The 2020 Uniform Guidance Revisions: A New Era in Grants Administration

THOMPSON GRANTS
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Overview

On Aug. 13, 2020, the Office of Management and Budget (OMB) set a course for a new path for grant program development and oversight by issuing final guidance that will incorporate long-awaited revisions to the current uniform guidance.

The revisions are part of an overall update to guidance contained in Title 2, Subtitle A, of the *Code of Federal Regulations*, and are the culmination of the required five-year review of the guidance, as stated at §200.109. They consist of changes to implement goals under the President's Management Agenda and its "Results-Oriented Accountability for Grants" Cross-Agency Priority Goal, as well as other administrative priorities. The revisions also implement statutory requirements and align Title 2 with other authoritative source requirements, and aim to clarify confusion about existing requirements.

Along with the uniform guidance at 2 C.F.R. Part 200, OMB revised 2 C.F.R. Part 25, "Universal Identifier and System for Award Management," and 2 C.F.R. Part 170, "Reporting Subaward and Executive Compensation Information." OMB expanded the applicability of federal financial assistance under these two parts beyond grants and cooperative agreements so that it includes other types of financial assistance that federal agencies receive or administer, such as loans, insurance, contributions and direct appropriations. Additionally, within Title 2, OMB added a new 2 C.F.R. Part 183 to apply Never Contract with the Enemy provisions to grants and cooperative agreements, as required by subtitle E, title VIII of the National Defense Authorization Act (NDAA) for federal Fiscal Year (FY) 2015 (Pub. L. 113-291).

OMB had proposed revisions to the existing uniform guidance in January and received thousands of comments in response to the proposal. Many of the proposed revisions were maintained, while others were clarified and some were deleted in response to concerns from commenters.

Effective Date and Immediate Provisions

The general effective date of the revised guidance is Nov. 12, and it becomes specifically effective for awardees as federal agencies implement the changes into their regulations (§200.110(a)). The revised guidance will become effective for awards issued after that date, therefore current award recipients, including those receiving awards under the Coronavirus Aid, Relief and Economic Security Act (CARES Act) (Pub. L. 116-136), will continue to follow the existing uniform guidance provisions. However, two regulations in revised guidance — §200.216, Prohibition on certain telecommunications and video surveillance services or equipment, and §200.340, Termination — are effective immediately.

The new provision at §200.216 states that "recipients and subrecipients are prohibited from obligating or expending loan or grant funds to: (1) procure or obtain; (2) extend or renew a contract to procure or obtain; or (3) enter into a contract (or extend or renew a contract) to procure or obtain equipment, services or systems that use(s) covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system."

The termination provision at §200.340 now eliminates the current "for cause" reason for termination and replaces it with one stating that an award may be terminated "if an award no longer effectuates the program goals or agency priorities." In addition, federal awarding agencies must make recipients aware, in a clear and unambiguous manner, of the termination provisions in §200.340.

Numbering System

Grant applicants and recipients should be aware that the revisions add new provisions that will change the numbering system in the revised guidance compared to the current guidance, thereby necessitating corresponding changes to nonfederal entities' internal policy references for awards received under the revised guidance.

All definitions in Subpart A of the revised guidance have been included in a single provision at §200.1. The provisions in Subpart C (pre-award) of the revised guidance add a new §200.202, Program planning and design, and push subsequent Subpart C provisions back. The revisions also retain §200.309 (which was proposed for deletion), therefore the numbering system in Subpart D (post-award) remains consistent to the current guidance through §200.321, but the revised guidance adds a new §200.322, Domestic preference for procurements, pushing the post-award provisions back from that point on. In Subpart D, a new provision was added at §200.471, Telecommunications costs and video surveillance costs, again pushing the subsequent items of cost back (see chart).

