



March 23, 2020

Mr. Timothy F. Soltis  
Deputy Controller  
U.S. Office of Management and Budget  
Washington, DC 20503

RE: Revisions to 2 CFR 25, 2 CFR 170, and 2 CFR 200  
85 Federal Register 3766-3809, January 22, 2020

Dear Mr. Soltis:

This letter responds to the above referenced announcement seeking public comment on the regulatory revisions proposed in Title 2 of the Code of Federal Regulations.

The National Association of Development Organizations (NADO) provides advocacy, education, research and training for the nation's regional development organizations. The Association and its members promote regional strategies, partnerships, and solutions to strengthen the economic competitiveness and quality of life across America's local communities. NADO members are part of a national network of 540 multi-jurisdictional regional planning and development organizations that play a key role in fostering intergovernmental cooperation and collaboration among federal, state and local officials. In this capacity, NADO members are involved in a wide variety of federal assistance programs with roles as direct recipients, pass-through entities, and/or subrecipients. Accordingly, they are vitally interested in the regulations affected by your January 22 proposal and have broad and valuable implementation experience on which to rely in responding. Our members appreciate the opportunity to comment constructively about those policies.

Our level of engagement was once again demonstrated in July 2019 when we submitted detailed comments about features of the compliance requirements that are subject to testing pursuant to OMB's *Compliance Supplement*, Appendix XI of 2 CFR 200. In the comments that follow, we are choosing to reiterate some of what was communicated in those earlier comments because we believe that they demonstrate the need for supplemental language in the body of 2 CFR 200 itself. As well, we are addressing many of the new proposals that we believe will have an impact on our members.

DEFINITIONS (Proposed 2 CFR 200.1)—Definition of "Period of Performance" and the related terms-- NADO understands and supports OMB's objective to be clear about the time periods associated with implementation of grants, cooperative agreements, and subawards. However, in attempting to craft

new definitions for old concepts, we are concerned that unintended consequences may arise. According, we urge OMB to review the definitions that have been in sustained and effective use in the U.S. Department of Health and Human Services *Grants Policy Statement* (i.e., “project period” and “budget period”) to determine whether they can be employed. We further suggest that the term “obligation” be defined since it is used in the regulation and in the related forms approved for use under the Paperwork Reduction Act. In doing so, OMB should differentiate between obligations (financial commitments) made by awarding agencies to recipients or subrecipients and obligations incurred by recipients and subrecipients to pay for goods or services acquired or supported by their federal awards.

NON-AUTHORITATIVE GUIDANCE (Proposed 2 CFR 200.211(e)—NADO supports the proposed language in the cited section which would preclude including references to non-binding guidance in the terms and conditions of federal awards. Our members have been subjected to such requirements in a variety of troublesome ways that have carried with them the implicit threat of enforcement action. However, we suggest that OMB can enhance the effect of Executive Order 13891 by considering changes to two other regulatory provisions. The first is 2 CFR 200. 105 (Effect on other issuances). We suggest that OMB make clear that 2 CFR 200 continues to take precedence over any inconsistent federal agency “program manuals, handbooks, directives, circulars and other non-regulatory materials “ which have been issued or might be issued. Here OMB should also make clear what the continuing role, if any, will be for the Frequently Asked Questions documents which were issued under the auspices of the Council on Financial Assistance Reform (COFAR). The second relates to 2 CFR 200.331(a)(3) which allows pass-through entities to include “any additional requirements which the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibilities to the federal awarding agency...” We assert that the language cited has been an opening through which a considerable amount of non-authoritative guidance has been introduced into lower tier relationships. We urge OMB to address this problem by making clear that the “requirements” referred to in 2 CFR 200.331(a)(3) are those which the pass-through entity is truly required by law or regulation to impose rather than simply being discretionary or preferential.

CASE-BY-CASE DETERMINATIONS (Current 2 CFR 200.330)—The current language in the cited section represented a substantial improvement over previous requirements which were contained in Section 210 of the superseded OMB Circular A-133. This was particularly true because of the introduction of the terms “assistance” and “procurement” to characterize the nature of subrecipient and contractor relationships, respectively. Nevertheless, our members regularly encounter situations in which pass-through entities ignore the cautionary language in 2 CFR 200.330(c) about the use of judgment in making the determination about the relationship. While OMB’s statement that “all the characteristics listed” need not be present is helpful, a related problem arises when a pass-through entity uses **only** a single characteristic as the basis for the determination or introduces a factor that is not mentioned such as the organization nature of the lower tier entity (i.e., whether it is a governmental, nonprofit, or commercial entity). Both of these situations have been encountered by our members. We suggest that OMB strengthen 2 CFR 200.330(c) by adding the following statement in 2 CFR 200.330(c): “No single characteristic or any special combination of characteristics is necessarily determinative.” This would serve to reinforce the existing statement that it is the nature of the relationship that is most important in making the determination.

