

# CAPLAW<sub>update</sub>



## Navigating the OMB Super Circular Changes

By Eleanor A. Evans, Esq.

Community Action Agencies (CAAs), states and other entities receiving federal grant funds are readying themselves for significant changes to the rules governing how they spend and administer their federal grant funds, which will take effect later this year. These new rules are known informally as the “OMB Super Circular” or “Omni Circular.” This newsletter provides an overview of the Super Circular changes to assist CAAs and other Community Services Block Grant (CSBG) organizations in navigating the Super Circular and in preparing to comply with its requirements. This initial Q&A focuses on overarching aspects of the Super Circular and is followed by articles that walk through the changes to the uniform administrative requirements, federal cost principles, and audit requirements. Stay tuned for future updates and clarifications on the Super Circular from CAPLAW.

### What Is the Super Circular and Why Was It Issued?

The federal Office of Management and Budget (OMB) issued the Super Circular on December 26, 2013 in the form of final regulations officially titled “Uniform Administrative



Requirements, Cost Principles, and Audit Requirements for Federal Awards.” For purposes of the Super Circular, the term “federal award” includes federal grants, cooperative agreements and other agreements for federal assistance, such as, loan agreements. (This newsletter uses the term “federal grant” interchangeably with the term “federal award.”)

The Super Circular supersedes and streamlines requirements from the following OMB Circulars applicable to the administration, use and audit of federal grant funds by nonprofit organizations, state, local and tribal governments, and colleges and universities:

- A-122 (Cost Principles for Non-Profit Organizations)
- A-87 (Cost Principles for State, Local and Indian Tribal Governments)

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- A-21 (Cost Principles for Educational Institutions)
- A-110 (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profits)
- A-102 (Grants and Cooperative Agreements with State and Local Governments)
- A-89 (Federal Domestic Assistance Program Information)
- A-133 (Audits of States, Local Governments and Non-Profit Organizations)
- A-50 (Audit Follow-Up).<sup>1</sup>

The Super Circular is divided into six parts:

- 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; and
- Subpart F—Audit Requirements.

It also includes 11 appendices. Of particular note to CSBG network organizations are:

- Appendix I—Full Text of Notice of Funding Opportunity;
- Appendix II—Contract Provisions for Non-Federal Entity Contracts under Federal Awards;
- Appendix IV—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations;
- Appendix V—State/Local Government and Indian Tribe-Wide Central Services Cost Allocation Plans; and

- Appendix VII—States and Local Government and Indian Tribe Indirect Cost Proposals.

The Super Circular's primary objectives include : eliminating duplicative and conflicting guidance; focusing on performance over compliance for accountability; encouraging efficient use of information technology and shared services; providing for consistent and transparent treatment of costs; limiting allowable costs to make best use of federal resources; encouraging non-federal entities to have family-friendly policies; strengthening oversight; targeting audit requirements on risk of waste, fraud and abuse.<sup>2</sup>

OMB developed the Super Circular in response to directives from President Obama regarding reducing unnecessary regulatory and administrative burdens, redirecting resources to services that are essential to achieving better outcomes at lower cost, and strengthening accountability by intensifying efforts to eliminate payment error, waste, fraud and abuse. In doing so, OMB worked with the Council on Financial Assistance Reform (COFAR), an interagency group of federal executive branch officials that coordinates government-wide financial assistance initiatives. OMB published an advance notice of proposed guidance in February 2012 followed by a notice of proposed guidance in February 2013, both of which solicited public input on the grant reform proposals and invited the public to make additional reform recommendations. The public responded with more than 300 comments on each of the two notices.<sup>3</sup>

In response to over 200 questions and comments received since the final Super Circular regulations were published in December 2013, the COFAR has issued Frequently Asked Questions (FAQs) on implementation of the Super Circular. The COFAR's August 29, 2014 [FAQs](#) include and update the FAQs it issued earlier in the year. The COFAR plans to continue issuing more FAQs in the future in response to additional comments and questions on the Super Circular, which may be submitted to the COFAR by email at [cofar@omb.eop.gov](mailto:cofar@omb.eop.gov). A training webcast and other resource materials on the Super Circular are also available on the [COFAR website](#).

## To Whom Does the Super Circular Apply?

"The Super Circular applies to federal agencies that make federal awards to non-federal entities... as well as to non-federal entities that receive federal grant funds."

