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¶ 265 FEATURE COMMENT: Office Of Management And Budget Proposes Significant Changes To Its Guidance For Grants And Agreements

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On Sept. 22, 2023, the Biden Administration announced its proposed "fundamental rewrite" of the Office of Management and Budget's Guidance for Grants and Agreements, including the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR pt. 200 (Uniform Guidance). See *Dollars Delivering Results: Biden-Harris Administration Publishes Proposed Updates to the Uniform Grants Guidance to Improve Impact of Federal Grants and Other Financial Assistance*, White House Briefing Room Blog (Sept. 22, 2023), *www.whitehouse.gov/omb/briefing-room/2023/09/22/dollars-delivering-results-biden-harris-administration-publishes-proposed-updates-to-the-uniform-grants-guidance-to-improve-impact-of-federal-grants-and-other-financial-assistance/*. The Biden Administration's announcement of the proposed rewrite states that "[t]he proposal will materially decrease the burden on recipients of Federal financial assistance, … meaningfully improve the administration of Federal financial assistance," and "reduce complexity and confusion for would-be applicants." Id. The announcement indicates that the changes will reduce unnecessary compliance costs, remove barriers to entry by, for example, revising notices of funding opportunities (NOFOs) to make it easier for non-expert and smaller organizations to apply, and ensure assistance serves intended communities by, among other things, providing that exclusive use of English in notices, applications, and reporting is not required (proposed 2 CFR § 200.111). Id.; Guidance for Grants and Agreements, Prepublication Version (Proposed Rule), at 16–17. Comments will be due 60 days after its publication in the *Federal Register*, which is scheduled for Oct. 5, 2023. See *www.federalregister.gov/public-inspection/2023-21078/guidance-for-grants-and-agreements*.

The preamble to the Proposed Rule indicates that the purpose of the revisions is "(1) incorporating statutory requirements and administration priorities; (2) reducing agency and recipient burden; (3) clarifying sections that recipients or agencies have interpreted in different ways; and (4) rewriting applicable sections in plain language, improving flow, and addressing inconsistent use of terms." Proposed Rule, at 2. OMB generally sought to maintain

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the existing structure and content of the 2 CFR guidance, except "where OMB proposes policy changes or other edits for consistency with statutory requirements." Id. at 3.

To reduce agency and recipient burden (objective 2), OMB is proposing to increase certain monetary thresholds, including "increasing the single audit threshold from $750,000 to $1,000,000 and increasing the threshold from $5,000 to $10,000 for determining items that are considered to be equipment." Id. at 5. OMB is also proposing a complete revision to the template text for a NOFO, located in Appendix I of the Uniform Guidance in part 200, which will include a requirement to include an "Executive Summary section" in every NOFO.

An example of the changes to address objective 3 (clarifying sections that have been interpreted differently) is the Proposed Rule's clarification that costs that require prior approval in accordance with 2 CFR pt. 200, subpt. E, will be deemed approved at the time the federal award was issued if the costs were included in the recipient's proposal, and that such costs do not require further approval. See id. at 6; id. at 212 (proposed revisions to 2 CFR § 200.308).

As part of the plain language revisions (objective 4), throughout subparts A through E of part 200, OMB is proposing to replace the term "non-Federal entity" with "recipient," "subrecipient," or both (where applicable) to address the fact that use of the term "non-Federal entity" makes it difficult for readers to understand what entity is being addressed in specific provisions. Id. at 6.

OMB is also proposing to revise the headings in 2 CFR to replace the term "Grants and Agreements" with "Federal Financial Assistance" to ensure that the Uniform Guidance is understood to be applicable to all types of assistance, not just grants and cooperative agreements, unless otherwise noted in the applicability provision at 2 CFR § 200.101 or in relevant provisions elsewhere.

Additional proposed revisions are discussed in more detail below.