PROCUREMENT STANDARDS (Proposed 2 CFR 200.317-326) NADO supports the revisions to the selected sections of the procurement standards in order to align them with statutory language enacted by Congress. OMB’s decisions to defer applicability of the procurement standards and to address the statutory language through issuance of an OMB memorandum rather than through a more timely

revision to the regulation resulted in unfortunate confusion among federal awarding agencies and pass-through entities about what has actually been required. If, in the future, OMB is confronted with statutory language that affects subjects covered by 2 CFR 200, we urge that it implement the related policy in interim final regulations permitted under the Administrative Procedure Act, while accepting comments from interested parties.

**DOMESTIC PREFERENCE (Proposed 2 CFR 200.321)** While NADO understands that the proposed language aligns with provisions of Executive Order 13891, we suggest that OMB add language that indicates that issuance of a solicitation (invitation for bids or request for proposals) that states that preference will be given to goods, products, or materials produced in the United States constitutes a good faith effort to comply with this requirement.

**PAYMENT (Proposed 2 CFR 200.305)** As stated above, NADO submitted a letter on July 30, 2019 which urged OMB to amend the *Compliance Supplement* (Appendix XI of 2 CFR 200) to require audit testing of pass-through entities to determine whether they are complying with the requirement contained in 2 CFR 200.305(b) that advance payments be made to subrecipients that meet standards for cash management contained elsewhere in 2 CFR 200.305(b)(4). We have attached a copy of that letter to these comments. We are hopeful that OMB will adopt our earlier recommendation and that it will be reflected in the 2020 edition of the *Compliance Supplement*. However, NADO also believes that OMB needs to reinforce the longstanding intent of its advance payment requirement. It is noteworthy that the advance payment requirement has been in place for many years going back to at least the Common Rule issued pursuant to OMB Circular A-102 (March 11, 1988). We also point out that placing a recipient or subrecipient on reimbursement is a special risk-based condition articulated in 2 CFR 200.207(b)(1). Accordingly, NADO urges OMB to add language to either 2 CFR 200.305(b)(3) or 2 CFR 200.305(b)(4) which states that the reimbursement method is not to be used because of “unwillingness or inability of the pass-through entity to provide timely advance payments to the subrecipient to meet the subrecipient’s actual cash disbursements.” This quoted language is currently present in the regulation to address inappropriate use of the working capital advance payment method. Adding it would address similarly inappropriate but all too common abuse of the reimbursement method.

**REPORTING—(2 CFR 200.302, 2 CFR 200.327 and 2 CFR 200.333-337)**—As NADO pointed out in the aforementioned July 30, 2019 letter concerning the *Compliance Supplement*, the current regulation does not adequately protect subrecipients from excessive financial reporting imposed by pass-through entities. The experience of our members shows that this policy gap generates exactly the kind of burden which OMB has been attempting to reduce through initial issuance of 2 CFR 200 and the additional proposals that are now pending. The federal government’s model for quarterly financial reporting and its expectations for generating and maintaining source documentation stands in sharp contrast to the practices that are occurring routinely in many state administered programs where NADO members are subrecipients. Our members observe that contrast first hand because they are often recipients of direct federal awards as well as subrecipients of awards from pass-through entities. In addition to the failure to make required advance payments as discussed above, many pass-through entities demand more frequent and more detailed financial reports. Some of the pass-through entity forms include comparisons of budgeted amounts to actual costs incurred during the reporting period—something that the OMB itself has precluded at the federal level through design of the Standard Form 425, Federal Financial Report and its predecessor, Standard Form 269, Financial Status Report. In addition, these reporting procedures often require the submission of all back-up documentation (e.g., time and effort reports, receipts for purchases, etc.) in order have payment released. We hasten to add that the subrecipients involved are **not** organizations that are subject to special conditions pursuant to 2 CFR

200.207. The clear results of these practices are increased administrative expense, duplicate recordkeeping, and performance delay. Further, testing of subrecipient financial reporting by independent auditors conducting audits under Subpart F of 2 CFR 200 often covers much of the same territory as pass-through entity review of the submitted detailed reports. We call on OMB to look closely at our assertions and consider introducing “best practices” language into the regulatory sections we have identified above. This language should include, but not necessarily be limited to (1) “Pass-through entities are not required to use the financial reporting forms or frequencies employed on direct federal awards however they should not impose more frequent or more detailed financial reports unless required under 2 CFR 200.207 and (2) “Appropriate source documentation should be generated and maintained by the non-federal entity incurring the cost. Federal awarding agencies and pass-through entities are not precluded from obtaining such documentation when necessary but should avoid requiring routine or full submissions except in extraordinary circumstances.” We believe that the employment of such language would lead to the more reasonable regime of federal grants management policies and would step away from the use of what OMB referred to as “antiquated processes to monitor compliance” in the preamble to its January 22 proposal.

