Final Uniform Guidance Revisions Issued

April 16, 2024

On April 4, 2024, the federal Office of Management and Budget (OMB) announced a draft version of the federal register notice releasing the final revisions to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (the Uniform Guidance), 2 C.F.R. Part 200. The final revisions are expected to be published in the Federal Register as a Final Rule soon. In the preamble to the Final Rule, OMB reiterated that its reasons for these revisions are to incorporate statutory requirements and the administration's priorities, reduce burdens, clarify and simplify language, and increase accessibility to federal resources. The effective date for the Final Rule is October 1, 2024. However, federal agencies may elect to implement it prior to the effective date, but no earlier than 60 days after the date of publication of the Final Rule in the Federal Register.

This most recent revision of the Uniform Guidance, the first since 2020, contains numerous changes that will affect how federal grant recipients and subrecipients, including Community Action Agencies (CAAs), administer their federal funds. A number of the changes address questions and concerns expressed in a comment letter that CAPLAW, the National Community Action Partnership, and the National Association for State Community Services Programs submitted to OMB in response to the proposed version of the rule.

As with other iterations of the Uniform Guidance, each federal agency is required to affirmatively adopt the revised regulations unless different provisions are required by Federal statute or approved by OMB. See 2 C.F.R. 200.106. OMB specifically opted not to strengthen this requirement despite requests urging them to do so. The requests focused on the inaction of some federal agencies to fully adopt the 2020 revisions. OMB, however, issued a Memorandum for Heads of Executive Departments and Agencies, M-24-11 (Agency Implementation Memo) which directs all federal agencies to submit to OMB their plans for implementing the 2024 revisions by May 15, 2024.

Some of the key changes to the Uniform Guidance in the Final Rule are as follows:

- **Definitions (200.1).** While the Final Rule added a few new definitions, it mainly revised existing ones. The most extensive change was the replacement of the term "non-federal entity" with recipient, subrecipient or both to provide greater clarity on the type of entity being addressed. Newly added definitions included "continuation funding", "financial obligations", "for-profit organizations", "likely questioned costs", "participant", and "prior approval" and mostly reflect the existing understanding of these terms as currently used in other sections of the Uniform Guidance.

  A few, mostly positive additions and insights include the newly added "participant" term which factors into the determination of modified total direct costs. OMB intentionally provided a non-exhaustive list of examples of individuals considered participants and focused solely on those participating in or attending program activities, not implementing them. Another is OMB's commentary regarding the new "prior approval" definition. OMB explained, but did not include in the definition, that Federal agencies may exercise

reasonable discretion in providing after-the-fact prior approval when warranted on a case-by-case basis and when consistent with law. In the definition, OMB simply noted that prior approval means “written approval obtained in advance” and opted not to include the ways in which prior approval may be reflected, e.g., via an approved budget. The other is “financial obligations” which recognizes orders, contracts and similar transactions that will result in an expenditure of federal funds. OMB explained in its commentary that “an obligation will often require a future – but not immediate – expenditure or outlay of funds.”

One of OMB’s most notable revisions to the definitions is the increase in the following threshold levels:

- $10,000, up from $5,000, per unit acquisition cost at which tangible personal property is considered equipment,
- $10,000, up from $5,000, acquisition cost under which a computing device is considered a supply, and
- $50,000, up from $25,000, portion of each subaward that may be included in the modified total direct cost base.

In both the definitions for “cost objective” and “indirect cost”, OMB removed general references to “Facilities and Administration (F&A)” and explained that “indirect costs” are not necessarily limited in all cases to the more specific “F&A” category. OMB clarified that costs are “incurred” not just “expended” in the “budget period” definition, giving another nod to the way most business is transacted, via obligations rather than immediate cash expenditures. Unfortunately, OMB removed a few examples of payments not considered improper from the “improper payments” definition to better align with existing guidance, but retained in the definition of “questioned costs” the clarification that such costs are not necessarily considered “improper payments.”

- **Exceptions (200.102).** In response to comments, OMB clarified that it did not intend to make significant changes to when a federal agency can seek an exception to the Uniform Guidance. In the Final Rule, OMB mostly restructured this section with no substantive revisions.

