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SUBJECT: CFO Guidelines and Procedures on Waiving Claims against USAID Employees for Erroneous Payments

1. PURPOSE. This directive establishes guidelines and procedures for waiving claims by the Agency against an employee for erroneous payments of (1) pay and allowances (*e.g.*, health and life insurance, post differential, etc.) and (2) travel, transportation, and relocation expenses and allowances.

2. BACKGROUND.

a. 5 U.S.C. 5584 authorizes the waiver of claims by the United States in whole or in part against an employee arising out of erroneous payments of pay and allowances, travel, transportation, and relocation expenses and allowances. A waiver may be considered when collection of the claim would be against equity and good conscience and not in the best interest of the United States provided that there does not exist, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim.

b. The General Accounting Office Act of 1996 (Pub. L. 104-316) amended 5 U.S.C. 5584 by transferring the authority to waive claims for erroneous payments exceeding \$1,500 from the Comptroller General of the United States to the Office of Management and Budget (OMB). OMB subsequently re delegated this waiver authority to the executive agency that made the erroneous payment. The authority to waive claims not exceeding \$1,500, which was vested in the head of each agency prior to the enactment of Pub. L. 104-316, was unaffected by the Act.

c. 5 U.S.C. 5514 authorizes the head of each agency, upon a determination that an employee is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination, to deduct up to 15%, or a greater amount if agreed to by the employee, from the employee's pay at officially established pay intervals in order to repay the debt.

3. DELEGATION.

The Chief, Bureau for Management, Office of Financial Management, Central Accounting and Reporting Division (M/FM/CAR) is delegated by the Chief Financial Officer (CFO) the authority to waive, in whole or in part, a claim of the United States against an employee for an erroneous payment of pay and allowances, travel, transportation, and relocation expenses and allowances, in accordance with the limitations and standards in 5 U.S.C. 5584.

4. APPEALS.

Requests for waiver of claims which are denied in whole or in part by the Chief, M/FM/CAR may be appealed to the CFO.

5. RESPONSIBILITIES.

- a. Mission Controllers and other billing or payment offices must
 - (1) Promptly notify an employee upon discovery of an erroneous payment to that employee. If the overpayment results from an error in pay made through the National Finance Center (NFC), notification will be to the Chief of the Payroll Division;
 - (2) Promptly act to collect erroneous overpayments other than payments made through NFC, following established debt collection policies and procedures in 22 CFR 213;
 - (3) Advise the employee of the time frames for requesting a waiver;
 - (4) Pay a refund when appropriate if a waiver is granted;
 - (5) Fulfill all due process rights outlined in 22 CFR 213 when implementing these procedures; and
 - (6) Fulfill any other responsibility of the agency imposed by 5 U.S.C. 5584, or other applicable laws and regulations.

- b. The Chief, Payroll Division must
 - (1) Promptly notify an employee upon discovery of an error in pay made through NFC;
 - (2) Promptly act to collect erroneous payments made through NFC, following established debt collection policies and procedures in 22 CFR 213;
 - (3) Advise the employee of the time frames for requesting a waiver;
 - (4) Pay a refund when appropriate if a waiver is granted;
 - (5) Fulfill all due process rights outlined in 22 CFR 213 when implementing these procedures; and
 - (6) Fulfill any other responsibility of the agency imposed by 5 U.S.C. 5584, or other applicable laws and regulations.

- c. The Chief, M/FM/CAR will advise employees whose requests for waiver of claims are approved or denied in whole or in part. The basis for the denial and the right to appeal the denial to the Chief Financial Officer must be included in all denials. All such appeals to the CFO must
 - (1) Be made in writing;
 - (2) Specify the basis for the appeal;
 - (3) Include a chronology of the events surrounding the erroneous payments;
 - (4) Include a statement regarding any mitigating factors;
 - (5) Be submitted no later than 60 days from the written notice of the denial of the waiver; and
 - (6) Attach at least the following documents: the employee's original request for a waiver; the denial of the request; and any personnel actions, e.g., promotions, demotions, step increases, etc., that relate to the overpayment.

6. REPORTING REQUIREMENTS.

a. M/FM/CAR (both for M/FM/CAR and the CFO) will maintain a register of waivers. The register will cover each fiscal year and will contain the following information:

- (1) The total amount waived by the office;
- (2) The number and dollar amount of waiver applications granted in full;
- (3) The number and dollar amount of waiver applications granted in part and denied in part, and the dollar amount of each;
- (4) The number and dollar amount of waiver applications denied in their entirety; and
- (5) The dollar amount refunded as a result of waiver action.

b. The Chief, M/FM/CAR will retain a written record of each waiver action for six years and three months. At a minimum, the written record will contain

- (1) The summary of the events surrounding the erroneous payment;
- (2) Any written comments submitted by the employee from whom collection is sought;
- (3) An account of the waiver action taken and the reasons for such action; and
- (4) Other pertinent information such as any action taken to refund amounts repaid.

