, by the issuance by OPM of a second proposed rule containing the clarifications and providing the public with a chance to comment again.

Under the final rule, effective for 2006 and subsequent campaigns, OPM does not mandate that applicants check the Specially Designated Nationals (SDN) List or the Terrorist Exclusion List (TEL). Charities, however, as a minimum, should follow the U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities, which is located on the OFAC Web site at *http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml.* Thus, even though OPM will not mandate list-checking by applicants for the 2006 and subsequent campaigns, it continues to encourage charities to check the SDN List and the TEL as a way to help ensure compliance with applicable regulations and as an important part of implementing the type of risk-based compliance program proposed by the Guidelines. It is the intention of OPM that applicants enhance their efforts to ensure that funds collected through the CFC not be used to finance unlawful activities or those who engage in them, not that such efforts be diminished. This is not a departure from prior policy. The new certification takes into account the fact that the various charities participating in the CFC operate under unique circumstances and it is ultimately their responsibility to ensure compliance with the OFAC economic sanctions programs. OPM does not believe it is necessary to issue a second proposed rule and will continue to consider feedback from stakeholders throughout the current and future campaigns.

One of the commenters recommended changes to the Supplementary Information section of the NPRM to reflect that more than one U.S. based charity and its leadership have been indicted for providing material support or resources to terrorist organizations. The commenter further requested that OPM clarify the entry that states ''(iv) investigated numerous other charities operating in the U.S. and suspected of terrorist financing activity'' to read ''(iv) investigated numerous other charities operating in the U.S. suspected of involvement in supporting terrorist activities.'' OPM agrees and made the changes to the Supplementary Information in this final regulation. The commenter also recommended a final regulation similar to the one issued and used by the United States Agency for International Aid (USAID). Although OPM reviewed and considered the regulation and guidance used by USAID, OPM believes that the proposed certification, with revisions based on public comments, more appropriately meets the needs of the CFC. USAID enters into assistance agreements with organizations and must ensure that it, as an entity, complies with the OFAC sanctions program as well as criminal statutes against providing material support to terrorist groups. As a result, USAID requires disclosure of contractors and subgrantees of its grants, as well as compliance verifications on these contractors and subgrantees. Although OPM facilitates Federal employee support for charitable recipients through the CFC, OPM does not provide direct support to organizations in the manner that USAID does, nor does OPM collect comparable information from its participating organizations. As a result, the burden of ensuring compliance with the OFAC sanctions programs properly rests with the charities that provide the charitable benefits, and that are in any event charged with compliance with OFAC sanctions programs as a matter of law. OPM does annually conduct a match of participating charities at the national level against the OFAC list and requires LFCCs to similarly conduct an annual match of local charitable organizations against the OFAC list.

One commenter objected to the last sentence in the proposed certification, stating that it implies the organization has violated the law and raises Constitutional concerns of self-incrimination. The commenter suggested that OPM revise this sentence to match the one used in the 2005 certification. While OPM intends for voluntary compliance with this regulation to include reporting instances of non-compliance, OPM agrees that the suggested language accomplishes that purpose and has made the change to the last sentence of the certification in this final regulation.

One commenter proposed that the certification should be clarified to recognize that no entity can ensure absolute compliance and to provide a standard that allows each charity to plan its individual approach to compliance. The commenter stated that by requiring a charity to state that it is in compliance, CFC puts the applicant in the potential position of having to

prove a negative: that there is no diversion of funds. The commenter cited the certification used by USAID as providing a clearer and more realistic statement: ''does not knowingly provide support or resources * * * to the best of its current knowledge.'' The commenter pointed out that the USAID guidance states that list checking may be used but is not mandatory, defines ''material support'' and clarifies what a charity must do if it believes recipients of its support are involved in terrorist acts. The commenter also proposed that the CFC provide a process for charities that discover noncompliance with the certification during the fiscal year to cure the problem without interrupting their participation in the program and that absent negligence in oversight, the CFC should not attempt to recoup donations already received when a charity comes forward to report and cure non-compliance. The commenter stated that any other approach is inherently unfair and discourages charities from coming forward to report and correct problems. Finally, the commenter suggested the removal of OPM's description of a ''pattern of abuse of U.S. and foreign charities'' included in the Supplementary Information in the NPRM. The commenter based this suggestion on a citation from a 2004 research paper, which disputed that U.S. charities were unwittingly being used to support terrorist activities.