- **Inquiries (200.108).** Even though commenters expressed frustration with pass-through entities and federal agencies repeatedly not following the Uniform Guidance, OMB declined to create a way for recipients and subrecipients to submit their concerns. Rather, OMB made no changes to this section which directs recipients and subrecipients to submit concerns about the Uniform Guidance to the appropriate funding source representative, i.e., the federal agency, cognizant agency for indirect costs, pass through entity, etc.

- **Mandatory Disclosures (200.113).** In spite of concerns expressed by many commenters, the Final Rule retained revisions that require subrecipients and recipients to “promptly disclose” (rather than disclose “in a timely manner”) “credible evidence of the commission of a violation” (rather than an actual violation) of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in the civil False Claims Act. OMB slightly narrowed the language by stating that the “credible evidence” disclosure must be “in connection with the Federal award”

and not just one that is "potentially affecting the federal award." OMB maintained that applying a "credible evidence" standard is easier for recipients and subrecipients because they will no longer need to make legal determinations that a criminal law has been violated. OMB indicated that protecting the federal government from fraud, waste and abuse outweighed the influx of potentially frivolous claims based on what commenters explained was a vague and overly broad standard.

Even though requested, OMB opted not to provide a definition of "credible evidence." Rather OMB explained that it intends for the meaning to align with the definition in the federal acquisition regulations (FAR) that applies to federal contracts (not grants). The FAR Council explained "that the 'term indicates a higher standard [than reasonable grounds to believe], implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government.'" OMB also adopted FAR's interpretation that the threshold does not impose "an obligation to carry out a complex investigation, but only to take reasonable steps that the [applicant, recipient, or subrecipient] considers sufficient to determine that the evidence is credible." OMB explained further that the word "promptly" was used to indicate that "any such preliminary investigation should not be open-ended or extend over a longer period of time than is necessary to make a preliminary assessment of credibility."

- **Notices of Funding Opportunities (200.204); Appendix 1 to Part 200.** A number of updates were made to the regulations governing notices of funding opportunities (NOFOs) to encourage Federal agencies to make NOFOs more accessible and comprehensible. These changes reflect administrative priorities to make the process easier for applicants with less experience applying for Federal awards. Most changes are reflected in the updated NOFO form in Appendix I to Part 200.

- **Never Contract with the Enemy (200.215); Prohibition on Certain Telecommunications and Video Surveillance Equipment or Services (200.216).** In spite of concerns expressed by commenters, OMB explicitly stated that section 200.215 applies to subrecipients as well as recipients, noting that it did not believe that checking the excluded parties list contained in SAM.gov is overly burdensome for subrecipients. In the Final Rule, OMB opted to emphasize the prohibition against the purchasing and procurement of covered equipment, and not include any further clarifying language that could be construed to impose "use" restrictions on recipients and subrecipients. OMB noted that a federal awarding agency may provide a loan or grant funds to a recipient that uses covered telecommunications equipment or services but did not include any language in the Final Rule to this effect. OMB reiterated further that, if a recipient is using covered equipment, the federal award must not be used to pay for that equipment or any related services.

- **Whistleblower Protections (200.217).** OMB added a new section on whistleblower protections which expands on the protections for whistleblowers for disclosures relating to a Federal contract or grant made by an employee who reasonably believes there is evidence of gross mismanagement, gross waste, abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation. Recipients and subrecipients must inform their employees in writing of employee whistleblower rights and protections.

- **Real Property (200.311).** In the Final Rule, OMB added a new requirement that establishes standards for conducting appraisals of real property, when required under the Federal award. Recipients and subrecipients now must use an independent appraiser to conduct the appraisals and a responsible official of the recipient or subrecipient must certify them.

- **Competition (200.319).** The prohibition on using geographic preference requirements was removed from this section. OMB also added a new provision to clarify that it does not prohibit the use of scoring mechanisms to reward bidders committing to specific numbers of U.S. jobs and certain compensation and benefits.

- **Contract Cost and Price (200.324).** Commenters strongly supported OMB's decision, reflected in the Final Rule, to remove the requirement that recipients negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed. In response to comments, OMB also clarified that while this practice is no longer expressly required, a recipient is not prohibited from taking such action if necessary.

- **Subrecipient and Contractor Determinations (200.331).** In response to comments, OMB clarified its initial proposal to add language emphasizing that Federal agencies do not have a direct legal relationship with subrecipients and contractors of pass-through entities. Rather, OMB revised this section to clarify that, while a Federal agency does not have a direct legal relationship with subrecipients, the Federal agency is still responsible for monitoring the pass-through entity's oversight of first-tier subrecipients.