How to Adjust Your Policies and Procedures Based on Revised Provision Numbers

SUBPART	EXISTING UNIFORM GUIDANCE	REVISED UNIFORM GUIDANCE
A: Definitions	§§200.1-200.99	All merged into §200.1
B: General Provisions	§§200.100-200.113	§§200.100-200.113
C: Pre-Award Requirements	§§200.200-200.213	§§200.200-200.216 (new provisions at §§200.202, 200.215 and 200.216)
D: Post-Award Requirements	§§200.300-200.345	§§200.300-200.346 (new provision at §200.322)
E: Cost Principles	§§200.400-200.475	§§200.400-200.476 (new provision at §200.471)
F: Audit Requirements	§§200.500-200.521	§§200.500-200.521
Appendices	Appendix I-XII	Appendix I-XII

Source: OMB

Provided by:

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Key Changes in Subpart A

A major change in Subpart A of the revised guidance is the extensive new coverage of the term "improper payment." OMB had planned in the January proposal to simply direct users to the improper payment definition in OMB Circular A-123, Appendix C, but commenters expressed confusion about this tactic.

Now, the revised guidance definition states that an improper payment is "any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative or other legally applicable requirements," as well as also: (1) explaining what "incorrect amounts" are; (2) noting that when an agency's review is unable to discern whether a payment was proper as a result of insufficient or lack of documentation, the payment should be considered improper; (3) stating that interest and other fees resulting from an underpayment by an agency are not considered improper payments if the interest was paid correctly; (4) explaining that a questioned cost should not be considered improper until the transaction has been completely reviewed and confirmed to be improper, and (5) defining the term "payment." The revised guidance further advises users to refer to the improper payment definition in Circular A-123, Appendix C.

Other Subpart A changes include the following:

- *New "budget period" and "renewal" definitions* — OMB added a new "budget period" definition, defining it as "the time interval from the start date of a funded portion of an award to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions." Also, a newly added term "renewal" is defined as "an award made subsequent to an expiring federal award for which the start date is contiguous with, or closely follows, the end of the expiring federal award," adding that a renewal award's start date will begin a distinct period of performance.

- *Amended "period of performance" definition* — OMB amended this definition to mean the total estimated time interval between the start of an initial federal award and the planned end date, which may include one or more funded portions, or budget periods. It adds that "identification of the period of performance in the federal award per §200.211(b)(5) does not commit the awarding agency to fund the award beyond the currently approved budget period."

- *Amended "obligations" definition* — OMB amended the term "obligations" to become "financial obligation" to align with the Digital Accountability and Transparency Act (DATA Act) (Pub. L. 113-101). A financial obligation, when referencing a recipient's or subrecipient's use of funds under a federal award, means orders placed for property and services, contracts and subawards made, and similar transactions that require payment.

- *Amended "micro-purchase" definition* — The revised guidance deletes the threshold dollar amount in the current "micro-purchase" definition and defines this as "the purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold." It also states that the micro-purchase threshold is "the dollar amount at or below which a nonfederal entity may purchase property or services using micro-purchase procedures. Generally, the micro-purchase threshold for procurement activities administered under federal awards is not to exceed the amount set by the Federal Acquisition Regulation (FAR) at 48 C.F.R. subpart 2.1, unless a higher threshold is requested by the nonfederal entity and approved by the cognizant agency for indirect costs."

- *Clarified "simplified acquisition threshold" definition* — While the revised guidance maintains the existing definition for the "simplified acquisition threshold" to mean the dollar amount below which a nonfederal entity may purchase property or services using small purchase methods, it clarifies this definition to explain that the threshold for procurement activities administered under federal awards is set by the FAR. Further, it adds language stating that "the nonfederal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures. However, in no circumstances can this threshold exceed the dollar value established in the FAR (48 C.F.R. subpart 2.1) for the simplified acquisition threshold" and "recipients should determine if local government laws on purchasing apply."

