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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 724

RIN 3206-AJ93

#### Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002—Judgment Fund

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to carry out the agency reimbursement provisions of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act). The No FEAR Act requires that the President or his designee promulgate rules to regulate agency reimbursement of the Judgment Fund for payments made to employees, former employees, or applicants for Federal employment because of actual or alleged violations of Federal antidiscrimination laws, Federal whistleblower protection laws, and/or retaliation claims arising from the assertion of rights under those laws. This rule implements the reimbursement provisions of Title II of the No FEAR Act.

**DATES:** *Effective Date:* The final rule is effective October 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Gary D. Wahlert by telephone at (202) 606-2930; by FAX at (202) 606-2613; or by e-mail at [NoFEAR@opm.gov](mailto:NoFEAR@opm.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The United States and its citizens are best served when the Federal workplace is free of discrimination and retaliation. In order to maintain a productive workplace that is fully engaged with the

many important missions before the Government, it is essential that the rights of employees, former employees and applicants for Federal employment under antidiscrimination, and whistleblower protection laws be steadfastly protected and that agencies that violate these rights be held accountable. Congress has found that agencies cannot be run effectively if they practice or tolerate discrimination. In addition, Congress has found that requiring Federal agencies to pay for any discrimination or whistleblower judgment, award, or settlement should improve agency accountability under these laws. Therefore, under authority delegated by the President, OPM is issuing final regulations to implement the reimbursement provisions of Title II of the Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Public Law 107-174.

#### Introduction

On January 22, 2004, OPM published at 69 FR 2997 (2004) an interim final rule implementing the reimbursement provisions of the No FEAR Act, and provided a 60-day comment period. The rule was effective October 1, 2003. On March 31, 2004, OPM at 69 FR 16769 (2004) extended the comment period to April 26, 2004. OPM received 13 comments from Federal agencies or departments, five comments from civil rights organizations, and more than a hundred comments from individuals. OPM thanks all who provided comments—each comment has been carefully considered.

#### Hearings/Comment Period

A significant number of commenters requested that OPM conduct public hearings on the No FEAR regulations and that OPM extend the comment period on the interim final rule published on January 22, 2004. OPM believes that the Administrative Procedures Act process for obtaining comments during the regulatory process is an appropriate method to capture public concerns and therefore has declined to conduct public hearings. However, to help ensure that OPM considers all concerns, OPM extended the comment period as noted previously.

#### Definition of Agency

The regulation's definition of agency mirrors the statutory definition contained in section 103 of the No FEAR Act. One commenter pointed out, however, that the definition for agency is the one provided in 5 U.S.C 105. The commenter noted that this section of the statute does not include military departments as defined in 5 U.S.C. 102 and suggested that military departments as a result would not reimburse the Judgment Fund. OPM has concluded that military departments are covered by the No FEAR Act because they are part of the Department of Defense. The statute at 5 U.S.C. 105 defines Executive Agency as including executive departments, one of which under 5 U.S.C. 101 is the Department of Defense.

The No FEAR Act requires agencies to reimburse the Judgment Fund for payments made in connection with proceedings involving Federal antidiscrimination and whistleblower protection laws. Section 724.102 of the interim final rule defined such a payment as "a disbursement from the Judgment Fund on or after October 1, 2003" (the effective date of the reimbursement provision of the No FEAR Act). Thus, under the rule, if a payment is made from the Fund on or after that date based on a judgment, award, or settlement in such a proceeding, the agency is obligated to reimburse the Fund. A number of commenters expressed concern about this definition and suggested that it be modified. Some thought an agency's obligation to reimburse the Fund should occur only if a judgment, award, or settlement occurs on or after that date. Others thought that an agency should not be obligated in any proceedings to which it was not originally a party (see later discussion about financial implications generally under Agency Obligations). Some thought an agency's obligation should only accrue in proceedings that are initiated on or after October 1, 2003. OPM understands that there may be significant financial implications associated with this rule and that some may perceive the rule to be unfair. Nevertheless, OPM has determined that its definition of payment (and thus describing agencies' reimbursement obligations) reflects Congressional intent. OPM does believe, however, that the term payment is a broad concept and may include a

