

NADO 2023 Annual Training Conference

Comment Clinic: Proposed Revisions to Title 2 Code of Federal Regulations

November 7, 2023

Presented by Bob Lloyd

OMB's Continuing Grant Reform Efforts

- **Grants Policy Evolution**
- **OMB Circulars for Different Types of Performers (1968-2014)**
- **OMB's Uniform Guidance— 2 CFR 200 (2014-Present)**
 - **Federal Agency Uniform Implementation (12/26/14)**
 - **OMB Commitment for Five Year Review (1/20/20)**
 - **COVID Interruption (2020)**
 - **Limited Revisions (Effective 11/12/20)**
 - **Current Process**
 - **Request for Information (2/9/23)**
 - **Public Response (1,250 Comments from 113 Sources)**

Toward a “Comprehensive System of Guidance”

- **OMB’s Sources of Authority (88 FR 69393)**
- **2 CFR 25 Unique Entity Identifier and System for Award Management**
- **2 CFR 170 Reporting Subaward and Executive Compensation Information**
- **2 CFR 180 OMB Guidelines to Agencies on Government-Wide Debarment and Suspension (Nonprocurement)**
- **2 CFR 182 Government-Wide Requirements for Drug-Free Workplace (Financial Assistance)**
- **2 CFR 183 Never Contract With The Enemy**
- **2 CFR 184 Buy American Preferences for Infrastructure Projects (New Regulation--8/23/23)**
- **2 CFR 200 Uniform Administrative Requirement, Cost Principles, and Audit Requirements for Federal Awards**

Understanding OMB's Policy Baseline

- **IN EFFECT UNTIL OMB PROPOSAL IS FINALIZED AND ADOPTED BY FEDERAL AWARDING AGENCIES!**
- **2 CFR 200 (Federal Agency Codifications--DOS: 2 CFR 600; USAID: 2 CFR 700; DHHS: 45 CFR 75)**
- **Six Subparts**
 - **Subpart A—Acronyms and Definitions**
 - **Subpart B—General Provisions**
 - **Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards**
 - **Subpart D--Post Federal Award Requirements**
 - **Subpart E—Cost Principles**
 - **Subpart F—Audit Requirements**
- **Twelve Appendices**
 - **Including Instructions on Development and Submission of Indirect Cost Rate Proposals**

OMB's Current Proposal

- **Federal Register Publication (10/5/23)**
 - **www.govinfo.gov**
 - **Citation: 88 FR 69390-69500**
- **Comments: Due by 12/4/23**
- **Stated Intentions**
 - **Incorporate Intervening Statutory and Executive Order Policies**
 - **Update, Change or Clarify Existing Guidance**
 - **Employ Plain Language**
 - **Reduce Federal Agency and Recipient Burden**
 - **Reflect Administration Priorities**
 - **Maintain Policy Structure and Numerical Citations**

OMB's Statements

- **OMB's Audience: Federal Awarding Agencies**
- **The issuance "... is guidance to Federal agencies and not a regulation."**
- **Preamble (Important Commentary About Intent)**

Grant “Politics”

- **Addressing the Underserved**
- **Consideration for Less Experienced Applicants**
- **Inclusion of Labor Organizations**
- **Encouragement of Diversity**
- **Broader Nondiscrimination Policies**
- **Sustainability**

- **Stakeholders/Other Voices**
 - **Federal Awarding Agencies**
 - **The “Oversight Community”**
 - **The “Federal Assistance Community”**
 - **Who Are the “Elephants in the Room?”**

Proposal Highlights

- **Key Word Choice Change**
 - **Non-federal Entity → Recipient and/or Subrecipient**
- **Problematic Word Choice Deletions**
 - **See Proposed 2 CFR 200.318(k) and 2 CFR 200.400)**
- **Interpretation Clarifications**
- **Revised Dollar Thresholds**
 - **Single Audit Requirement**
 - **Equipment and Supply Definitions**
 - **Modified Total Direct Costs**
 - **Fixed Amount Awards and Subawards (2 CFR 200.201, 2 CFR 200.333)**

Proposal Highlights

- **Proposed Changes in Prior Approval Policies**
 - **[Defective] Definition**
 - **Proposed Elimination of Some Prior Approvals (2 CFR 200.407)**
 - **[Attempted] Clarification of Subaward-Related Prior Approval (2 CFR 200.308)**
 - **Treatment of Costs Included in Award Budget**
 - **Timing of Responses to Prior Approval Requests**
- **Treatment of Close-out Costs**
 - **Incurrence**
 - **Liquidation**