Key Changes in Subpart B

The revised guidance aims to strengthen the governmentwide approach to performance and risk by encouraging agencies to measure recipient's performance in a way that will help federal awarding agencies and nonfederal entities improve program goals and objectives, share lessons learned and spread the adoption of promising performance practices. For example, the exceptions provision at §200.102 in the revised guidance states that federal awarding agencies may request exceptions to certain uniform guidance provisions "in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance." It also amends current uniform guidance language at §200.102(c) to state that a federal awarding agency "may adjust requirements to a class of federal awards or nonfederal entities when approved by OMB, or when required by federal statutes or regulations," except for the single audit requirements in Subpart F.

One other addition in the revised guidance is a new §200.110(b) indicating that "existing negotiated indirect cost rates as of [the Aug. 13, 2020, publication date] will remain in place until they expire. The effective date of changes to indirect cost rates must be based upon the date that a newly renegotiated rate goes into effect for a specific nonfederal entity's fiscal year. Therefore, for indirect cost rates and cost allocation plans, the revised uniform guidance as of [the Aug. 13, 2020, publication date] becomes effective in generating proposals and negotiating a new rate (when the rate is renegotiated)."

Key Changes In Subpart C

Subpart C in the revised guidance includes the addition of three new provisions. One new provision is located at §200.202 entitled "Program planning and design," which would require federal awarding agencies, when designing a program, to create an Assistance Listing before announcing the Notice of Funding Opportunity, adding that "the program must be designed with clear goals and objectives to facilitate the delivery of meaningful results consistent with the federal authorizing legislation of the program. It notes that program performance shall be measured based on the goals and objectives developed during program planning and design. Performance measures may differ depending on the type of program. Further, the program must align with the strategic goals and objectives within a federal awarding agency's performance plan and should support the federal awarding agencies' performance measurement, management and reporting under OMB Circular A-11."

Other key revisions in this subpart include:

- *More extensive merit review process* — The revised guidance requires federal agencies to extend their merit review practice to all awards in which the federal awarding agency has the discretion to choose the recipient. The provision at §200.205, states that "for discretionary federal awards, unless prohibited by federal statute, the federal awarding agency must design and execute a merit review process for applications, with the objective of selecting the recipients most likely to be successful in delivering results based on the program objectives outlined in section §200.202. A merit review is an objective process of evaluating federal award applications in accordance with written standards set forth by the federal awarding agency. This process must be described or incorporated by reference in the applicable funding opportunity. The federal awarding agency must also periodically review its merit review process."

- *New language related to FAPIIS* — The revised guidance adds language related to the Federal Awardee Performance and Integrity Information System (FAPIIS) under the "Federal awarding agency review of risk posed by applicants" provision (§200.206(a)(2)), stating that, federal awarding agencies, prior to making a federal award, must "consider all of the information available through FAPIIS with regard to the applicant and any immediate highest level owner, predecessor (i.e., a nonfederal entity that is replaced by a successor), or subsidiary, identified for that applicant in FAPIIS, if applicable."

- *Greater emphasis on performance goals* — In the "Information contained in a federal award" provision (§200.211), the revised guidance has new language pertaining to the federal award performance goals discussion (§200.211(a)) stating: "Performance goals, indicators, targets and baseline data must be included in the federal award, where applicable. The federal awarding agency must also specify how performance will be assessed in the terms and conditions of the federal award, including the timing and scope of expected performance. See §§200.202 and 200.301 for more information on federal award performance goals."

- *New "Never Contract With the Enemy" provision* — The revised guidance adds a new provision on "Never contract with the enemy" (§200.215), stating that federal awarding agencies and nonfederal entities are subject to the regulations implementing the Never Contract with the Enemy provisions under new regulations at 2 C.F.R. Part 183. These regulations affect covered contracts, grants and cooperative agreements that are expected to exceed $50,000 within the period of performance, are performed outside the U.S. and its territories, and are "in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities."