- **Prior Written Approval (200.407).** Consistent with its priority to reduce Federal agency and recipient burden, OMB removed a number of prior written approval requirements in the Final Rule. Prior written approval is no longer a requirement of cost allowability for direct costs, entertainment costs, memberships, participant support costs, selling and marketing costs, and taxes. With respect to real property and equipment, OMB removed from this section references to obtaining prior approval that might be required for their use and disposition (see 200.311 and 200.313). The requirements for prior written approval as it relates to the purchase of equipment and other capital expenditures, pursuant to 200.439, remain in the Final Rule. OMB emphasized that even absent prior approval, the Cost Principles must be followed for costs to be allowable to federal awards.

- **Indirect Costs (200.414).** OMB followed through on its proposed revision and in the Final Rule increased the de minimis rate for indirect cost recovery from 10% to up to 15% of modified total direct costs, amidst widespread support from commenters. OMB explained that the phrasing "up to" refers to the flexibility that recipients and subrecipients have to elect a rate lower than 15%, especially if desired where a statute or regulation limits indirect cost recovery to a percentage below 15%. However, OMB emphasized that Federal agencies and pass-through entities may not compel recipients and subrecipients to use a rate lower than the 15% de minimis rate, unless required by statute. Though not specifically addressed by OMB, this section still requires recipients and subrecipients to apply the de minimis rate consistently to all federal awards. Thus, even if one funding source limits indirect cost recovery on its specific award to a rate lower than

15%, recipients and subrecipients of that award may still elect to use the 15% de minimis rate to fully recover costs as permitted by other funding sources without such limits or caps. A funding source cap on indirect costs only limits how much of that 15% rate can be recovered from that particular award.

OMB also added specific language in the Final Rule directing pass-through entities to accept all federally negotiated indirect cost rates for subrecipients.

The Final Rule clarifies that both recipients and subrecipients may notify OMB of any disputes with Federal agencies regarding the application of a federally negotiated indirect cost rate. However, OMB declined to establish itself as a formal arbiter of indirect cost rate disputes even though commenters expressed concerns about Federal agencies' refusing to recognize federally negotiated indirect cost rates.

- **Advertising and Public Relations (200.421).** In response to comments, OMB added in the Final Rule "recruiting project participants" as an example of an allowable "program outreach" activity. OMB explained that the example is intended to clarify the type of "program outreach" activity for which federal funds may be used. OMB declined to include additional examples and reiterated that the absence of a specific cost in the Uniform Guidance does not mean it is allowable or unallowable. Rather, the analysis depends on the programmatic need and the basic considerations in the Uniform Guidance Cost Principles.

- **Compensation – Fringe Benefits (200.431).** In the Final Rule, OMB clarified that when a recipient or subrecipient uses the cash basis of accounting and an employee retires or is terminated, payments for unused leave are allowable in the year of payment and must be allocated as a general administrative expense to all activities. OMB had initially proposed additional language saying that agencies may include these costs for unused leave in fringe benefit rates with the approval of the cognizant agency for indirect costs. It removed that proposal, however, in response to comments that noted some recipients might not have a cognizant agency for indirect costs.

- **Participant Support Costs (200.456).** OMB removed, in the Final Rule, prior approval requirements for participant support costs and simply stated that they are allowable as defined in 200.1 of the Uniform Guidance. OMB also added a requirement that recipients and subrecipients must document the classification of items as participant support costs in written polices and treat them consistently across all Federal awards. OMB declined to offer guidance on what these policies and procedures may look like.

- **Audit Requirements (200.501).** In the Final Rule, OMB raised the threshold of federal funds expenditure that triggers a Single Audit, from $750,000 to $1 million. OMB also added language clarifying that Single Audit requirements apply when a non-Federal entity expends $1 million or more in Federal awards during its fiscal year.

- **Audit Report Submission (200.512).** In an important and much-needed point of clarification, OMB added to the Final Rule that a cognizant agency for audit or oversight agency for audit may extend the due date for Single Audit submission when the nine-month timeframe would place an undue burden on an auditee. This revision aligns the Uniform Guidance Audit Requirements with the requirements of the Single Audit Act. OMB specifically included "oversight agencies for audit" as authorized to extend an audit submission due date to account for some auditees not having a "cognizant agency for audit."

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