OPM agrees with some of the comments made by this commenter and disagrees with others. As stated previously, OPM believes that this final rule will provide the required clarification and that the best practices guidance issued by the U.S. Department of the Treasury will assist charities in their compliance efforts. As explained above, OPM reviewed and considered the regulation and guidance used by USAID but believes that the proposed certification, with revisions based on public comments, more appropriately meets the needs of the CFC. In regard to the comments on charities that discover instances of non-compliance and are able to resolve them without affecting CFC participation, the proposed rule and this final regulation state that OPM ''will take steps it deems necessary.'' These steps may include the items iterated in the NPRM and in this final regulation. Historically, OPM has chosen to work with charities to correct occurrences of non-compliance with CFC regulations and will continue to do so. However, OPM recognizes that circumstances vary. Particularly with regard to this sensitive issue, it has determined that it must reserve discretion to act appropriately given unforeseen future events.

Finally, OPM opted to remove the language regarding ''a pattern of abuse'' noted in the **SUPPLEMENTARY INFORMATION** of the NPRM. While more than one U.S. based charity and its leadership have been indicted for providing material support or revenues to terrorist organizations, OPM acknowledges that there are differing views regarding this assertion. Furthermore, OPM does not intend this NPRM to be the forum for this debate.

The final commenter reiterated the comments provided by the previously described commenter, which we already have addressed in this discussion.

Waiver of Delayed Effective Date

Pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective upon the date of publication of this notice. In accordance with established practice, OPM will begin accepting applications for the 2006 CFC on December 1, 2005. Waiting 30 days from the date of publication of this notice to make the rule effective will not provide sufficient time in advance of December 1, 2005, for the application form for the 2006 CFC to be made available to parties wishing to complete and submit the form.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. Organizations applying to the CFC have an existing, independent obligation to comply with U.S. sanctions laws. Requiring them to execute a certification with respect to such compliance is not burdensome. OPM has taken steps to minimize the economic impact on small entities by including in the text of the certification the OFAC Web site address at which extensive information on U.S. sanctions is available via the internet free of charge, including the text-searchable OFAC SDN List.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 950

Administrative practice and procedures, Charitable contributions, Government employees, Military personnel, Nonprofit organizations and Reporting and recordkeeping requirements.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM amends 5 CFR part 950 as follows:

PART 950—SOLICITATION OF FEDERAL CIVILIAN AND UNIFORMED SERVICE PERSONNEL FOR CONTRIBUTIONS TO PRIVATE VOLUNTARY ORGANIZATIONS

■ 1. The authority citation for part 950 continues to read as follows:

Authority: E.O. 12353 (March 23, 1982), 47 FR 12785 (March 25, 1982). 3 CFR, 1982 Comp., p. 139. E.O. 12404 (February 10, 1983), 48 FR 6685 (February 15, 1983), Pub. L. 100–202, and Pub. L. 102–393 (5 U.S.C. 1101 Note).

■ 2. In Subpart A § 950.104 add paragraph (b)(18) to read as follows:

§ 950.104 Local Federal Coordinating Committee responsibilities.

* * * * *

(b) * * *

(18) Determining whether each local federation, federation member, and unaffiliated organization that applies to participate in the local campaign has completed the sanctions compliance certification required pursuant to § 950.605. The LFCC must deny participation to any federation or organization that has not completed the sanctions compliance certification.

* * * * *

■ 3. In Subpart F, add new § 950.605 to read as follows:

§ 950.605 Sanctions compliance certification.

Each federation, federation member and unaffiliated organization applying for participation in the CFC must, as a condition of participation, complete a certification that it is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities or individuals subject to economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). Should any change in circumstances pertaining to this certification occur at any time, the organization must notify OPM's Office of CFC Operations immediately. OPM will take such steps as it deems appropriate under the circumstances, including, but not limited to, notifying OFAC and/or other enforcement authorities of such change, suspending disbursement of CFC funds not yet disbursed, retracting (to the extent practicable) CFC funds already

disbursed, and suspending or expelling the organization from the CFC.

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1427

RIN 0560–AH36

Extra Long Staple Cotton Prices

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule finalizes an interim final rule published June 20, 2005 that was effective August 5, 2005, amending the Extra Long Staple (ELS) Cotton Competitiveness Payment Program of the Commodity Credit Corporation (CCC). The interim rule changed the ELS cotton price used to calculate the payment rate from the ''average domestic spot price quotation for base quality U.S. Pima cotton'' to the ''American Pima c.i.f. Northern Europe'' price. The change was made to reduce the cost to the Federal Government of operating the program by incorporating a reference price more indicative of actual ELS cotton world market prices. This final rule makes changes from the interim final rule in the prices used to calculate the payment rate from ''American Pima c.i.f. Northern Europe'' and ''c.i.f. Northern Europe'' price quotes to ''U.S. Pima C/F Far East'' and ''C/F Far East,'' respectively. This change is made in response to comments and for other reasons as discussed.