The Super Circular applies to federal agencies that make federal awards to non-federal entities (such as states or CAAs), as well as to non-federal entities that receive federal grant funds. Under the Super Circular, a non-federal entity receiving federal grant funds may be a direct recipient of those funds (such as a state receiving Weatherization Assistance Program funds from

the U.S. Department of Energy or a CAA receiving Head Start funds directly from the U.S. Department of Health and Human Services' Administration for Children and Families) or a subrecipient receiving federal funds through a subaward

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(such as a CAA receiving CSBG funds from a state or a child care “partner” organization receiving Head Start funds from a CAA). Any non-federal entity that provides a subaward to a subrecipient to carry out part of a federal program is considered a pass-through entity. Thus, as noted above, in some cases, a CAA may be a recipient or a subrecipient; in other cases, it may be a pass-through entity (such as when it makes a subaward of Head Start funds to a delegate agency or child care partner organization).

Different rights and responsibilities apply to non-federal entities depending on whether they are recipients, subrecipients or pass-through entities. Pass-through entities are required to follow the Super Circular requirements applicable to pass-through entities but not requirements directed toward federal awarding agencies unless the Super Circular or the terms and conditions of their federal awards specifically indicate otherwise.<sup>4</sup>

### Do All the Requirements of the Super Circular Apply to All Federal Grant Programs?

The Super Circular’s audit requirements apply to all federal awards. However, certain federal programs are exempted from a number of the Super Circular’s other requirements.

For example, except for the requirement to provide public notice of federal financial assistance program, Subpart C (Pre-Federal Award Requirements and Contents of Federal Awards) does not apply to:

- Entitlement programs such as Medicaid and Temporary Assistance for Needy Families (TANF);
- Entitlement awards under the Commodity Assistance, Summer Food Service Program for Children, and the Child and Adult Care Food Program; and
- Non-discretionary awards under the Special Supplemental Nutrition Program for Women Infants and Children (WIC), the Emergency Food Assistance Programs, and the Commodity Supplemental Food Program.<sup>5</sup>

By the terms of the Super Circular, block grants authorized under the Omnibus Reconciliation Act of 1981 (including, for example: CSBG, the Low-Income Home Energy Assistance Program (LIHEAP), the Social Services Block Grant, and the states’ program of Community Development Block Grant (CDBG) awards for small cities – and federal

“By the terms of the Super Circular, block grants... are only subject to the following provisions...”

awards authorized under the Child Care and Development Block Grant Act of 1990) are only subject to the following provisions: the requirement to provide public notice of federal financial assistance programs; rules on distinguishing between subrecipients and subcontractors; requirements for pass-through entities; and rules on fixed amount subawards.<sup>6</sup> Note, however, that the federal CSBG Act, which takes precedence over the Super Circular, requires states to ensure that recipients of CSBG funds follow the OMB circulars;<sup>7</sup> therefore, CAAs must comply with the Super Circular’s administrative requirements, cost principles and audit requirements with respect to their CSBG funds. Also, keep in mind that although certain Super Circular requirements, such as the cost principles, may not apply to these block grant programs (other than CSBG), a state may choose to require subrecipients of block grant funds under these programs (such as CAAs receiving LIHEAP funds) to follow the Super Circular requirements.

### When Does the Super Circular Become Effective?

**IN GENERAL** – Federal awarding agencies must adopt regulations implementing the Super Circular to be effective by December 26, 2014.<sup>8</sup> The Super Circular’s administrative requirements and cost principles will apply to new federal awards issued by federal awarding agencies on or after December 26, 2014.

These requirements will also apply – in the case of federal awarding agencies that consider incremental funding actions on previously made awards to be opportunities to change award terms and conditions – to the first funding increment issued on or after December 26, 2014. For example: A CAA that is awarded a five-year Head Start grant will receive those funds in five, one-year increments. If a CAA’s first increment is issued September 1, 2014, the CAA will not be subject to the Super Circular with respect to funds received for that increment – i.e., for the period September 1, 2014 through August 31, 2015. However, it will be subject to the Super Circular for the remaining four one-year funding increments. Existing federal awards that do not receive incremental funding with new terms and conditions will continue to be governed by the terms and conditions of the original federal award; thus, the Super Circular will not retroactively change the terms and conditions for funds a non-federal entity has already received.<sup>9</sup>

“The Super Circular’s administrative requirements and cost principles will apply to new federal awards issued by federal awarding agencies on or after December 26, 2014.”

