OMB’S REVISIONS TO TITLE 2 OF THE CODE OF FEDERAL REGULATIONS

Sponsored by the National Association of Development Organizations

Presented by Bob Lloyd

September 10, 2020
Title 2 of the Code of Federal Regulations

- Entitled “Grants and Agreements”
- Policies affecting grants and cooperative agreements and subawards thereunder
  - Issued by the Office of Management and Budget (OMB)
  - Issued by federal awarding agencies in response to issuances by OMB
- Formal rulemaking under the Administrative Procedure Act

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How Did We Get Here?

- OMB’s federal grant reform initiative (2012-2014)
- Implementation of 2 CFR 200 (December 26, 2014)
  - Issuance of Interpretations (COFAR FAQ’s)
- OMB Commitment for 5 Year Review of 2 CFR 200 (2 CFR 200.109)
- Issuance of Presidential Executive Orders
- Development of Revised President’s Management Agenda
- Issuance of NPRM (January 22, 2020) with 60 Day Comment Period
- 215 Separate Responses (Approximately 2,500 Separate Comments)
- OMB COVID19 Class Deviations (M-20-11, M-20-17, M-20-26)
- OMB’s Main Objective: Alignment with Revised Sources of Authority
NADO Engagement with OMB

- Comment letter on 2020 Compliance Supplement (7/31/19)
  - Payment by pass-through entities
  - Requirements for submission of back-up documentation to support financial reports

- Comment letter on 2 CFR 200 revisions (3/23/20)
  - Comments on sections solicited by OMB
  - Acceptance of indirect cost rates by awarding agencies
  - Comments on other sections deemed problematic by NADO members
  - Payment by pass-through entities
  - Reporting burden on subawards received
  - Space occupancy in fully depreciated buildings
What’s The Verdict?

- OMB limited changes only to purposes and subjects originally proposed
- Extensive comments on other aspects of 2 CFR 200 were deemed to be “out of scope” and “were not accepted”
- Numerous problems affecting recipients and subrecipients remain
- OMB’s statement about future consultation with stakeholders and possible additional revisions
Revisions to 2 CFR

- Affected Sections
  - 2 CFR 25
  - 2 CFR 170
  - 2 CFR 183 Never Contract with the Enemy
  - 2 CFR 200

- Published August 13, 2020


- Today’s Subject Coverage
  - 2 CFR 200
  - 2 CFR 25
  - 2 CFR 170

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2 CFR 200 Revisions

- Subpart A—Definitions (2 CFR 200.1)
- Subpart B—General Requirements (2 CFR 200.100 et seq.)
- Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards (2 CFR 200.200 et seq.)
- Subpart D—Post Federal Award Requirements (2 CFR 200.300 et seq.)
- Subpart E—Cost Principles (2 CFR 200.400 et seq.)
- Subpart F—Audit Requirements (2 CFR 200.500 et seq.)
- Appendices (I-XII)
“Housekeeping”

- Renumbering of Many Sections
  - Full Integration After 1/1/21
- Supersession of COFAR FAQ’s
- Key Definition Changes
  - “Assistance Listing”
  - Period of Performance
  - Budget Period
  - Renewal
- Management of Exceptions
- Required Notice and Comment on Requirements to be Imposed in Financial Assistance Awards (2 CFR 200.105(b))
Revisions to Federal Agency Responsibilities

- Enhanced Program Planning and Design (2 CFR 200.202)
- Enhanced Risk Assessment Criteria (2 CFR 200.206)
  - Including Inquiries to the Federal Awardee Performance and Integrity Information System (FAPIIS--2 CFR 200.213)
- Public Access to FAPIIS (2 CFR 200.212)
Section 889
McCain NDAA for FY 2019

- Statutory prohibition (PL 115-232)
  - “Procure or obtain…”
  - “Extend or renew…”
  - “Enter into a contract to procure or obtain…”

- Affected equipment and services (from China)

- Affects federal agencies, contractors and recipients

- “A fluid situation” with lots of players

- New regulatory section (2 CFR 200.216) affecting grant recipients and subrecipients

- New regulatory section (2 CFR 200.471) on allowability of telecommunications equipment and services
Post-award Issues

- More renumbering
- Enhanced public policy requirements (2 CFR 200.301)
  - *Drawn from executive orders*
    - Examples: “free speech”; “religious liberty”
  - *Must be incorporated into awards*
- “Federal” payment (2 CFR 200.305)
- Programmatic and budgetary changes (2 CFR 200.308)—”Expanded authorities”
Procurement