7. EFFECT OF REQUEST FOR WAIVER. A request for a waiver of a claim will not affect an employee's opportunity under 22 CFR 213 for a hearing on the determination of the agency concerning the existence or the amount of the debt, or the terms of the repayment schedule. A request by an employee for a hearing under 22 CFR 213 will not affect an employee's right to request a waiver of the claim. The determination whether to waive a claim may be made at the discretion of the deciding official either before or after a final decision is rendered pursuant to 22 CFR 213 concerning the existence or the amount of the debt, or the terms of the repayment schedule.

8. GUIDELINES FOR DETERMINING REQUESTS.

a. A waiver may be considered when collection of the claim would be against equity and good conscience and not in the best interest of the United States provided that there does not exist, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim.

b. A request for a waiver will not be granted if the deciding official determines there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. There are no exceptions to this rule for financial hardship or otherwise.

c. "Fault" exists if, in light of all the circumstances, it is determined that the employee knew or should have known that an error existed, but failed to take action to have it corrected. Fault can derive from an act or a failure to act. Unlike fraud, fault does not require a deliberate intent to deceive. Whether an employee should have known about an error in pay is determined from the perspective of a reasonable person. Pertinent considerations in finding fault include whether

- (1) The payment resulted from the employee's incorrect, but not fraudulent, statement that the employee should have known was incorrect;
- (2) The payment resulted from the employee's failure to disclose material facts in the employee's possession which the employee should have known to be material; or
- (3) The employee accepted a payment, which the employee knew or should have known to be erroneous.

d. Every case must be examined in light of its particular facts. For example, post differential payments are based upon an employee promptly and correctly reporting his or her absence from post under circumstances that would stop the post differential payment. Eligibility information for post differential payments as outlined in the Standardized Regulations is periodically published as a Mission Notice for employees. Employees are responsible for knowing when post differential is to be started and stopped and for generally monitoring their Statements of Earnings and Leave to ensure that payment was made in accordance with information furnished to the timekeeper. Under such circumstances, waiver of post differential overpayments must overcome a high threshold for employee fault. However, where an employee is promoted to a higher grade but the step level for the employee's new grade is miscalculated, it may be appropriate to conclude that there is no fault on the employee's part because employees are not typically expected to be aware of and understand the rules regarding determination of step level upon promotion. A different conclusion as to fault potentially may be reached if the employee in question is a personnel specialist who concentrates on personnel regulations and actions.

e. If the deciding official finds an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim, then the request for a waiver must be denied.

f. If the deciding official finds no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim, the employee is *not* automatically entitled to a waiver. Before a waiver can be granted, the deciding official must also determine that collection of the claim against an employee would be against equity and good conscience and not in the best interests of the United States. Factors to consider when determining if collection of a claim against an employee would be against equity and good conscience and not in the best interests of the United States include, but are not limited to

- (1) Whether collection of the claim would cause serious financial hardship to the employee from whom collection is sought;
- (2) Whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances;

(a) To establish that a valuable right has been relinquished, it must be shown that the right was, in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the overpayment.

(b) To establish that the employee's position has changed for the worse, it must be shown that the decision would not have been made but for the overpayment, and that the decision resulted in a loss.

(c) An example of a "detrimental reliance" would be a decision to sign a lease for a more expensive apartment based chiefly or solely upon reliance on an erroneous calculation of salary, and the funds spent for rent cannot be recovered.

(3) The cost of collecting the claim equals or exceeds the amount of the claim;

(4) The time elapsed between the erroneous payment and discovery of the error and notification of the employee;

(5) Whether failure to make restitution would result in unfair gain to the employee; and

(6) Whether recovery of the claim would be unconscionable under the circumstances.

g. The burden is on the employee to demonstrate that collection of the claim would be against equity and good conscience and not in the best interest of the United States.

9. AUTHORITIES.

a. 5 U.S.C. 5584, "Claims for Overpayment of Pay and Allowances, and of Travel, Transportation and Relocation Expenses and Allowances."

b. 5 CFR Part 550, subpart K, "Collection by Offset from Indebted Government Employees."

c. 22 CFR 213, "Claims Collection Standards"