Understanding the Proposed Changes to the Uniform Guidance

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[Allison Ma'luf, CAPLAW]

We are talking about the Uniform proposed Guidance and all the changes that have recently been issued. I'm very happy to have with me today my colleague Emily Center-Bregasi, who's a staff attorney here at CAPLAW, and our legal intern. She's jumping in for the fun, Julia George. She's really raring to go on this.

With that, I'm going to get us started. We have a lot that we're going to cover today. We're going to start by setting the stage, and setting the stage also includes my telling you that there's a Q&A box, and so please input all of your questions in the Q&A box. We are not going to be responding to chats. I think chats might be closed, so don't put questions there. If we can get to questions, we will. It may not be likely, but if you put them in that box, we'll at least have them logged, and we may be able to address them in some other form at some other time.

So, with that, I'm just going to let you know that we're going to talk about, in the very beginning, the key acronyms that we're going to use throughout the presentation today, and also that you might see throughout the Uniform Guidance. We're going to set just a baseline with respect to the Uniform Guidance, just a few basics to get us kind of oriented. We're going to talk about the rulemaking process, just give a very brief overview of that, and then we're going to dive in deep. So, get ready. We're going to talk about the Office of Management's objectives with this Notice of Proposed Rulemaking. We're going to walk through the relevant proposed changes, and there are a lot, but there are themes, and we're going to try to continually identify those themes. And then, if we have time, we will answer questions. I promise, if we have time. Alright, with that, I'm going to turn it over to Julia.

[Julia George, CAPLAW]

Hello, everyone. I am so happy to be here. I'll have Allison go to the next slide. Beautiful. So, there's a few acronyms you may hear us use or see on our slides over the next hour that we just wanted to make clear. Some of these might be familiar, but I'd like to specifically highlight that we are going to be using FA as federal agency and UG for Uniform Guidance. If there's any acronyms that we missed here, please use the Q&A feature to ask us as we go along, and we'd be happy to clarify.

Going to the next slide. Today is all about the Uniform Guidance. So, what is the Uniform Guidance? It's formally the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. This is a set of regulations that was created by OMB in 2014 to provide a standardized framework for federal agencies to administer federal funds.

This is not the first time since then that it has gone through significant changes. The Uniform Guidance acts as baseline rules, but federal agencies like HHS are permitted to make adoptions, interpretations, or amendments to accommodate specific legal requirements of the agency or a particular grant program.

The Uniform Guidance is one part of a larger body of guidance provided by OMB in Title 2 of the Code of Federal Regulations. Title 2 is called Federal Financial Assistance, and it has one subpart, Subpart A. In Subpart A, there are three sections. Part 1 is the introductory material, Chapter 1, which is general guidance, and Chapter 2, which is the Uniform Guidance that we tend to reference. The discussion today is going to cover changes in all three of these parts of Title 2, Subpart A.

The Uniform Guidance itself is split into six subparts, as you can see here: Definitions, General Provisions, Pre-award, Post-award, Cost Principles, and Audit Requirements. There are also 12 appendices that provide form language and supplemental guidance. So, when you see a citation on our slides today that starts with 200 you're going to know that we're going to be discussing one of these subparts.

Now that we're all on the same page about the Uniform Guidance, we're going to talk about the legal framework for the proposed changes. So, backing all the way up, there's three types of laws: statutes, which are passed by Congress; regulations, which are created by the federal agencies under authority granted by Congress; and then finally case law, which is court interpretations and analyses of statutes and regulations. Each of these kinds of laws have procedures and systems that have to be followed for the law to have binding effect and be enforceable.

To create or change regulations, which are often called rules, the procedures that must be followed generally come from the Administrative Procedure Act, or the APA, and authorizing statutes.
The basic process is that a federal agency makes an announcement in a Notice of Proposed Rulemaking, an NPRM. The public then will have time to comment, and then the agency takes those comments into consideration for the final rule. The final rule is what is the actual law. An NPRM is not law, it's just a step towards making or revising law.

An important part of the NPRM that we're going to be discussing today is the preamble, which is basically a narrative section that outlines the OMB's rationale and legal justification for the proposed changes. Both the preamble and the text of the proposed rule are available to the public on the Federal Register.

