

Client Alert

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OMB Revises and Consolidates Rules Governing Most Federal Grants

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In the final days of 2013, the White House Office of Management and Budget (OMB) released for publication long-awaited final guidance on administrative requirements, cost principles and audit requirements pertaining to federal grants and cooperative agreements. Guidance previously found in eight separate OMB Circulars has been consolidated in an attempt to reduce the administrative burden on recipients of federal funds, while also bolstering the government's efforts to eliminate fraud, waste and abuse in federal funding. The new rules have significant ramifications for "non-Federal entities"—defined by OMB to include non-profit organizations, institutes of higher education (IHEs), state and local governments and Indian tribes—and may also apply to for-profit and foreign entities in limited circumstances.

In February 2013, OMB released draft uniform federal funding guidance and sought comments from stakeholders. The proposed reforms were developed by a newly created OMB Council on Financial Assistance Reform (COFAR), charged with cutting government red tape and reducing waste, fraud, and abuse in connection with the more than \$500 billion spent annually on grants. OMB received more than 300 comments, which it considered in developing the final guidance.

This final guidance, to be codified at Title 2 of the Code of Federal Regulations, supersedes and consolidates requirements from OMB Circulars A-21, A-87, A-89, A-102, A-110, A-122 and A-133, and those portions of A-50 pertaining to audits. These Circulars had conflicting and duplicative language, which increased administrative burdens on federal funding recipients. In addition to standardizing administrative requirements, OMB has clarified those policies that differ depending on the type of entity involved, and the final guidance includes sections that clearly delineate the type(s) of non-Federal entities to which they apply.

Of particular note are provisions that require federal funding applicants to disclose conflicts of interest and certain types of criminal violations, that raise the thresholds on federal awards subject to audit, that limit allowable costs associated with federal award performance, and that restrict the accumulation of profits in connection with federal awards.

The guidance applies to federal agencies effective on its date of issuance (December 26, 2013), although it is understood that it will take until the second half of the year to be fully implemented. Agencies have six months to submit necessary draft implementing regulations to OMB, with the expectation that they will be finalized and effective no later than December 26, 2014. In the interim, non-Federal entities that wish to implement system changes to comply with the new requirements may do so.

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Below is a brief summary of the areas addressed by OMB's final guidance:

1. ELIMINATING DUPLICATIVE AND CONFLICTING GUIDANCE

As noted above, the combination of eight separate sets of guidance into one uniform set has eliminated overlapping and sometimes conflicting requirements.

2. INCREASED FOCUS ON PERFORMANCE FOR ACCOUNTABILITY

The new guidance includes provisions for fixed amount awards that limit compliance requirements in exchange for requirements to meet specified performance milestones. Also, OMB will now permit, on a case-by-case basis, the waiver of certain compliance requirements for other program designs that improve cost-effectiveness and encourage collaboration across programs. Examples of such strategies include tiered evidence grants, "Pay for Success" and other pay-for-performance approaches, and "Performance Partnerships" allowing braided and blended funding.

Additionally, IHEs are now only subject to cost accounting standards when their federal awards total \$50 million or more—up from the prior \$25 million threshold. Further, IHEs no longer need to wait for agency approval of proposed changes to their disclosure statements. Instead, if, after six months, the applicable agency has not extended the review period or indicated concern regarding any proposed change submitted to the agency, the IHE may implement the change without further delay.

3. NEW RULES PERTAINING TO INFORMATION TECHNOLOGY AND SHARED SERVICES

A non-Federal entity's responsibility for safeguarding protected personally identifiable information and information designated as sensitive is now explicit. This new language is intended to result in stronger policies for protecting sensitive information across federal awards.

OMB's guidance also includes specific rules pertaining to the allowability of certain technology-related costs. Certain computing devices are subject to the less-burdensome administrative requirements applicable to supplies rather than those pertaining to equipment. Costs of idle facilities that are necessary to meet fluctuations in workload (such as when developing shared service arrangements) are now allowable. Additionally, beginning in January 2016, non-Federal entities may be reimbursed for financing costs associated with patents and computer software.