2 CFR § 200.113, Mandatory Disclosures—Currently, the mandatory disclosure rule in 2 CFR § 200.113 is limited to requiring disclosure of actual "violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award." Recipients and subrecipients only need to make disclosures to the pass-through entity or the awarding agency. Based on "feedback from the oversight community," Proposed Rule at 17, the Proposed Rule would expand this requirement and align it more closely with the Federal Acquisition Regulation mandatory disclosure rule, see FAR 52.203-13(b); FAR 3.1003(a)(2), by requiring prompt disclosure of "*credible evidence* of a violation of Federal criminal law potentially affecting the Federal award (*for example*, fraud, embezzlement, bribery, gratuity violations, identity theft, or sexual assault and exploitation) *or a violation of the civil False Claims Act.*" Proposed Rule at 179 (emphasis added). Not only would the proposed rule expand the disclosure requirement to credible evidence of violations (instead of limiting the disclosure obligation to actual violations), it also: (1) expands the violations that must be disclosed beyond criminal violations to include violations of the civil False Claims Act; and (2) expands the criminal violations that must be disclosed to *any* criminal violation that potentially affects the award (including, but not limited to violations involving sexual assault and exploitation), instead of limiting the violations potentially affecting the award to those involving fraud, bribery, or gratuity violations. Additionally, the disclosure would need to be made to the agency's office of inspector general, in addition to the awarding agency and/or pass-through entity (if applicable). Id. The proposed rule specifies that failure to make a required disclosure could result in remedies described in 2 CFR § 200.339. Id.

2 CFR § 200.216, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment—The Proposed Rule would update § 200.216's prohibition on certain telecommunications and video surveillance services or equipment, which implements § 889 of the Fiscal Year 2019 National Defense Authorization Act, P.L. 115-232, 132 Stat. 1,636, 1,917 (2018). The changes incorporate information from OMB's Frequently Asked Questions. See

Proposed Rule at 19. The new provisions provide that (1) "A recipient or subrecipient may use covered telecommunications equipment or services for their own purposes (not program activities) provided they are not procured with Federal funds"; (2) "The prohibition on covered telecommunications equipment or services applies to funds generated as program income, indirect cost recoveries, or to satisfy cost share requirements"; and (3) "The recipient or subrecipient is not required to certify that funds were not expended on covered telecommunications equipment or services beyond the certification provided upon signing the award." Id. at 197.

Proposed 2 CFR § 200.217, Whistleblower Protections—OMB is proposing to add a new section to the Uniform Guidance which explains the whistleblower protections applicable to federal assistance award recipients and subrecipients. Currently, these protections are incorporated by reference in 2 CFR § 200.300. The new section would provide that:

> An employee of a recipient or subrecipient may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (a)(2) of 41 U.S.C. 4712 information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

Procurement Standards—The Proposed Rule includes a number of changes to the procurement standards for federal award recipients:

2 CFR § 200.317, Procurements by States—Currently, § 200.317 provides that "[w]hen procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds." States must comply with §§ 200.321 ("Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms"), 200.322 ("Domestic preferences for procurements"), and 200.323 ("Procurement of recovered materials") and ensure that every purchase order or other contract includes any clauses required by § 200.327. In recognition of Tribal sovereignty, and consistent with the existing requirements for States, the proposed revision to § 200.317 would allow Indian tribes to follow their own policies and procedures for procurements. Id. at 22.

2 CFR § 200.318, General Procurement Standards—2 CFR § 200.318 outlines the Uniform Guidance's general procurement standards, which require recipients and subrecipients to maintain documented procurement procedures and oversight over contractors. The section also provides that recipients and subrecipients "must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement." The Proposed Rule would clarify that, when evaluating contractor responsibility, in addition to considering integrity, public policy, past performance, and financial and technical resources, recipients and subrecipients must also consider whether contractors appropriately classify employees consistent with the Fair Labor Standards Act (29 USCA chapt. 8). Proposed Rule at 22.

The Proposed Rule would also add a new paragraph (l) to § 200.318 that clarifies that the procurement standards do not prohibit recipients and subrecipients from:

- Using Project Labor Agreements or similar forms of pre-hire collective bargaining agreements;
- Requiring commitments or goals for hiring residents of high-poverty areas or disadvantaged communities, or high-unemployment census tracts where a federally funded construction project was located, provided there is no prohibition on interstate hiring;
- Requiring contractors to use hiring preferences or goals for individuals with barriers to employment, including women and people in underserved communities;
- Using agreements intended to ensure uninterrupted delivery of services or to ensure community benefits;

- Offering employees of a predecessor contractor rights of first refusal under a new contract.

See Id. at 227–28. The new section will give federal agencies the ability to allow such practices if they are consistent with the U.S. Constitution, applicable federal statutes and regulations, and the objectives and purposes of the federal financial assistance program.