Key Changes to Subpart D

In Subpart D, the revised guidance at (§200.320) divides the procurement methods into "informal" (i.e., micro-purchases and small purchases), "formal" (i.e., sealed bids and proposals) and "noncompetitive." Informal methods can be used "to expedite the completion of transactions and minimize the associated administrative burden and cost" when the value of the procurement for property or services under a federal award does not exceed the simplified acquisition threshold in the Federal Acquisition Regulation (FAR). The revised guidance removes the current dollar amount for micro-purchase and small purchase thresholds. It also enables recipients to develop documented procurement procedures to increase their micro-purchase thresholds up to $50,000 (§200.320(a)(iv)) and avoid formal procurement methods. Further, it allows for noncompetitive procurement when the aggregate dollar amount of property or services acquired does not exceed the micro-purchase threshold.

Other key revisions in Subpart D include:

- *Buy American preference* — The revised guidance implements a new preference for domestic procurements provision (§200.322) in response to recent Buy American presidential executive orders (E.O. 13788 and E.O. 13858).

- *Closeout extensions* — The revised guidance changes provisions in §200.344, "Closeout," based on lessons learned from the implementation of the Grants Oversight and New Efficiency Act (GONE Act), thereby increasing the number of days for recipients to submit closeout reports and liquidate all financial obligations from 90 days to 120 days.

- *Religious liberty* — The revised guidance updates language in the statutory and national policy requirements provision (§200.300) to align with E.O. 13798, "Promoting Free Speech and Religious Liberty," and E.O. 13864, "Improving Free Inquiry, Transparency and Accountability at Colleges and Universities," to underscore the importance of complying with the First Amendment and religious liberty laws under federal awards.

- *Performance measurement* — The revised guidance reworks the language under the "Performance measurement" provision (§200.301), moving to the top information stating that federal awarding agencies must (instead of "should") measure the recipient's performance to show achievement of program goals and objectives, share lessons learned, improve program outcomes, and foster adoption of promising practices. It also adds that this provision is designed to operate in tandem with evidence-related statutes (e.g., the Foundation for Evidence-Based Policymaking Act of 2018 (Pub. L. 115-435)), which emphasizes collaboration to advance data and evidence-building functions in the federal government).

- *Performance reports* — The revised guidance retained language in the existing guidance related to the due date for annual performance reports submitted under §200.329(b)(1), whereby annual reports must be due 90 calendar days after the reporting period (this timeframe was proposed to be extended to 120 calendar days in the January proposal). However, the revised guidance did include a change as proposed, whereby the final performance report will be due 120 (instead of 90 currently) calendar days after the period of performance end date.

- *Pass-through entity oversight* — The revised guidance also adds a new provision under monitoring activities at §200.332(d)(4) to explain that the pass-through entity is not required to address all of the subrecipient's audit findings, thereby seeking to ease pass-through oversight burdens. Specifically, the new language states that the pass-through entity "is responsible for resolving audit findings specifically related to the subaward and [is] not responsible for resolving cross-cutting findings. If a subrecipient has a current single audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of federal funding …, the pass-through entity may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform audit follow-up and make management decisions related to cross-cutting findings. … Such reliance does not eliminate the responsibility of the pass-through entity to issue subawards that conform to agency and award-specific requirements, to manage risk through ongoing subaward monitoring and to monitor the status of the findings that are specifically related to the subaward."

Key Changes in Subpart E

In Subpart E of the revised guidance, OMB clarified that any nonfederal entity that does not have a current negotiated (including provisional) indirect cost rate, except for those nonfederal entities described in Appendix VII.D.1.b, may use the 10% de minimis rate in §200.414(f), thus expanding this option to all nonfederal entities where currently it is only available to recipients with no previously negotiated indirect cost rate. No documentation will be required to justify the 10% de minimis indirect cost rate. OMB explained that both federal agencies and nonfederal entities have advocated to expand the use of the de minimis rate for nonfederal entities that have negotiated an indirect cost rate previously, but under some circumstances, the negotiated rates have expired, perhaps due to breaks in federal relationships and grant funding or a lack of resources in preparing an indirect cost rate proposal.