number of separate payments. For example, a judgment, award or settlement may call for separate payments over an extended period of time, subsequent payments may be based on some future condition, separate payments may be made to individual members of a class action, and separate payments may be made for attorney fees. Because there may be many payments involved in a given proceeding, OPM is responding to the previous comments by modifying the definition to clarify that "payment" means the *first* disbursement in a particular proceeding. For example if the Judgment Fund made a disbursement in a proceeding before October 1, 2003, any subsequent disbursement made in that same proceeding on or after October 1, 2003, would not be considered payments that would obligate the agency involved to reimburse the Fund. However, if a proceeding was pending before October 1, 2003, and the first disbursement from the Fund in that proceeding occurred on or after October 1, 2003, the agency would be obligated to reimburse the Fund.

One commenter stated that the types of actions on which payments from the Judgment Fund are made could be misunderstood. OPM agrees and has modified the definition in section 724.102 by inserting additional statutory references and using the phrase "or retaliatory conduct" as appropriate. This should help eliminate any confusion about which payments are covered by the No FEAR Act.

Finally, with regard to payments, OPM notes that the No FEAR Act does not change the criteria or process for obtaining payments from the Judgment Fund; it only creates a reimbursement requirement for agencies. In other words, the No FEAR Act does not authorize agencies to make payments directly to employees, former employees, or applicants for Federal employment that, prior to the No FEAR Act, would have been made from the Judgment Fund. Judgments, awards, or settlements that were eligible for payment from the Judgment Fund before the No FEAR Act became effective will continue to be paid by the Judgment Fund.

#### Agency Obligations

With regard to agency obligations, a number of commenters suggested that the regulations take into account the fact that the agency or organization currently assigned as a party to a proceeding may not have been the original party to the proceedings because of reorganization, transfer of function, etc. The No FEAR

Act draws no distinctions between original and successor agencies in proceedings and OPM is reluctant to do so as well. By inserting a parenthetical phrase in section 724.103, OPM confirms that the obligation to reimburse the Judgment Fund extends to successor agencies. In those proceedings where financial considerations are paramount, OPM notes that Congress understood that an agency may need to complete its reimbursement of the Fund over a period of years under the circumstances described in section 102 of the Act, *i.e.*, to avoid reductions in force, furloughs, other reductions in compensation or benefits for the workforce of the agency or to avoid an adverse effect on the mission of the agency. (Several commenters suggested that these circumstances be described in the regulations but OPM has declined since the Act itself is clear.) As further indication that Congress understood this potential circumstance, the No FEAR Act requires agencies to report on any adjustments in their budgets made in order to comply with reimbursement obligations.

#### Procedures

Section 724.104(a) of the interim final rule stated that FMS would notify agencies within 15 business days after January 22, 2004, of any payments from the Judgment Fund between October 1, 2003, and January 22, 2004, involving those agencies. This notice period has expired and thus OPM is deleting the provision from the final rule.

Several commenters had questions about the means FMS would use to notify agencies under section 724.104(a) that a payment has been made from the Judgment Fund. OPM has clarified this section to reflect the intent that such notices be in writing.

A number of commenters stated that section 724.104(b) is unclear about the time frame that would apply to an agency's obligation to reimburse the Judgment Fund or contact FMS to make arrangements. OPM notes that the intent of this provision is to require agencies to reimburse the Fund or contact FMS within 45 business days after they receive the FMS notice. Accordingly, OPM has modified the section to reflect this intent more clearly. Other suggestions included lengthening the time frames applicable to agencies and adding appeal procedures for agencies to follow if FMS' notices are disputed. OPM believes that the stated time frames are reasonable and appropriate and that, in the event there is a dispute between an agency and FMS, an agency may discuss that dispute with FMS

without utilizing a special appeals procedure. Therefore, OPM declines to make additional modifications to § 724.104(b).