2 CFR § 200.319, Competition—2 CFR § 200.319 currently prohibits using geographic preferences in procurements under grants, even if required by state, local, or tribal law. The Proposed Rule would eliminate this prohibition. The Proposed Rule would also specify that subpart D of 2 CFR pt. 200 "does not prohibit recipients or subrecipients from developing written procedures for procurement transactions that incorporate a scoring mechanism that rewards bidders that commit to specific numbers and types of U.S. jobs, minimum compensation, benefits, on-the-job-training for employees …, and other worker protections." Proposed Rule, at 229. The Proposed Rule specifies that "any geographic preferences or scoring mechanisms must be consistent with the U.S. Constitution, applicable Federal statutes and regulations, and the terms and conditions of the Federal award," and that any scoring mechanism must be consistent with established practices and legal requirements applicable to the recipient or subrecipient.

2 CFR § 200.320, Procurement Methods—Section 200.320 describes the methods of procurement that recipients and subrecipients must use. Currently, this section describes three different procurement methods: (1) informal procurement methods (micro-purchases and small purchases); (2) formal procurement methods (through sealed bids and proposals); and (3) noncompetitive procurement. The proposed revisions would align this section with standard terminology by replacing "small purchases" with "simplified acquisition," and would clarify that micro-purchases and simplified acquisitions are both types of informal procurement methods for small purchases. Proposed Rule at 230–34.

2 CFR § 200.321, Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms—The Proposed Rule would add veteran-owned businesses to the types of businesses that recipients and subrecipients are encouraged to consider for procurement contracts under a federal award. The section title would be changed to "Contracting with small businesses, minority businesses, women's business enterprises, *veteran-owned businesses*, and labor surplus area firms." Proposed Rule at 234 (emphasis added).

2 CFR § 200.323, Procurement of Recovered Materials—Executive Order 14057 requires federal agencies to pursue new strategies to address climate change. The Proposed Rule would add a new paragraph to § 200.323 that "encourages" recipients and subrecipients, "to the greatest extent practicable and consistent with law," to purchase, acquire, or use (1) reusable, refurbished, or recycled products and services; (2) products and services that contain recycled content, are biobased, or are energy and water efficient; and (3) products and services that are sustainable. Id. at 24, 236.

2 CFR § 200.324, Contract Cost and Price—Section 200.324 requires recipients and subrecipients to perform a cost or price analysis for procurements and contract modifications over the simplified acquisition threshold. The Proposed Rule would modify the language to require recipients and subrecipients to perform a "cost-*benefit* or price analysis." Id. at 236 (emphasis added). Additionally, the current section requires recipients and subrecipients to negotiate profit as a separate element of the contractor's price in all cases where a cost analysis is performed and for each contract where there is no price competition. The Proposed Rule would remove this requirement. Id. at 24, 236. The Proposed Rule would also add language to this section indicating that recipients and subrecipients "should consider potential workforce impacts in their analysis if the procurement transaction will displace public sector employees." Id. at 236.

2 CFR § 200.331, Subrecipient and Contractor Determinations—The Proposed Rule would amend 2 CFR § 200.331 to clarify that "[t]he Federal agency does not have a direct legal relationship with subrecipients or contractors of any tier." Proposed Rule, at 24,

243. The Proposed Rule also adds language clarifying that the characteristics indicative of a subrecipient or contractor relationship "may not be present in all cases, and some characteristics from both categories may be present at the same time. Therefore, the recipient or subrecipient is responsible for determining the nature of an agreement." Id. at 243.

2 CFR § 200.332, Requirements for Pass-Through Entities—The Proposed Rule would amend 2 CFR § 200.332 to specify that pass-through entities must "[c]onfirm in SAM.gov that a potential subrecipient is not suspended, debarred, or otherwise excluded from receiving Federal funds." Id. at 244.

2 CFR § 200.333, Fixed Amount Subawards—As explained in current 2 CFR § 200.1, fixed amount awards are a type of grant or cooperative agreement under which the federal agency or pass-through entity "provides a specific level of support without regard to actual costs incurred under the Federal award," somewhat similar to a firm-fixed price contract. "This type of Federal award reduces some of the administrative burden and record-keeping requirements for both the non-Federal entity and Federal awarding agency or pass-through entity." For example, the cost principles in 2 CFR 200 subpart E do not apply. "Accountability is based primarily on performance and results." Id.

Under the current version of 2 CFR § 200.333, pass-through entities can only use fixed amount subawards up to the simplified acquisition threshold ($250,000). The Proposed Rule would eliminate this limitation, allowing pass-through entities to use fixed amount subawards for higher dollar-value projects. Proposed Rule at 248.