**INCREMENTAL FUNDING** – For incremental funding that is subject to the Super Circular, non-federal entities are not obligated to segregate or otherwise track old funds and new funds but may do so at their discretion. For example, a non-federal entity may track the old funds and continue to apply the federal award flexibilities to the funding awarded under the old rules. For federal awards made with modified award terms and conditions at the time of incremental funding actions, federal awarding agencies may apply the Super Circular to the entire federal award that is uncommitted or unobligated as of the federal award date of the first increment received on or after December 26, 2014.<sup>10</sup>

**SUBAWARDS** – The effective date of the Super Circular for subawards is the same as the effective date of the federal award from which the subaward is made. The requirements for a subaward, no matter when made, flow from the requirements of the original federal award from the federal awarding agency.<sup>11</sup> Thus, if the federal Office of Community Services (OCS), which administers the CSBG program, makes a FY 2015 CSBG award to a state effective October 1, 2014, the Super Circular rules will not apply to subawards of those CSBG funds to CAAs. However, FY 2016 CSBG funds that OCS awards to a state effective October 1, 2015 and the state then passes through to CAAs will be subject to the Super Circular. Presumably, OCS would treat any FY 2015 CSBG funds appropriated under a continuing resolution effective on or after December 26, 2014 as governed by the FY 2015 CSBG terms and conditions effective as of October 1, 2014 and therefore not subject to the Super Circular, rather than applying the Super Circular to that portion of FY 2015 funds appropriated after December 26, 2014. However, should this situation arise, states should confirm this assumption with OCS.

### **PERMITTED CHANGES TO ORGANIZATION-WIDE POLICIES**

– After the December 26, 2014 effective date, non-federal entities with both old and new awards (i.e., awards not covered by the Super Circular and those that are) may make changes to their entity-wide policies (for example to payroll or procurement systems) to comply with the Super Circular and will not be penalized for doing so.<sup>12</sup>



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**PROCUREMENT REQUIREMENTS** – In light of significant changes to procurement rules made by the Super Circular, for the non-federal entity's first full fiscal year that begins on or after December 26, 2014, it must document whether it is complying with the old procurement standards or the new ones and must meet the documented standard. For example, if a CAA's fiscal year starts on July 1, its first full fiscal year beginning on or after December 26, 2014 would be the fiscal year ending June 30, 2016. The Single Audit Compliance Supplement will instruct auditors to review procurement policies and procedures based on the documented standard. For future fiscal years, all non-federal entities will be required to comply fully with the Super Circular.<sup>13</sup>

### **INDIRECT COST RATES AND INDIRECT COST RATE PROPOSALS**

“Existing negotiated indirect cost rates will remain in place until they are due to be re-negotiated.”

– Existing negotiated indirect cost rates will remain in place until they are due to be re-negotiated. The effective date of changes to indirect cost rates must be based upon the date that a newly re-negotiated rate goes into effect for a specific non-federal entity's fiscal year. Therefore, for indirect cost rates and cost allocation plans, federal

awarding and indirect cost rate negotiating agencies will use the Super Circular both in generating proposals for and negotiating a new rate (when the rate is due to be re-negotiated) for non-federal entity fiscal years starting on or after December 26, 2014. For example, the Super Circular eliminates the concept of “use allowance” for depreciation. Nevertheless, a CAA with a negotiated rate that is based on a use allowance would continue to use its existing rate, based on the use allowance until the rate is due to be re-negotiated.<sup>14</sup>

Non-federal entities may begin to submit actual cost proposals based on the Super Circular when they are due for fiscal years that begin on or after December 26, 2014. For example, if a CAA is required to submit a rate proposal based on FY 2014 actual costs to set rates for FY 2016, the rate proposal can be developed using the provisions in the Super Circular.<sup>15</sup>

**AUDIT REQUIREMENTS** – The Super Circular's audit requirements will apply to audits of non-federal entity fiscal years beginning on or after December 26, 2014.<sup>16</sup> Thus, if a CAAs fiscal year starts July 1, the Super Circular would not apply to the audit for the CAA's fiscal year starting July 1, 2014, but would apply to the audit for its fiscal year starting July 1, 2015.

### **May OMB or Federal Awarding Agencies Make Exceptions to the Super Circular or Impose Additional Requirements?**

No exceptions may be made to the Super Circular's audit requirements (Subpart F) – either by OMB or by any federal agency – nor may more restrictive audit requirements be imposed.

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OMB may allow exceptions to the Super Circular's other requirements for classes of federal awards or non-federal entities when those exceptions are not prohibited by statute. However, in the interest of maximum uniformity, any such exceptions will be permitted only in unusual circumstances. Exceptions for classes of federal awards or non-federal entities will be published on the [OMB website](#). The federal awarding agency or the cognizant agency for indirect costs may authorize exceptions to Super Circular requirements (other than the audit requirements) on a case-by-case basis for individual non-federal entities, except where otherwise required by law or where OMB or other approval is expressly required by the Super Circular.