#### Compliance

A number of commenters stated that the § 724.105 requirement for FMS to record on an annual basis and post on the FMS Web site information about agencies that fail to meet their Judgment Fund reimbursement obligations is an inadequate response to such failures. Several suggested alternatives such as posting the names of responsible officials, disciplining responsible officials, or notifying Congress. The No FEAR Act provides no specific enforcement authority and OPM declines to assume such a role without authorization. OPM notes, however, that agencies are required by the No FEAR Act to report to Congress and others on the amount of money required to be reimbursed to the Judgment Fund by those agencies. (OPM will issue separate regulations on this and other reporting requirements.) One commenter also suggested that a process be described for removing postings from FMS Web site once the Judgment Fund is reimbursed. OPM agrees that such a process would be appropriate and has amended section 724.105 so that postings will be removed during the annual posting following the date when the agency comes into compliance with the No FEAR Act.

#### Miscellaneous Comments

A significant number of comments noted that the interim final rule on reimbursement of the Judgment Fund did not address the topics of notification, training, reporting, and disciplinary best practices that are covered by the No FEAR Act. As noted in the Supplementary Information in the interim final rule, OPM will issue regulations on each of these topics separately.

A number of comments addressed subject matter covered by Title III of the No FEAR Act. Congress assigned the responsibility for issuing regulations under that Title to the Equal Employment Opportunity Commission. Since OPM lacks authority under Title III, it is unable to respond to those comments.

#### Immediate Implementation of Final Rule

Immediate implementation of this final rule is based upon the exceptions found at 5 U.S.C. 553(b)(A), (b)(3)(B) and (d). The agency obligations under the No FEAR Act to reimburse the Judgment Fund began on October 1,

2003. Interim final rules covering these obligations were published on January 22, 2004, and were effective on October 1, 2003. It was essential, at the time of initial publication, that all agencies be placed in a position to understand their responsibilities regarding this requirement. The revisions to these rules make some adjustments to our description of agency obligations that we believe should be retroactive to October 1, 2003. OPM has determined under 5 U.S.C. 553(b)(3)(A) that the reimbursement provision only affects the rules of agency organization, procedure, or practice and has no effect on the substantive rights of those entitled to payment from the Judgment Fund. OPM has determined under 5 U.S.C. 553(b)(3)(B) that it would be contrary to the public interest to delay promulgation of the rules governing the reimbursement provisions of the No FEAR Act. For the same reasons, OPM has determined under 5 U.S.C. 553(d)(3) that there is good cause for the final rule to become effective upon publication retroactive to October 1, 2003.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal employees and agencies.

#### E.O. 12866—Regulatory Review

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### E.O. 13132

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### E.O. 12988—Civil Justice Reform

This regulation meets the applicable standard set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were

deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

#### List of Subjects in 5 CFR Part 724

Administrative practice and procedure, Civil rights, Claims.

U.S. Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is adopting the interim rule that added part 724 to title 5, Code of Federal Regulations, which was published at 69 FR 2997 on January 22, 2004, as final with the following changes. Part 724 is revised to read as follows:

#### PART 724—IMPLEMENTATION OF TITLE II OF THE NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2002

##### Subpart A—Reimbursement of Judgment Fund

Sec.

- 724.101 Purpose and scope.
- 724.102 Definitions.
- 724.103 Agency obligations.
- 724.104 Procedures.
- 724.105 Compliance.
- 724.106 Effective date.

##### Subpart B—Notification of Rights and Protections and Training [Reserved]

##### Subpart C—Annual Report [Reserved]

##### Subpart D—Best Practices [Reserved]

**Authority:** Sec. 204 of Pub. L. 107-174, 116 Stat. 566; Presidential Memorandum dated July 8, 2003, "Delegation of Authority Under Section 204(a) of the Notification and Federal Employee Antidiscrimination Act of 2002."