So these are the general steps in the APA rule making process. As you can see, the Uniform Guidance NPRM is about halfway through this process. It's been published in the Federal Register and is open for public comment. Once the comment period closes, OMB will then review the comments. They may revise the rule, and then they will go through internal review before publishing anything final.

[Allison]

Alright. Thank you, Julia. That's great. So that kind of gives us a little bit of a framework for what we're talking about today, which is OMB's Notice of Proposed Rulemaking with respect to the Uniform Guidance. And I'm going to start our discussion off by talking about the framework for comments and the objectives for this new rule.

So, basically, this new rule was published in the Federal Register on May 29, 2026, and so we have 45 days from that date within which to comment on that rule, so comments are due by the end of July 13, 2026. This is a shorter comment period than we've had in the past with the two revisions, and there's a lot of changes. They are somewhat thematic, so I recommend folks take a look and make sure that they have time to submit comments on this new rule.

The expected effective date for this new rule is October 1, 2026. This is the date that the next federal fiscal year will begin. That's federal fiscal year 2027. The Administrative Procedures Act that Julia referred to, the APA, does require, unless there is a good cause exception – which there is a high threshold for that, so we're not expecting a good cause exception – but unless there's a good cause exception, the federal agency is required to issue the final rule 30 days prior to when it takes effect. So we are anticipating that the final rule will be issued to us on September 1, 2026 so that the administration can meet its goal of having it take effect on October 1, 2026.

So that means that any award that is issued on October 1, 2026, and thereafter, will be subject to this final rule. If there's any grant that is unamended that is currently in place, isn't going to be reissued during that time, then the current Uniform Guidance, the one that we've been working under currently, will still apply to that unamended grant, that unchanged grant. So, just like every other revision of the Uniform Guidance that we've dealt with in the past, there's usually some overlap time and period, and we'll do our best to work with recipients and subrecipients, if that occurs.

Alright, so OMB had some objectives for this new issuance, the revisions, and they are somewhat similar to objectives we've seen in the past. They're improving transparency, accountability, and oversight - we've seen that quite a bit. They're clarifying the status of the guidance as a regulation. This has been an area that other administrations have kind of dabbled in doing, making clear and trying to encourage federal agencies to more actively and effectively adopt any guidance from OMB, and so this administration is pushing that a little further. And the changes are reducing recipient burden, and so we're going to point some of that out as we go through today.

We're not going to talk about every single change, so I know you're going to be like, "Wow, there's more changes than what you're talking about," once you see our slide deck, but there are a few more. Most of the ones that we're not talking about apply to universities, institutions of higher education, and research and scientific bodies. So we're not going to touch on those. You may see us mention a few revisions that apply to those types of entities, but could also apply to us. So, you'll see a little crossover there, but generally not going to talk about the ones that are specific to those types of entities.

You may also remember that in August 2025 an executive order came out that directed the Office of Management and Budget to engage in this process and make changes, and so these changes are in response to that executive order, that's Executive Order 14332. It was called Improving Oversight of Federal Grant Making. So, if you want to just kind of do a little history and look back as to where this started in the current administration, you can go back to that point.

Alright, if you take away anything from today, you must take away that these are proposed changes. Nothing is final. Nothing has changed. Uniform Guidance is as it is for the time being.

So, this means that everyone in the public, that includes CAAs, Community Action Agencies, State Association, state agencies have an opportunity to comment on the proposed changes up until July 13, as I've already mentioned. What's very important to also note is that when the final rule comes out, it may look differently than what we've discussed here today. Between the proposed changes, the review of the comments, and any edits that this administration may make in response to those comments, they will issue a final rule. So, just because we're going over all this stuff today, the final rule could be different. So, keep that in mind.

The Uniform Guidance applies to federal awards and federal activities. And you just have to remember that if you've got activities that are funded by other sources – state or unrestricted dollars – that those generally are not going to be subject to the Uniform Guidance. We are going to talk about some activities by an applicant that could be considered, that aren't necessarily related to the federal award. But when you're talking about the actual rules that apply to your federal award, the majority of them are going to apply to you, because you receive federal funding. Now, some states take the Uniform Guidance and incorporate it by reference into their own state rules, and if a state does that, then you may see some of these Uniform Guidance rules applicable to your state grants.