DATES: Effective November 4, 2005. The first announcement of a payment rate under the new price mechanism will be on November 10, 2005.

FOR FURTHER INFORMATION CONTACT: Steve Neff, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, 1400 Independence Avenue, SW., AG STOP 0515, Washington, DC 20250–0515; Phone: (202) 720–7954; e-mail: *Steve.Neff@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

In an interim final rule published June 20, 2005 (70 FR 35367) the Commodity Credit Corporation (CCC) changed the regulations governing how payment rates are calculated under its Extra Long Staple (ELS) Cotton Competitiveness Payment Program to change the price used for the calculation from the ''average domestic spot price quotation for base quality U.S. Pima cotton,'' or ''U.S. spot quotes,'' to the ''American Pima c.i.f. Northern Europe quote.'' Before the interim rule, the ELS payment rate was the difference between U.S. spot prices, as reported by the Department of Agriculture (USDA), Agricultural Marketing Service (AMS), and the lowest foreign quote, c.i.f. Northern Europe, as published by the trade publication *Cotton Outlook,* adjusted to U.S. location and quality. This change was made because payments to ELS producers calculated using the old price had sharply increased program outlays. For example, the payment rate, which averaged a record high of 16.46 cents per pound in 2004, averaged 80.48 cents per pound for 7 weeks in February and March, 2005. Consequently, fiscal year 2005 outlays through March, 2005, normally budgeted for $50–55 million per year, exceeded $150 million.

The increase in the payment rate could be attributed principally to increases in U.S. spot market quotes. The market for ELS cotton is susceptible to price swings because it is a thin market. ELS production of 736,000 bales in 2004 was only 4 percent of total U.S. cotton production and 90 percent of ELS is produced in the San Joaquin Valley of California. The ELS market also has relatively few participants. For example, two trading companies received nearly 60 percent of the payments under this program in fiscal years 2003 and 2004. Further, growing conditions in 2004 contributed to a short supply of high-quality ELS cotton, excess moisture led to color deterioration and lower grade classification. These circumstances exposed a program weakness which allowed high prices and high payment rates to influence each other with no market-like, self-correcting mechanism. AMS collects transaction data from market participants whose payments depend on the reported prices. If a sale is made at a relatively low price, the merchant has no incentive to report that transaction. With a high payment rate in effect for a week, the merchant could bid more for existing supplies and report higher transaction prices to AMS, which led to a higher payment rate in the following week. With the higher payment rate, the merchant could source from the United States and remain competitive in international markets.

The interim final rule's intent was to reduce future payment rates by comparing foreign quotes to quotes for American Pima c.i.f. Northern Europe to determine the payment rate. American Pima c.i.f. Northern Europe was determined to be the most valid price measure for this program because it was a comparison of foreign and U.S. quotes from the same source within the same geographical area. This measure is net of the payment rate and based on the export market. FSA believed that this measure was appropriate because 90 percent of U.S.-produced ELS cotton is exported. According to our analysis, the payment rate calculated in this manner would have resulted in a payment of 20.69 cents per pound for the first week of April, about a quarter of the rate CCC actually paid.

Public Comment

Section 1601(c) of the Farm Security and Rural Investment Act of 2002 (2002 Act) provided that the regulations needed to implement Title I of the 2002 Act, which includes this rule, shall be promulgated without regard to the notice and comment provisions of 5 U.S.C. 553 or the Statement of Policy of the Secretary of Agriculture effective July 24, 1971, relating to notices of proposed rulemaking and public participation in rulemaking. Therefore, the rule was issued as an interim final rule and was effective immediately. Nonetheless, the Agency requested and accepted public comments.

Discussion of Public Comments

Eight public comments were received. Two letters supporting the interim final rule were received from Congress—one from the Chairman of the Senate Committee on Agriculture, Nutrition & Forestry; one from the Chairman of the House Committee on Agriculture. Also, separate letters were received from two cotton industry groups, the National Cotton Council and Supima, supporting the interim rule. These groups also joined in a letter signed by five organizations recommending the shift to a Far East price quote basis discussed below.

Price Quotes Used To Calculate Payments

A comment from a U.S. cotton spinner urged the Agency to change both price quotes used to calculate payments from the ''American Pima c.i.f. Northern Europe'' adopted in the interim final rule and the foreign price quote used for comparison, ''c.i.f. Northern Europe,'' to ''U.S. Pima C/F Far East'' and ''C/F Far East,'' respectively. This change was needed, the commenter suggested, because ''very little cotton, and especially very little American Pima (ELS cotton), is