- Three year deferred implementation of requirements
- Revised thresholds based on statute and OMB Memorandum 18-18
  - *Micropurchase (2 CFR 200.320 (a)(1))*
    - Statutory migration of the threshold (2014-2018)
    - OMB Memorandum 18-18
    - ($3,000→$3,500→$10,000→$50,000)
  - *Small purchase (2 CFR 200.320 (a)(2))*
    - Role of the federal Simplified Acquisition Threshold
- Domestic preference (2 CFR 200.322)
  - “As appropriate and to the extent consistent with law, the non-federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition or use of goods, products or materials produced in the United States...”
Close-out

- Multiple GAO reports to Congress on slow close-outs
- Enactment of the GONE Act (Grant Oversight and New Efficiency Act)
- Revised deadlines for completion of close-out actions (2 CFR 200.344)
  - Recipients (120 days)
  - Subrecipients (90 days or earlier, if agreed)
  - Federal agencies (1 year)
- Recipient close-out actions
  - Settle claims and reconcile cash
  - Submits final reports
  - Report on and address grant acquired property
- OMB did not address impact of slow determination of final NICRA’s under the provisional/final methodology
The De Minimis Indirect Cost Rate

- 10% of modified total direct costs (MTDC) incurred
- Expanded use will be permitted for:
  - Organizations that never had a federal NICRA
  - Organizations that have had gaps in funding
  - Organizations that elect usage
- Must be used consistently
- Key clarification: NO need to prove costs under this method!

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Pass-through Entities and Indirect Costs

■ Responding to scenarios involving multiple pass-through entities (such as state agencies in the same state)

■ Acceptance of rates negotiated by others is permitted

■ Possible “best practice” considerations
  – Certification by subrecipient (2 CFR 200.415)
  – Issuance of federal-type rate agreement by pass-through entity (Per 2 CFR 200 Appendices)
  – Statement by pass-through entity concerning use of procedures established in 2 CFR 200 Appendices
Public Notice Re: NICRAs

- Previous access policy related to federal agency access only
- Posting of NICRA’s on a federal website
  - Limited data elements included (indirect cost rate, distribution base, and rate type)
- Applicability of FOIA to proprietary information
Cost Principles and Audit

■ More renumbering without substantive changes
■ New section added to 2 CFR 200.403
  – *Costs must incurred during the approved budget period*
■ New section added to 2 CFR 200.414
  – *Public information on NICRA’s*
■ New section of telecommunications costs (2 CFR 200.471)
  – *Allowable with “carve out” related to prohibited items*
■ Clarification of pass-through entity responsibilities for subrecipient audit findings related to financial statements
Revised Appendices

- Appendix I—Full Text of Notice of Funding Opportunity
- Appendix IV-VII—Indirect (F&A) Cost Recovery Procedures by Sector of Performers
- Appendix XI—2020 Compliance Supplement
2 CFR 200 Appendix XI
2020 Compliance Supplement

- Released August 18, 2020
- Effective for audits of fiscal years beginning after June 30, 2019
- Two pieces
  - Main document—annual update
  - Future addendum related to COVID19 programs
- Key features (Part 2—Matrix of Compliance Requirements; Part 3—Compliance Requirements listing)
- Major issues
  - Identification of CARES Act funding on SEFA
  - Differing requirements for COVID 19 and regular funding under the same CFDA numbers
  - Differing requirements under 2 CFR 200 and OMB administrative flexibility memoranda

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2 CFR 25

- Registration on SAM or issuance of “unique identifier”
- Exemptions
- Broader definition of federal financial assistance
- Updated standard clause (Appendix A)
- Required flow-down
- Implementation
2 CFR 170

- Revision to standard clause (Appendix A)
- Subaward reporting raised to cover obligations of $30,000 or more
- Implementation
Areas for Continued Engagement

■ Federal agency implementation
  – *Example: HHS regulations 45 CFR 75*
  – *2 CFR 25 and 2 CFR 170*

■ OMB “commitment” to stakeholder consultation and possible additional changes

■ Revisiting “out of scope” issues
  – *Fixing “patent” and “latent” defects*
  – *Advance payment to subrecipients*
  – *Excessive reporting and submission of back-up documentation*
  – *Waiver of prior approvals*

■ Experience with COVID 19 “administrative flexibilities”
Questions?

■ NOW

Please use chat feature on the right of your screen

■ LATER

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