Alright. Okay, I'm going to talk as briefly as I can about a section of OMB's government-wide guidance that we don't normally talk about, and this is the section that introduces this part of this section of guidance. It's introduction to Title 2, Introduction to Subtitle A, where the Uniform Guidance lives, as well as some other guidance that the Office of Management and Budget issues for recipients and subrecipients, and then the responsibilities of the Office of Management and Budget and federal agencies with respect to all of this guidance.

And the reason I'm going to talk about this is because they've made changes in these sections that basically are making the Uniform Guidance have greater weight and effect when it is issued as a final rule. So I know it's confusing because we keep saying rule and then we say guidance, but the Office of Management and Budget, under the statute that speaks to how it operates, directs that office to create guidance for federal financial assistance. So for federal agencies in facilitating awards, they look to the Office of Management and Budget to make sure that they're doing so in an accountable way. And so as part of that OMB issues guidance that then federal agencies, as Julia described earlier on, adopt. And so the changes in these sections are basically saying that the Uniform Guidance is now a regulation or rule once this final rule takes effect. So it's replacing guidance with regulation. It's also removing the need for the federal agency to adopt the Uniform Guidance as a regulation, so it's kind of taking out a step.

It's unclear, honestly, what the practical implications of this will actually be, because a lot of federal agencies just adopt the Uniform Guidance wholesale when they adopt it as a rule and codify it with some exceptions. And the ability to have exceptions for the most part is still in place.

So this transition of language from guidance to regulation is also taking place in this other portion of OMB's government-wide guidance – that's the portion that talks about the unique entity identifier, the sam.gov website, the reporting by, of subawards and executive compensation, department and suspension guidance, and drug free workplace guidance. So you see all these citations. So in all of these citations, if you looked at them, you're going to see that the Uniform Guidance is replaced with [, the reference to] guidance is replaced with regulation, and the parts that talk about the UEI, the sam.gov, the reporting of sub awards, and executive compensation – you're going to see guidance referred to as policies, giving them greater weight.

And then in 180 and 182 where there's been debarment / suspension guidance and guidance on the drug free workplace act, you're going to see that they're making that guidance binding with the issuance of the final rule. So there's no longer any need for a federal agency to take OMB's guidance and then codify it as their own, or at least recognize it as the final rule applicable to their funding.

So with respect to debarment / suspension and the drug-free workplace rules, there seems to be some limitation on a federal agency to deviate from the rule that would take effect, that had previously been guidance, and that limitation is based on whether or not a federal agency has the discretion to deviate from the rules. So that discretion is going to be outlined in the funding source statute likely, if it exists, or in the statutes that govern debarment and suspension and the drug-free workplace act.

Alright, I am going to dive into now the Uniform Guidance that we mostly deal with, and you're going to see this similar theme. I'm not going to get off this theme of transitioning the Uniform Guidance from guidance to a rule, so you're going to see that, and you're going to see some other stuff that is happening with respect to the Uniform Guidance.

So we all are, I think, familiar with the fact that the Uniform Guidance has a definitions section, and there's not that much that has changed with this definition section. Basically they have removed the need for the compliance supplement that's used in, as part of, the single audit review. They removed the need for a federal agency to annually adopt that. Emily is going to talk a little bit more about that when we get to that section of the Uniform Guidance.

They are doing this all throughout; we're just highlighting it once – they're moving away from paper to electronic forms of issuances. They are revising the definition for personally identifiable information. They are basically removing examples of where you may find it. They're removing the different ways that you may identify if information is personally identifiable information. So they had an explanation in there that basically said you may have to do a case-by-case analysis to determine if someone is at risk of having information identifiable. They removed that analysis from the definition. And they also removed an explanation of when non PII becomes PII, when you basically combine it. That doesn't necessarily mean that this information isn't still applicable; it's just no longer going to be in the rule.

They added a definition for obligated in the existing definition for unobligated balances. This is a helpful change, if this goes through. Unobligated balances, prior to this, just referred to balances that weren't obligated. So now, for the purposes of this definition, they've explained when an obligation would occur. So a contract has been entered into, a liability has been incurred – those sorts of examples.

Alright. So that was brief. We've got one brief section [done]. I'm going to dive into the part of the Uniform Guidance of Subpart B, referred to [as] the General Provisions, that generally talk about how the Uniform Guidance functions and how the Office of Management and Budget interact with it, as well as how the federal agencies interact with it.