A federal awarding agency may apply more restrictive requirements (other than audit requirements) to a class of federal awards or non-federal entities when approved by OMB or required by federal statutes or regulations.<sup>17</sup>

## What Effect Will the Super Circular Have on Existing Federal Agency Guidance?

"...the Super Circular will supersede the existing OMB circulars on federal grant requirements..."

As noted above, the Super Circular will supersede the existing OMB circulars on federal grant requirements (e.g., OMB Circulars A-122, A-87, A-110, A-133). In addition, all federal administrative requirements, program manuals, handbooks and other non-regulatory materials that are inconsistent with the requirements of the Super Circular will be superseded

upon implementation of the Super Circular by the federal agency, except to the extent they are required by statute or authorized in accordance with the provisions on exceptions and additional requirements discussed above.<sup>18</sup> One such item of non-regulatory guidance that will be superseded by the Super Circular is the Grants Policy Statement, issued by the U.S. Department of Health and Human Services (HHS), which currently applies to many of HHS's discretionary grants, including Head Start grants and CSBG training and technical assistance grants received by national and state CSBG network organizations directly from the federal Office of Community Services (OCS).

## To Whom Should We Address Questions about the Super Circular?

Non-federal entities, such as CAAs and state CSBG offices, receiving funds directly from the federal government should address their questions to their federal funding agency or agencies, their cognizant agency for indirect costs or their cognizant or oversight agency for audit, depending on the subject of the question. Non-federal agencies, such as CAAs, receiving funds through a pass-through entity, such as state CSBG office, should address questions to their pass-through entity. OMB will answer questions from federal awarding agencies.<sup>19</sup>

## What New Information Must Be Disclosed When Receiving a Federal Award?

The Super Circular requires federal awarding agencies to establish conflict of interest policies for federal awards. Non-federal entities must disclose in writing any potential conflict of interest to the federal awarding agency or pass-through entity in accordance with the applicable federal awarding agency policy.<sup>20</sup>

A non-federal entity or an applicant for a federal award must disclose, in a timely manner, in writing to the federal awarding agency or pass-through entity all violations of federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the federal award. Failure to make required disclosures can result in any of the remedies described in § 200.338 Remedies for noncompliance, including suspension or debarment.

## Which Provisions of the Super Circular Are Likely to Have the Most Impact on CSBG Network Organizations?

Super Circular changes in the following areas are the ones likely to have the most significant impact on CAAs and other CSBG network organizations and to require changes to their organizational policies, systems and forms:

- **PASS-THROUGH ENTITY REQUIREMENTS** – Pass-through entities now ensure that every subaward is clearly identified as such and includes certain specified information, including information about the indirect cost rate that will apply to funds the subrecipient receives under the subaward. (Note that the term "pass-through entity" includes not only states but also CAAs and state CAA associations that make subawards of federal grant funds to other organizations.) Therefore, CSBG network organizations will need to develop new contract forms for use with their subrecipients that incorporate the required information.



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- **INDIRECT COSTS** – As noted above, a pass-through entity making a subaward must permit the subrecipient to apply an indirect cost rate to the subaward funds. For subrecipients that have a federally recognized indirect cost rate negotiated with the federal government (a federally negotiated indirect cost rate or FNICR), the pass-through entity must recognize that rate. For subrecipients without an FNICR, the pass-through entity must generally let the subrecipient use an indirect cost rate that is 10% of modified total direct costs (the Super Circular calls this rate a “de minimis” indirect cost rate), unless the subrecipient asks to negotiate a lower rate. Nonprofits that receive funds directly from the federal government and that have never received a FNICR may choose to use the 10% de minimis indirect cost rate indefinitely, without having to go through the process of negotiating a rate. Non-federal entities that have FNICRs may apply for a one-time extension of a current rate for up to four year.
- **PROCUREMENT PROCEDURES AND THRESHOLDS** – The Super Circular’s procurement rules are significantly different from those that currently apply to nonprofits. Fortunately, as noted above, the COFAR FAQ provide for a one-year grace period for compliance with the new procurement rules. In preparation for compliance, CSBG network organizations should compare their procurement policies and procedures to the Super Circular’s requirements and thresholds and make any necessary or desired changes to those policies and procedures.
- **DOCUMENTATION OF COMPENSATION FOR PERSONAL SERVICES** – Although the Super Circular provides for more flexibility in documenting staff time and effort spent on federal grants and no longer specifically requires personnel activity reports (PARs), it is not clear exactly what documentation will be sufficient. Therefore, many organizations receiving federal grant funds are choosing to continue using PARs until more information is available.
- **CHANGE FROM USE ALLOWANCE TO DEPRECIATION** – CSBG network organizations currently employing a use allowance to recover costs associated with the use of buildings, other capital improvements and equipment will be required to switch to the depreciation method of recovering such costs.