2 CFR § 200.407, Prior Written Approval (Prior Approval)—To reduce recipient and federal agency burden, the Proposed Rule would eliminate the prior written approval requirements for 10 types of costs. Prior written approval would no longer be required for real property, equipment, direct costs (specifically, direct charges for salaries of administrative and clerical staff), entertainment costs, exchange rates, memberships, participant support costs, selling and marketing costs, and taxes. Id. at 26.

2 CFR § 200.414, Indirect (F&A) Costs—In § 200.414, OMB is proposing to raise the de minimis indirect cost rate from 10 percent to 15 percent. The preamble to the Proposed Rule explains that the "change would allow for a more reasonable and realistic recovery of indirect costs, particularly for new or inexperienced organizations that may not have the capacity to undergo a formal rate negotiation, but still deserve to be fully compensated for their overhead costs." Proposed Rule, at 26–27. The Proposed Rule would allow recipients and subrecipients to use an indirect cost rate lower than 15 percent at their own discretion and clarifies that agencies cannot compel use of an indirect cost rate below 15 percent unless required by statute. The Proposed Rule also clarifies that the "de minimis rate must not be applied to cost reimbursement contracts issued directly by the Federal Government in accordance with the FAR." Id. at 272.

The Proposed Rule would also eliminate the requirement in paragraph (h) of § 200.414 that indirect cost rates be publicly available on a Government-wide website. The preamble notes that this may be revisited when applicable systems are updated.

2 CFR § 200.472, Termination Costs—Currently, 2 CFR § 200.472 does not address closeout costs related to federal awards. The Proposed Rule would revise this section to include closeout costs, providing that "[a]dministrative costs associated with the closeout activities of a Federal award are allowable," and permitting recipients and subrecipients to "charge the Federal award during the closeout for the necessary administrative costs of that Federal award (for example, salaries of personnel preparing final reports, publication and printing costs, and the costs associated with the disposition of equipment and property)." Proposed Rule, at 337. The preamble states that this change is based on "feedback from the Federal financial assistance community that the exclusion of closeout costs in the Uniform Guidance has been problematic as recipients and subrecipients have been unable to charge actual costs associated with closeout actions, such as certain administrative or staff costs not covered through indirect cost recoveries." Id. at 30.

2 CFR § 25.110, Exceptions to Requirement for

Unique Entity Identifier and System for Award Management Registration—Although OMB did not include any proposed revision to this provision in the Proposed Rule, it requested comment on establishing a one-time exception in 2 CFR § 25.110 to the requirement to obtain a Unique Entity Identifier (UEI) and register in the System for Award Management (SAM.gov) for foreign organizations and foreign public entities receiving federal awards between $25,000 and $250,000 to help reduce administrative burdens for such organizations. The exception would only be available on a case-by-case basis in situations where the agency has conducted a risk-based analysis and determined that it is impractical for the recipient to comply with these requirements. Additionally, in recognition of issues that arise when entities, particularly new and inexperienced applicants, attempt to register in SAM.gov, OMB is also considering expanding the exigent circumstances exception in 2 CFR § 25.110 to provide recipients with additional time to obtain a UEI and complete a SAM.gov registration if exigent circumstances extend beyond 30 days. OMB's proposal would permit agencies to give recipients an additional 90 days to complete their registration. The preamble notes that "[i]f included in the final revisions to the guidance, OMB proposes to further clarify that Federal agencies should not issue payments to a recipient that is unable to obtain a UEI or complete registration in SAM.gov." Proposed Rule, at 11–12.

Other Revisions Under Consideration for Future Updates—In addition to the specific proposed changes to 2 CFR, the Proposed Rule requests comment on several topics that it is considering for potential future revisions to the Uniform Guidance, including:

- Establishing specific audit requirements for for-profit entities (which are not subject to the audit requirements in 2 CFR 200, subpt. F).
- Incorporating the requirements of National Security Presidential Memorandum 33 on research security requirements.
- Additional guidance on the relationship of specific aspects of the guidance to loans and loan guarantees.
- Establishing mechanisms to automatically adjust certain thresholds due to inflation or other triggering events (where permitted by law).
- Removing additional prior approval requirements.
- Topics related to indirect costs, including challenges related to negotiating indirect costs.
- Expanding the guidance in subpart F to include more specific requirements on the scope of an audit to give agencies additional information to guide them in resolving audit findings.