Okay, they have made a number of changes throughout this subpart. The first one has to do with the applicability, and now we're back on that theme about the Uniform Guidance no longer being guidance, it is now going to become a regulation right out of the gates. Federal agencies no longer need to adopt it, so you're going to see that echoed and changes with respect to applicability. They have taken out the discussion of regulatory conflicts – so when the Uniform Guidance conflicts with a funding source regulation –they've treated it separately in a separate subsection. Statutory conflicts – it's the same, it hasn't changed.

So the interesting part about regulatory conflicts, and the change here, is the default presumption that the Uniform Guidance, that federal agencies are directed to – to the maximum extent practicable and as consistent with law – to have the Uniform Guidance govern over any policy and a funding source regulation. So basically they want the Uniform Guidance to truly be uniform, and so they're giving it greater weight in this instance. And if a federal agency is aware of a conflict between a funding source regulation or policy and the Uniform Guidance, then they need to try to reconcile that in the Notice of Funding Opportunities, so that recipients and subrecipients are clear as to what rule applies.

They are only making a slight adjustment to the Exceptions section of the Uniform Guidance. This is where a federal agency can issue exceptions to the adoption of the Uniform Guidance. We're not going to have federal agencies adopt it/[the Uniform Guidance] anymore if these rules go into effect, but they will still have the ability to issue exceptions as they need to, and as required by law, and as approved by the Office of Management and Budget. However, there is a prohibition against exceptions that are prohibited by law, and that other approval is expressly required by the Uniform Guidance for those exceptions to be recognized and go into effect. And so they've added in that a federal agency cannot issue an exception, an example of an exception that they can't issue, is an exception to the Termination and Suspension provisions in the Uniform Guidance. So I'm not quite sure how this is going to play out – we're not sure how all these different new rules are going to play out – but it's something to be aware of that they are very much focused on clarifying a federal agency's authority to terminate and suspend discretionary funding, and they want that to be consistent throughout the proposed rule.

Alright, we've got a few more sections that talk about this recognition of the Uniform Guidance as a rule, and emphasizing its universal application. And I will say that this is something that prior administrations have tried to do in the past, and their original impetus, one of the original impetuses for the Uniform Guidance, was to create a universal and uniform rule. And so there is a section that talks about the federal agency implementing the Uniform Guidance, and now it no longer talks about adopting and implementing, it just talks about implementing the final rule. And it does acknowledge with respect to the effective date, that while the final rule will go into effect, that a federal agency may still seek agency exceptions to the rule, so long as, again, they're required by statute, they're not prohibited by any statute, and they're approved, or they're approved by OMB, Office of Management Budget.

Alright, they are moving away from recognizing other languages in federal award materials, so there's no longer a "should" try to use English in these materials. It's now a "must", and so they've made some changes to solidify the use of English in all the materials.

The Conflict of Interest provision has always been here, and it's intended for federal agency to determine, and for recipients and subrecipients to determine, if they have a conflict with the federal agency from whom they're seeking an award. So the federal agency will put together [a] conflicts of interest policy and seek disclosures. The change that is being proposed would require the subrecipient to disclose if they have an employee that is applying for the award – or if the award is received, maybe working on their award – if that employee had worked for the federal government in the prior two years to submitting a proposal for that award. And so the intent of this is likely to increase transparency as to the current or prior administrative influences in the application process, try to potentially make it fairer across the board. That disclosure they say in the new rule is for "informational purposes" only, but they do emphasize the transparency aspect of it.

The Uniform Guidance does require that applicants, recipients, and subrecipients disclose credible evidence in connection with their federal award of the commission of a federal criminal act that is related to fraud, conflicts of interest, and bribery, and any kind of intentional act of that type. This has been in the Uniform Guidance. It was tweaked – and I note this on this slide – in 2024. The tweak in 2024 was intended to align this language with language in the federal acquisition rules. These are the rules that apply to federal contracts, and so they explained at that time that credible evidence is a threshold that is higher than reasonableness, and that it would enable the recipient / subrecipient / applicant time to investigate whether or not there is credible evidence in connection with [an] award of those crimes – fraud, bribery, etc. And also that they're supposed to reply promptly, so they're not supposed to take a year to investigate, but they are encouraged to investigate before making the submission and disclosing the credible evidence.