4. CONSISTENT AND TRANSPARENT TREATMENT OF COSTS

The final guidance updates policies on direct and indirect costs. Non-Federal entities may treat administrative costs as direct costs when such costs meet conditions showing they are directly allocable to a federal award. With regard to indirect costs, the guidance includes provisions that provide for a de minimis indirect cost rate of 10% to non-Federal entities that have never had a negotiated indirect cost rate. Though commenters suggested that the de minimis rate be set at 15-20%, ultimately OMB adopted the more conservative, lower rate, given its automatic application and indefinite allowability. The new guidance also requires federal agencies to accept negotiated indirect cost rates unless an exception is required by statute or regulation, or otherwise approved by a federal awarding agency head or delegate based on publicly documented justification and to allow for a one-time extension without further negotiation of federally approved negotiated indirect cost rates for a period of up to 4 years.

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The guidance also addresses cost sharing by non-Federal entities. Voluntary cost sharing will only be solicited for research proposals where required by regulation and clearly articulated in the Notice of Funding Opportunity. Such voluntary cost sharing “may never be considered during the merit review.”

5. LIMITS ON ALLOWABLE COSTS

The final guidance limits the allowability of certain types of costs under federal awards. For instance, a provision regarding employee health and welfare costs eliminates the previous allowance for “morale” costs. New “relocation” guidance limits the previously unlimited amount of time for which a federal award may be charged for the costs of an employee’s vacant home to up to six months. Conference spending allowances have been clarified and conference sponsors are instructed to use their judgment and discretion regarding conference expenses to limit costs under federal awards to only those that are appropriate and necessary.

6. STANDARDIZATION OF BUSINESS PROCESSES

Agencies will now use standard definitions of terms and acronyms, and standard data elements in Notices of Funding Opportunities and related documents. Funding recipients will also now receive a standard set of data elements to be provided in all federal awards. This will ease the management of information and allow for easier comparison of opportunities and awards.

7. ENCOURAGEMENT OF FAMILY-FRIENDLY POLICIES

The new guidance includes provisions intended to promote family-friendly policies to enable researchers with families to better balance their careers. Specifically, the new guidance addresses dependent-care costs during conference attendance and associated travel costs.

8. STRENGTHENED OVERSIGHT OF FEDERAL AWARDS AND NEW DISCLOSURE REQUIREMENTS

The final guidance includes provisions that strengthen oversight over federal awards in a number of ways. First, OMB’s final guidance requires federal agencies and pass-through entities to review risks associated with potential award recipients prior to award, including by making better use of available information, by using the Federal Awardee Performance Integrity Information System (FAPIIS), Dun & Bradstreet reports, and audit reports available government-wide. The guidance lists potential risk areas an agency may consider, including financial stability and past performance.

Next, non-Federal entities must disclose information pertaining to conflicts of interest and criminal violations. Potential conflicts must be disclosed in writing, and other mandatory disclosures include all violations of criminal law involving bribery, fraud or gratuity violations potentially affecting the federal award.

Additional provisions expressly prohibit recipients of federal awards from earning or keeping any profits unless explicitly authorized by the terms and conditions of the award, and require certifications related to awareness of potential penalties under the False Claims Act.

9. TARGETED AUDIT REQUIREMENTS

OMB’s guidance is intended to tailor oversight and focus on areas with the greatest potential for waste and abuse. The Single Audit threshold has been raised from \$500,000 to \$750,000, a change that OMB expects to reduce the audit burden for approximately 5,000 non-Federal entities. This change will also keep intact Single Audit coverage for over

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99% of the federal dollars that the Audit Act currently covers. Single Audit Reports must be published online with safeguards for personally identifiable information.

These changes are significant but should also be welcome to recipients of federal funding. As with any regulatory change, implementation may be tricky at first, and affected non-Federal entities should be sure to understand the implications of these changes.

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