##### Subpart A—Reimbursement of Judgment Fund

###### § 724.101 Purpose and scope.

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to reimburse the Judgment Fund for payments. The regulations describe agency obligations

and the procedures for reimbursement and compliance.

###### § 724.102 Definitions.

In this part:

*Agency* means an Executive agency as defined in 5 U.S.C. 105, the United States Postal Service, or the Postal Rate Commission;

*Applicant for Federal employment* means an individual applying for employment in or under a Federal agency;

*Employee* means an individual employed in or under a Federal agency;

*Former Employee* means an individual formerly employed in or under a Federal agency;

*Judgment Fund* means the Judgment Fund established by 31 U.S.C. 1304;

*No FEAR Act* means the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002;"

*Payment*, subject to the following exception, means a disbursement from the Judgment Fund on or after October 1, 2003, to an employee, former employee, or applicant for Federal employment, in accordance with 28 U.S.C. 2414, 2517, 2672, 2677 or with 31 U.S.C. 1304, that involves alleged discriminatory or retaliatory conduct described in 5 U.S.C. 2302(b)(1) and (b)(8) or (b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(1) and/or (b)(8) or conduct described in 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e-16. For a proceeding involving more than one disbursement from the Judgment Fund, however, this term shall apply only if the first disbursement occurred on or after October 1, 2003.

###### § 724.103 Agency obligations.

A Federal agency (or its successor agency) must reimburse the Judgment Fund for payments covered by the No FEAR Act. Such reimbursement must be made within a reasonable time as described in § 724.104.

###### § 724.104 Procedures.

(a) The procedures that agencies must use to reimburse the Judgment Fund are those prescribed by the Financial Management Service (FMS), the Department of the Treasury, in Chapter 3100 of the Treasury Financial Manual. All reimbursements to the Judgment Fund covered by the No FEAR Act are expected to be fully collectible from the agency. FMS will provide written notice to the agency's Chief Financial Officer within 15 business days after payment from the Judgment Fund.

(b) Within 45 business days of receiving the FMS notice, agencies must

reimburse the Judgment Fund or contact FMS to make arrangements in writing for reimbursement.

#### **§ 724.105 Compliance.**

An agency's failure to reimburse the Judgment Fund, to contact FMS within 45 business days after receipt of an FMS notice for reimbursement under § 724.104 will be recorded on an annual basis and posted on the FMS Web site. After an agency meets the requirements of § 724.104, the recording will be eliminated no later than the next annual posting process.

#### **§ 724.106 Effective date.**

This subpart is effective on October 1, 2003.

#### **Subpart B—Notification of Rights and Protections and Training [Reserved]**

#### **Subpart C—Annual Report [Reserved]**

#### **Subpart D—Best Practices [Reserved]**

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## **DEPARTMENT OF AGRICULTURE**

### **Farm Service Agency**

#### **7 CFR Part 760**

RIN 0560-AH45

#### **2005 Section 32 Hurricane Disaster Programs**

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** The Farm Service Agency (FSA) issues this interim final rule in response to emergency agricultural situations caused by the 2005 Hurricanes Dennis, Katrina, Ophelia, Rita, and Wilma in certain counties in Alabama, Florida, Louisiana, Mississippi, North Carolina, and Texas. The named hurricanes severely limited the purchasing power of farmers engaged in the production of agricultural commodities. This rule provides for the establishment of four hurricane disaster programs and one grant program using an estimated \$250 million in funds available under section 32 of the Act of August 24, 1935, to be administered by FSA in order to provide funds to eligible producers who suffered eligible losses, thus reestablishing these producers' purchasing power. The grants will be provided to the respective States to enable them to assist aquaculture producers having losses

related to the aforementioned 2005 hurricanes.