So the change to the rule is actually small but impactful. It is saying that once that credible evidence is submitted to the Office of Inspector General (OIG), and that is required currently under the rule, that then OIG must transmit that credible evidence to the US Attorney General's office within 10 days of receipt . . . within . . .OIG has to submit it within 10 days of receipt of it to the Attorney General's office. And this is intended to strengthen enforcement and accountability, to try to mitigate fraud and try to discern credible allegations that may exist.

Alright, I am now moving to the section of the Uniform Guidance that talks about the design and planning of a federal program, and I'm going to try to go through this as quickly as I can, because we have a lot to cover, and hopefully I will capture everything that everybody needs to know or would like to know. So they have tweaked the type of agreement that a federal agency can use to issue federal funding. They removed fixed amount awards as that type of agreement. They did move the definition of fixed amount awards to this section, so if this final rule goes into effect, that's where you'd find it. They've also removed the pass-through entity as a decider of that/[any] type of agreement. That decision falls solely on the federal agency. The fixed amount awards [were] removed because they felt like there were insufficient guardrails, and that they were not being used consistently.

They have attempted to align the program planning and design process for discretionary awards to incorporate executive orders, to emphasize alignment with applicable law and to lessen administrative burden. You're going to see this throughout this slide, as well as other slides. So, you see they're aligning, they're directing the federal agency . . . and . . . when they're designing the award, what it's going to look like, what the, what the program is going to look like. When they're designing that/[the process], they need to think about the administration's policies and priorities. Administrations typically do an overlay of their administration's policies and priorities.

They also added some new provisions to ensure that the use of the funds are compliant, they're not being used for prohibited activities, even the appearance of a prohibited activity. The example they give is lobbying, but you can't use your federal funds to lobby. They also want the federal agencies to specify in the Notice of Funding Opportunity those who are eligible for receipt [of the award] –

so list that – but they don't necessarily have to list those who are ineligible. They want the federal agencies to try to design multi-year awards.

There's more for the Notice of Funding Opportunity – there's quite a few revisions. The intent of these provisions is to increase transparency and availability of federal awards, but also to streamline the process. That's sort of the summary of everything that's on this slide. So now federal agencies are directed to announce all of the different discretionary award competitions that are available – so not just open competitions – but it could be limited [competitions], those that have a limited competition or those with no competition. So this is really the first time we've sort of seen this language used in the Uniform Guidance. They/[the federal agencies] have to post all the NOFOs on grant.gov unless there's an exception for national security or national interest. They have to require applications through grants.gov. They can't require the use of technical or legal consultants, and again, they have to identify those who could be eligible.

One of the more notable changes to the Notice of Funding Opportunity section is the addition of a statement of interest, and this is intended – as you can see at the bottom of the slide – there is a purpose for this, and it's to reduce the burden on the applicant and to assist the federal agency in doing a more competitive process. So it's directing federal agencies to seek a two-pager that will summarize a project concept. They have to review that two-pager before inviting a potential applicant to submit a full proposal. And you can see there's some framework with respect to how that process will work on this slide.

They are also required to include, in the notice of funding award, a date by which the statement of interest applicants will be invited, or not invited, to submit a full proposal. Federal agency heads have the authority now to increase the word count on the executive summary, so now it's/[could be] a larger word count. And they may display the NOFO on other systems other than grants.gov, so they have that discretion.

They are now requiring that NOFOs be posted for 30 days. Before it was "use your best efforts" to post for 30 days, so that's a good change. And they are saying that if you are not going to post for 30 days, that you have to include a justification as to why in the actual NOFO, the Notice of Funding Opportunity.

So when the federal agency reviews the merit proposals, there are conditions and a whole process with respect to that review that are principles that would be considered. And so they have added what they refer to as a Pre-issuance Review process. This is new. It is requiring federal agencies to make sure that the proposals are consistent with applicable law, federal agency priorities, and national interests. It is also designating one or more senior appointees to conduct a review of the proposal to make sure that it follows principles. It does have language in there that says the review of those principles need to be done with respect to the relevance of those principles and with respect to those principles being consistent with applicable law. So where applicable, they're supposed to advance the president's policy priorities, that's what they're looking for in these proposals.