ACCEPTANCE OF INDIRECT COST RATES NEGOTIATED BY PASS-THROUGH ENTITIES (2 CFR 200.331(a)(4) and 2 CFR 200.414)—Most of NADO’s members are local governmental entities organized under state joint powers laws. Further, because of the size of their federally funded award portfolios, they are organizations that fall into the category discussed in Appendix VII of 2 CFR 200, Paragraph D(1)(b)—entities that receive less than \$35 million in direct federal funding. Finally, under Appendix V of 2 CFR 200, Paragraph F (1), most are assigned to the Department of Commerce for federal cognizant agency purposes. Taken together, these policies establish that these entities that are not required to submit an indirect cost allocation plan and indirect cost rate proposal to a cognizant federal agency unless instructed to do so by that cognizant agency. This situation has placed many of our members between the proverbial “rock and a hard place” when actually attempting to recover their indirect costs.

Of importance here, the Department of Commerce does not routinely require its cognizance assignees to submit an indirect cost allocation plan and rate proposal since doing so defeats the purpose of relieving such smaller entities (and the federal agencies) the burden of engaging in negotiation. Instead, assignees submit the certification contained in Appendix VII concerning their indirect cost documentation and Commerce acknowledges their submission. Under procedures established in Paragraph D(1)(a) of Appendix VII, the documentation must be retained for audit. OMB’s *Compliance Supplement*, Part 3B instructs the independent auditor to test indirect costs under these circumstances. The problem with these procedures is that they do not produce a “rate” as that term is understood in 2 CFR 200.331(a)(4) and numerous pass-through entities (and even some federal agencies) refuse to acknowledge that such procedures provide reasonable assurance that an organization’s indirect costs will be properly calculated. Instead, they demand to see a rate of the type that would be present in a negotiated indirect cost rate agreement issued by a federal cognizant agency. Further, because of the perceived work load, many pass-through entities seek to avoid negotiating rates with subrecipients despite instructions in 2 CFR 200.331(a)(4) and Appendix VII to do so. Thus if one of our members wishes to recover indirect costs, they are left with the prospect of making a submission to the Business Center of the U.S. Department of Interior which has a cross-serving agreement with the Department of Commerce or approaching another direct federal funding source in the attempt to obtain a federally negotiated rate. We call on OMB to remedy this situation which affects hundreds of organizations by making it clear that the policy regime called for by way of the current submission policy for entities

receiving less than \$35 million is intended to be fully relied upon by federal agencies and pass-through entities.

Even where a pass-through entity such as a state agency has been willing to negotiate an indirect cost rate with a subrecipient for **the award that it makes** to that entity, another problem has arisen. NADO is gratified to see that OMB is seeking to address it—the lack of acceptance of that negotiated rate by other pass-through entities (even other state agencies in the same state government). OMB’s proposal in 2 CFR 200.331(a)(4)(iii) to require acceptance of a rate negotiated by another pass-through entity is a step in the right direction. NADO and its members support it as far as it goes. However, given what we assert is the willingness of some pass-through entities to ignore other indirect cost negotiation procedures (see above), we suggest that an additional feature be introduced to address this situation. For example, if Pass-through Entity A were to negotiate a rate with a subrecipient and then to certify that the rate was arrived at based upon the procedures contained in the relevant Appendix of 2 CFR 200, then other Pass-through Entities (B, C, etc.) would then be obligated to accept it and, more importantly, much more inclined to accept it. Without such a procedure, we believe that this problem associated with subrecipient indirect cost recovery will persist.

We also offer our comments on the subject of the *de minimis* indirect cost rate. NADO supports the idea that any non-federal entity that wishes to do so would be permitted to elect use of this rate approach as opposed to just organizations that have never had a federally negotiated indirect cost rate. Further, many of our members make subawards to small community based subrecipients that do not have the sufficient federal funding or technical expertise to engage in indirect cost negotiation. This expansion of policy coupled with the statement that “no documentation is required to provide proof of costs that are covered...” will simplify cost recovery in this environment. However, we believe that OMB needs to clearly articulate the policy that a federal agency or pass-through entity cannot **force** a recipient or subrecipient to accept the *de minimis* rate when that organization would prefer to seek a negotiated one.