Other changes to Subpart E of note include:

- *Indirect cost rate website* — To comply with the Federal Funding Accountability and Transparency Act, as amended by the DATA Act, the revised guidance includes a new indirect cost requirement at §200.414(h) to make all negotiated indirect cost rate agreements publicly available on an OMB-designated federal website. In response to comments submitted when this provision was proposed, OMB now clarifies that it is excluding Indian tribes and tribal organizations from the requirement, and it specifically details the exact information grantees must provide (i.e., federally negotiated indirect cost rate, distribution base and rate type).

- *Disclosure statements* — OMB sought to reduce burdens on institutions of higher education (IHEs) by clarifying the timing of the disclosure statement (DS-2) submission. At §200.419(b)(1), the revised guidance requires IHEs to submit the DS-2 to the cognizant agency for indirect costs, with a copy to the IHE's cognizant agency for audit. It adds that "the initial DS-2 and revisions to the DS-2 must be submitted in coordination with the IHE's facilities and administrative (F&A) rate proposal, unless an earlier submission is requested by the cognizant agency for indirect costs. IHEs with cost allocation standards (CAS)-covered contracts or subcontracts meeting the dollar threshold in 48 C.F.R. §9903.202-1(f) must submit their initial DS-2 or revisions no later than prior to the award of a CAS-covered contract or subcontract."

- *Evaluation costs* — To provide clarity and consistency among federal awarding agencies, the revised guidance updates the "Direct costs" provisions at §200.413(b) to include program evaluation costs as an example of directs costs under a federal award. It states that "if directly related to a specific award, certain costs that otherwise would be treated as indirect costs may also be considered direct costs. Examples include extraordinary utility consumption, the cost of materials supplied from stock or services rendered by specialized facilities, program evaluation costs, or other institutional service operations."

- *New provision on technology costs* — The revised guidance includes a new provision at §200.471, explaining that costs incurred for telecommunications and video surveillance services or equipment such as phones, internet, video surveillance, and cloud servers are allowable except when obligating or expending covered telecommunications and video surveillance services or equipment or services as described in § 200.216 to: (1) procure or obtain, extend or renew a contract to procure or obtain; (2) enter into a contract (or extend or renew a contract) to procure; or (3) obtain the equipment, services or systems.

Key Changes in Subpart F

Provisions at §200.513(a)(3)(ii) in the revised guidance require the cognizant agency for audit to obtain or conduct quality control reviews on selected audits made by nonfederal auditors and provide the results to other interested organizations. This governmentwide review was initially required to be conducted every six years beginning with audits in 2018, but was delayed to incorporate significant changes appearing in the 2019 Compliance Supplement. Although OMB, when it issued proposed revisions to the uniform guidance in January, planned to begin this project beginning with audits submitted in 2021, commenters suggested this requirement be delayed considering issues resulting from the COVID-19 pandemic faced by auditors conducting audits this year. OMB acquiesced to these concerns; therefore, the final revision includes no start date for the initiative.

The revised guidance also adds more details about the responsibilities of the cognizant agency for audit in §200.513(a)(1). Although this provision maintains existing language stating that a nonfederal entity expending more than $50 million a year in federal awards must have a cognizant agency for audit, the revised guidance clarifies that the designated cognizant agency for audit must be the federal awarding agency that provides the predominant amount of funding directly (direct funding) to a nonfederal entity as listed on the Schedule of Expenditures of Federal Awards unless OMB designates another specific cognizant agency for audit. It further adds, “When the direct funding represents less than 25% of the total expenditures (as direct [awards] and subawards) by the nonfederal entity, then the federal agency with the predominant amount of total funding is the designated cognizant agency for audit.”

For More Information

The revised guidance is available at
https://grants.complianceexpert.com/sites/grants/files/advisory_files/2020-17468_0.pdf.

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