They are going to give preference to institutions with lower indirect cost rates, if all things are equal. This is likely getting at universities and research and scientific bodies more so than Community Action Agencies, but it's important to note that it's out there. The pre-issuance process also is directing federal agencies to consider a mix of recipients. This is likely more geared toward research grants, because it's talking about recipients who could put out, for example, a drug more quickly versus ones that have a longer process before they can put out, for example, a new drug. They also include [that] they're to look for proposals that do not fund, promote, encourage, subsidize, or facilitate racial preferences, including intentional proxies that are used for criteria for employment or program participation, denial of sex as binary, illegal immigration, or compromised public safety, or promote anti-American values. Again, all of these have to be relevant – these principles, when they're reviewing them – relevant and consistent with applicable law.

They also add, as part of this pre-issuance review process, that this appointed senior reviewer is directed to use their independent judgment and not defer to recommendations of others. This really seems more like it's in the research context than in our context. They're saying that they're not discouraging peer reviews, that they can be used so long as they're advisory and not intended to be de facto binding on the appointee. They are saying that federal agencies don't always have to fund a NOFO – if there's not a good proposal out there, if it's quote low quality – that they can repost the NOFO at a later date.

Alright the next section is talking about the assessment of risk posed by applicants. This again is a section that exists in the Uniform Guidance, and they have added some items for consideration when evaluating an applicant's risk, and that's the risk to have financial integrity and to be eligible for the award. So there's always been a condition or consideration to assess the financial capacity of the applicant, and now they're tying that financial capacity to the ability to manage high dollar awards. So they're going to look at your history with the size of awards you've received.

They're going to look at what they refer to as a history of questionable practices. That review is going to be based on publicly available and verifiable information. You can see here that the first part of what might be considered a questionable practice is really related to research and education, so plagiarism and non-replicable studies. But, then it talks about activities inconsistent with civil rights and anti-discrimination laws; religious liberty laws; membership or affiliations with organizations engaged in activities that violate the law, undermine safety, or promote the overthrow of the government.

There are also standards that apply to the way in which a federal agency engages with recipients and subrecipients and govern sort of what they can ask of, and from, the recipient. And so, here, the federal agencies are being directed. This is new language. Being directed to review, to review and remove, if necessary / if they're not necessary, programmatic and administrative requirements, and if they're not required by law. So this is part of that streamlining effort. And if they do that removal, then to make sure that they're updating Office Management and Budget on that.

There is also a section that talks about when the federal agency could impose specific conditions on an existing award. And the changes here are really focused on clarifying the adjusting and removing of specific conditions, and that is qualified by the extent permitted by law. It says "to the extent," but it should say "extent permitted by law." And it talks about removing and adding conditions throughout the period of performance [and] when the award is made. And when they're added to an existing award, it has a framework for how those conditions can be removed and added, depending on whether or not the considerations are listed in the Uniform Guidance, or whether or not they're outside of the Uniform Guidance.

They give some examples of the specific conditions that could be imposed. So the specific conditions are still the same, but one example is requiring the payment, requiring information about payment of subrecipients. This was added to the condition seeking more detailed financial reports. You'll see a theme – it's probably going to start now, might have started a little earlier – about a focus on subawards and keeping track of subawards, who they're going to and what they're doing to make sure that they're furthering the purposes and goals of the statute under which the funding was issued.

It also has this new section that talks about program level specific conditions and when those might be added, but not a lot of information about what's considered an elevated programmatic risk. So I'm sure we'll get further information or guidance – or hopefully we will – when this rule takes effect – if it takes effect.

There's also a section that talks about the information that is required to be in a federal award. And so this is probably not new for most folks, because the terms and conditions have always included at least a reference to the termination provisions and the Uniform Guidance – that's in section 203.340 – but now they want that language to be more explicit, either you specifically list the information from 200.340, the reasons why the award could be terminated by the federal agency, or you more expressly incorporate 200.340. And it also directs the federal agency to inform the recipient if additional termination provisions apply that go beyond the 200.340 or maybe supplant the 200.340 provisions.

So they have language here that is new, and it is prohibiting the use of federal funding to support what's referred to as disparate impact liability. This is a concept that is actually in some of the civil rights acts that govern, so it'll be interesting to see how this plays out, but basically they're saying that you cannot use your federal funds in any way that promotes the concept, the principles of disparate impact liability.

And disparate-impact liability occurs basically when you have a facially neutral policy that, when it's applied, it results in a discrimination occurring – it results in someone receiving preference under. . . that policy that appears facially neutral. So they want to take that concept out of the federal grant law world. They feel like it is making it more difficult to enforce the anti-discrimination laws by having this concept in there, and so they're requiring federal agencies and pass-through entities to review their policies with respect to it, and they're also requiring recipients and subrecipients to review their policies and make sure that they are not adopting, issuing, or enforcing disparate-impact liability when administering their federal funds.