The remainder of this newsletter provides a section-by-section review of those OMB Circular changes in Subparts C through F most likely to affect CSBG network organizations. While this newsletter provides an overview of the changes, it is not all-inclusive; we therefore urge CSBG network organizations to review the Super Circular itself – using this newsletter as a roadmap – for a complete understanding of the new rules along with [COFAR’s FAQ](#).

See endnotes on page 23



## Administrative Requirements Review

By Michael Shepsis, Esq., CAPLAW

This portion of the newsletter provides a section-by-section overview of changes to OMB administrative requirements for federal awards; these changes are contained in the Super Circular’s Subpart C – Pre-Award Requirements and Subpart D – Post-Award Requirements.

### Pre-Award Requirements (Subpart C)

The pre-award requirements part of the Super Circular can be found in sections 200.200 through 200.211. Much of the language in this part comes from OMB Circulars A-110 and A-102.

#### *Requirement to Provide Public Notice of Federal Financial Assistance Programs (§ 200.202)*

Each federal awarding agency must provide public notice of federal assistance programs in the Catalogue of Federal Domestic Assistance (CFDA). This requirement is from Circular A-89 which currently identifies the type of federal domestic assistance available.

#### *Notices of Funding Opportunities (§ 200.203)*

“...specifies the information that must be included in notices of funding opportunities.”

The Super Circular establishes standards not found previously in Circular A-110 or A-102 on how federal awarding agencies must announce competitive funding opportunities. Information that must be included in notices of funding opportunities is now specified and requires funding opportunities must generally be available for at least 60 days, and never less than 30 days.

#### *Federal Awarding Agency Review of Risk Posed by Applicants (§ 200.205)*

Federal awarding agencies must evaluate applicants for competitive awards and cooperative agreements on the basis of risk prior to making an award and may impose

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# Article End Notes

## Navigating the OMB Super Circular Changes

1. 78 Federal Register (Fed. Reg.) 78590 (Dec. 26, 2013); 2 C.F.R. Part 200.
2. 78 Fed. Reg. 78590, 78590-78594.
3. 78 Fed. Reg. 78590, 78590-78591.
4. 2 C.F.R. § 200.101(b)(1).
5. 2 C.F.R. § 200.101(e).
6. 2 C.F.R. § 200.101(d).
7. 42 U.S.C. § 9916(a)(1)(B).
8. 2 C.F.R. § 200.110(a). The federal agencies were required to submit draft implementing regulations to OMB by June 26, 2014; however, as of press time, the draft regulations had not been released to the public.
9. COFAR FAQ 200.110-12 (updated from previous Q II-1) (Aug. 29, 2014).
10. COFAR FAQ 200.110-7.
11. COFAR FAQ 200.110-11.
12. COFAR FAQ 200.110.110-13 (Previously Q II-2).
13. COFAR FAQ 200.110-6.
14. COFAR FAQ 200.110-1.
15. COFAR FAQ 200.110-2.
16. 2 C.F.R. § 200.110(b); COFAR FAQ 200.110-12 (updated from previous Q II-1).
17. 2 C.F.R. § 200.102.
18. 2 C.F.R. §§ 200.104 and 200.105.
19. 2 C.F.R. § 200.108.
20. 2 C.F.R. § 200.112.

## Administrative Requirements Review

1. COFAR FAQ 200.320-1.
2. COFAR FAQ 200.31-6 and 200.331-7.
3. 2 C.F.R. § 200.45.
4. Note that the three-year record retention period will be

extended if any litigation, claim or audit is started before the end of the three-year period or if the non-federal entity is notified by the federal government or the pass-through entity to extend the retention period. 2 C.F.R. § 200.333.

## Cost Principles Analysis

1. COFAR FAQ 200.400-3.
2. 2 C.F.R. § 200.19.
3. COFAR FAQ 200.414-2.
4. COFAR FAQ 200.414-3.
5. 2 C.F.R. § 200.68.
6. COFAR FAQ 200.331-5.
7. 2 C.F.R. § 200.420.
8. 2 C.F.R. § 200.53.
9. COFAR FAQ 200.430-1.

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