**DATES:** This interim final rule is effective May 9, 2006. Written comments via letter, facsimile, or Internet must be received on or before June 9, 2006 in order to be assured consideration.

**ADDRESSES:** FSA invites interested persons to submit comments on this interim final rule. Comments may be submitted by any of the following methods:

- *E-mail:* Send comments to [Diane.Sharp@wdc.usda.gov](mailto:Diane.Sharp@wdc.usda.gov).
- *Fax:* Submit comments by facsimile transmission to: (202) 690-2130.
- *Mail:* Send comments to: Diane Sharp, Director, Production, Emergencies, and Compliance Division; Farm Service Agency; United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW., Washington, DC 20250-0517.
- *Hand Delivery or Courier:* Deliver comments to: Diane Sharp, Director, Production, Emergencies, and Compliance Division; Farm Service Agency; United States Department of Agriculture, Rm. 4754-S, 1400 Independence Avenue, SW., Washington, DC 20250-0517
- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Diane Sharp, Director, Production, Emergencies, and Compliance Division; Farm Service Agency; United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW., Washington, DC 20250-0517; telephone (202) 720-7641; e-mail [Diane.Sharp@wdc.usda.gov](mailto:Diane.Sharp@wdc.usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

##### **2005 Section 32 Hurricane Disaster Programs**

Section 32 of the Act of August 24, 1935, as amended (section 32) provides, in part, discretionary authority for the Secretary of Agriculture (the Secretary) to use section 32 funds to reestablish farmers' purchasing power by making payments to them in connection with the normal production of agricultural commodities produced for domestic consumption. This authority has been used in the past to provide assistance to producers in response to unusual market conditions that adversely affected them. Therefore, the Secretary is using funds available under section 32 in order to restore purchasing power to farmers affected by the significant

and widespread destruction caused by the 2005 Hurricanes Dennis, Katrina, Ophelia, Rita, and Wilma in applicable counties in Alabama, Florida, Louisiana, Mississippi, North Carolina, and Texas. The hurricanes destroyed and damaged trees, killed livestock, destroyed feed, and adversely impacted crop production, including aquaculture. This interim final rule addresses the hurricane destruction in those counties receiving a Presidential or Secretarial Designation as a primary county. Accordingly, the Secretary has determined that assistance is appropriate under this authority in these counties by providing the following programs:

- The Hurricane Indemnity Program (HIP) will provide payments to eligible producers who receive either a Federal Crop Insurance Corporation crop insurance indemnity payment or a crop loss payment under FSA's Noninsured Crop Disaster Assistance Program (NAP) for crop losses that are primarily attributable to one of the five listed hurricanes in an eligible county. HIP payments will be equal to 30 percent of the Risk Management Agency crop insurance indemnity or 30 percent of the NAP payment, subject to the limitations of this rule. Producers suffering crop losses due to an eligible hurricane may have been impacted by other causes of loss, not related to such a hurricane, prior to the hurricane occurrence. As a result, if a crop insurance indemnity or NAP payment was received for multiple causes of loss, including hurricane and related conditions, the entire crop insurance indemnity or NAP payment will be used to determine the HIP benefit. Since losses under both programs are not finalized until after harvest is completed or crop is abandoned RMA and FSA are unable to specifically prorate crop insurance indemnities or NAP payments strictly due to hurricane. If FSA determines that the cause of loss was not due to a hurricane or related condition, no payment will be made.

- The Feed Indemnity Program (FIP) will provide payments for feed losses or increased feed costs to eligible owners, or cash lessees, of eligible livestock in eligible counties due to 2005 hurricanes. Payments will be based on per-day feed needs for each type of eligible livestock.

- The Livestock Indemnity Program (LIP) will provide payments to eligible livestock owners and contract growers who suffered eligible livestock deaths that occurred in an eligible county due to 2005 hurricanes. Payments will be based on 75 percent of an average market value of the eligible livestock for non-contract growers and 75 percent of