Other Proposed Revisions

- **Policies Affecting Federal Agency Pre-award Activities**
 - **Requirements for Obtaining a UEI and Registering with SAM.gov**
 - **Exceptions**
 - **Full Revision of 2 CFR 200, Appendix I (Full Text of Notice of Funding Opportunity--NOFO)**
 - **Notifications of Unsuccessful Applicants**
 - **Clarifications about Timing and Scope of Federal Agency Risk Assessment of Applicants and Recipients**

Proposed Revisions: Procurement and Property Management

- **Procurement**

- **2 CFR 200.318 Contractor Selection Criteria--
Responsible Contractor Classification of Workers
under FLSA**

- **2 CFR 200.322 Changes in Geographic
Preference Policies**

- **2 CFR 200.323 Encouragement of Sustainability
Policies**

- **2 CFR 200.324 Clarification of
Recipient/Subrecipient Responsibility for Cost or
Price Analysis**

- **Property Management**

- **Revised Dollar Thresholds for Acquisition and
Disposition of Equipment and Supplies**

Proposed Revisions: Post-Award Impact for Recipients and Subrecipients

- **2 CFR 200.308 Clarification on Prior Approval of Subrecipients**
- **2 CFR 200.331 Clarification on Criteria for Case-by-Case Determination of “Lower Tier” Relationships**
- **2 CFR 200.333 Elimination on Dollar Cap on Fixed Amount Subawards**
- **2 CFR 200.201 Clarification on Retention of Unexpended Funds under Fixed Amount Awards and Subawards**
- **2 CFR 200.329 Clarification about Frequency and Timing of Performance Reports**
- **2 CFR 200.340 Clarification of Bases for Non-Continuation of Funding or Termination**

Proposed Revisions: Cost Allowability and Allocability

- **2 CFR 200.407 Revised List of Prior Approvals; Some Proposed Eliminations**
- **2 CFR 200.403 Treatment of Close-out Costs**
- **2 CFR 200.415 Proposed Additional Requirement for Certification of Costs by Subrecipients**
- **2 CFR 200.420 Clarification of Policy Concerning Costs Not Listed Among the “Selected Items of Cost”**

Proposed Revisions: Indirect Cost Recovery Matters

- Raising the *De Minimis* Indirect Cost Rate to 15% of the Modified Total Direct Costs (MTDC) Charged
- Revision of the Definition of “Modified Total Direct Costs” Allowing Indirect Costs to Be Charged on the First \$50,000 of Each Subaward.
- Handling of Indirect Cost Rate Cognizance and Submission of Indirect Cost Allocation Plans and Rate Proposals for Organizations Receiving Less than \$35 Million Annually.
- Deferral of Requirement to Post Indirect (F&A) Rates on a Public Website

Proposed Revisions— Audit Related

- **Increase in Threshold of Total Federal Awards Expended Annually to Trigger the Requirement for a Single Audit.**
 - **Currently: \$750,000**
 - **Proposed: \$1,000,000**
- **Proposed Revision to Involve Independent Auditors in the Process for Issuance of OMB's Annual Compliance Supplement**
- **Clarification of Policies Concerning Reporting of Questioned Costs in a Single Audit**
- **Revised Language Concerning Mandatory Disclosures (2 CFR 200.113)**
- **Added Language on Whistleblower Protection (2 CFR 200.217)**
- **Enhanced Language about Post Award Disputes (2 CFR 200.342)**

NADO's Comments

- **OMB's Solicitations**
 - **Specific Topics Identified in the Preamble**
 - **Alert for "Unintended Consequences"**
- **Due at OMB on December 4**
- **Possible Responses**
 - **"We Agree" and "Thank You"**
 - **" We Disagree"**
 - **" We Need Further Clarification"**
 - **" We Need an Additional Policy"**
 - **" We Told You Before"**

NADO Comments

- **Accurate and On Point**
- **IMPORTANT—“Live Case” Examples of Member Experiences**
- **Consider Sending an Individual Member Letter**
- ***Internal NADO Deadline: November 22***

“Ripe” Issues

- **2 CFR 200.331 Subrecipient vs. Contractor Determinations**
- **2 CFR 200.305(b) Advance Payment of Subrecipients**
- **2 CFR 200.308; 2 CFR 200.407 Prior Approval Authority of Pass-through Entities**
- **2 CFR 200.308 Timing for Prior Approval Responses**
- **2 CFR 200.308 Case-by Case Waivers by Pass-through Entities**
- **2 CFR 200.328 Financial Reporting Frequency and Content for Subrecipients**
- **2 CFR 200.332(a); 2 CFR 200.414 Acceptance of RDO Indirect Cost Allocation Plans and Resulting Rates by Pass-through Entities**

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- ***“Internal” NADO Comment Deadline: High Noon, 11/27/23!!***

Sorting Out Federal Award Relationships