Finally, we believe that the proposal to require that all rate agreements from non-federal entities be posted on a publicly available website is unnecessary and unwieldy. We suggest that it be dropped or substantially modified for the following reasons. First, the proposal as written does not differentiate between rate agreements negotiated by federal agencies versus those negotiated by pass-through entities. If this action is to be undertaken at all that differentiation should occur. Further, the rate agreements of many organizations may contain proprietary information that should not be publicly disclosed under federal or state law or regulation. Finally, given the fact that rate agreements may cover a variety of fiscal periods and durations, we suggest that the submission and retention processes that would be used to create this listing will be highly problematic with little corresponding benefit.

SPACE OCCUPANCY IN FACILITIES CONSIDERED TO BE FULLY DEPRECIATED—current 2 CFR 200.436(d)(4)—The cited subsection of Subpart E of 2 CFR 200 addresses the subject of employment of capital assets that have “outlived their depreciable lives.” Since charges for space occupancy in facilities is most often addressed in the indirect cost allocation plans of recipients and subrecipients, NADO is raising the subject in connection with our broader indirect cost related comments. NADO suggests that 2 CFR 200.436(d)(4) be revisited by OMB because, as currently written, it has resulted in inequitable treatment, particularly for facilities owned and operated by many of our members. The language in the current regulation states “No depreciation may be allowed on any assets that have outlived their depreciable lives.” This policy may be appropriate for an asset on which depreciation has been recovered from the federal government during every year of the useful life. However, when adopted in

the current regulation, it introduced inequitable treatment for organizations that have not recovered costs in that manner. That has resulted in situations where, for instance, a non-federal entity owns a facility in which federal programs are housed but can recover only operating and maintenance costs thereof. We also point out that many non-federal entities have chosen to purchase and own a building because, in the long run, it was cheaper to own than to rent. The current policy situation contrasts to a long standing policy which was in effect in OMB Circular A-87, *Cost Principles for State and Local Governments*, from as far back as January 15, 1981. That earlier policy stated, “No depreciation or use charge may be allowed on any assets considered as fully depreciated, **provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at the time of negotiation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the asset for the purpose contemplated** (emphasis added). NADO strongly urges OMB to reinstate that language. Doing so would still leave it up to a federal cognizant or awarding agency or pass-through entity whether to recognize that use of the facility provides a tangible and allocable benefit to federal awards that are performed within.

CLOSE-OUT (proposed 2 CFR 200.343)--NADO appreciates OMB’s proposal to extend the time periods associated with close-out for both recipients and subrecipients. However, we believe that additional language is needed in both 2 CFR 200.343 and 2 CFR 200.331(a)(6) to establish federal expectations about how close-out of subawards is to be coordinated with close-out of the federal award to the pass-through entity. In many cases, the pass-through entity’s close-out must await close-out of multiple subawards that have differing performance periods. Further, close-out of federal awards at all levels must often await the issuance of final indirect cost rates for entities whose rates are handled in accordance with the “provisional/final approach” sanctioned by procedures covered in the Appendices of 2 CFR 200. In the latter case, the delay in close-out is beyond the control of the non-federal entity. Finally, NADO opposes the proposal in 2 CFR 200.343(h) that would require the federal awarding agency to report a late close-out in the Federal Awardee Performance and Integrity Information System (FAPIIS). We suggest that the language in the proposal be changed to state that the federal awarding agency “should consider” doing so unless mitigating circumstances are present.

TERMINATION—(Proposed 2 CFR 200.343)—NADO questions language that has been added to this portion of the regulation which expands the reasons that a federal award can be unilaterally terminated by a federal agency or pass-through entity. In our view, the existing regulation contains ample authority for such termination. Introduction of the additional provision at 2 CFR 200.338(a)(2) invites arbitrary actions that are contrary to the intent of federal assistance to assist, stimulate or support non-federal entities in the conduct of public programs as distinct from serving only the federal government’s program goals and agency priorities. Further, the proposed provision at 2 CFR 200.338 (a)(5) appears to invite the federal awarding agency or pass-through entity to introduce additional termination criteria in award terms and conditions that go beyond those articulated elsewhere in the regulation. In our view, this undercuts both uniformity and a clear understanding of the how terms and conditions might be enforced.

2 CFR 170.220(b) and 2 CFR 170, Appendix A—NADO supports raising the dollar threshold for subaward reporting to \$30,000. However, we question the need to reference the American Recovery and Reinvestment Act in the required Award Term in Appendix A since it was our understanding that expenditures under that legislation were required to be concluded by September 30, 2013.

NADO and its members stand ready to continue engagement with OMB and its federal agency partners concerning the comments we have made and to provide evidence about their validity. We earnestly believe that, by adopting the suggestions we have made, OMB will advance its stated objectives of reducing administrative burden and risk while improving performance in federal grant funded programs.

Sincerely,

Joe McKinney  
Executive Director

Attachment: NADO Letter to OMB (Gilbert Tran), July 30, 2019