I think what's very important for folks to note is the second bullet on this slide. It is language from the proposed rule that recognizes that you may be conducting statistical or demographic analysis for an internal program, for evaluation research or other programs, and they are not saying that that that is prohibited. Rather they're saying you can do that, you just can't use your federal funds to do that, and you can't use the results of those efforts to inform your federally funded activities. And they do give a definition of disparate-impact liability that is a lot longer than the definition that I just quickly gave you – and more legal.

So they added a new section around the prohibition of what they refer to as discriminatory event services. This is getting at prohibiting viewpoint discrimination. You basically can't pass laws that infringe on individuals' right of free speech, to express their opinions, and so this is a very complicated and complex area of constitutional law. And so this applies to public entities generally, and so they are now putting it in the Uniform Guidance, and they are saying for non-public entities that you must not engage in any viewpoint discrimination with any activities that are within the scope of activities funded by your federal award. And so that means that you need to be very cognizant when you're doing an event, a meeting, or expressive activity – and they give some description as to what those are – that you are not engaging in actions – and here [on the slide] are examples of the actions that could be viewed as discriminating against someone's opinion or religious beliefs.

And so you have to make sure that you're being fair and consistent in the way that you're providing your services and activities; you're not modifying them based on someone's opinion or beliefs; that you are not imposing additional administrative burdens, fees, etc. and that your policies are being applied fairly across the board, and not in a way that could suppress someone's free expression.

Alright, I am now going to quickly move through a few of the rules that apply once you've received your federal funds, and then I'm going to hand it over to Emily to take us home here today. Okay, the Uniform Guidance has always had a section in it that establishes that you have to facilitate the funding, pursuant [to] and in compliance with the U.S. Constitution, and not discriminate against folks on the basis of their religious beliefs and items of that nature, characteristics or activities of that nature. And so that hasn't really changed with these revisions.

They did add a section in the general portion of the national policy requirements that focuses on Title VI, which is the federal law that prohibits discrimination on the basis of race, national origin in the provision of federal financial assistance. So when you're providing services and benefits, you can't discriminate on the basis of race or origin when you're doing that, so they reference that in the very beginning. They do take out public welfare and the environment as two of the areas that they're focused on with respect to furthering the goals and purposes of the funding. And they also take out a reference to Bostock v. Clayton County, which is a Supreme Court case that prohibits discrimination on the basis of sexual orientation or gender identity. So basically, in that decision, the Supreme Court said that sex – the discrimination based on sex – includes gender identity and sexual orientation. So they removed that reference to that case.

And they also added in information around faith-based organizations, and they are specifically requesting comments on this section. They also added a section on limitations on authorized uses of federal awards, and this just tracks what we've seen elsewhere, what I've already discussed, and in the executive orders. So you can't use your funds to promote, encourage, subsidize, or facilitate DEI, DEIA efforts, gender ideology, or transitioning of a child. And these are limited by, that you can't engage in these activities, to the maximum extent permitted by law, so that is now in, wouldn't [, sorry,] would be in the Uniform Guidance.

They have removed references to internal controls guidance that have been in the Uniform Guidance for a while, and also in the precursors to the Uniform Guidance, [U.S.] Comptroller and COSO frameworks for internal controls. They are now saying that they feel like grantees, recipients, subrecipients can handle this, can figure out what they need to do with respect to making sure that funds are used appropriately and properly, and that they have a system of accountability. They're not saying that you can't use those frameworks, they're just not including them in the Uniform Guidance.

They've added confidential business as one of the areas of information that needs to be protected using reasonable cybersecurity or other measures. They are requiring those who receive federal funds to participate in E-Verify. This is identifying if someone is eligible from an immigration status to work in the United States. E-Verify does not generally apply to private employers. It has generally just applied to federal contractors, those who receive federal funds through a contract. And so this would be new, and you would have to use E-Verify for employees and contractors who are working under a federal award. They're also requiring that states conduct a prepayment verification check using the Do Not Pay screening process, or an alternative payment screening process.

They have a few changes to the federal payments section. Again, they're requiring federal agencies to verify that recipients are using the Do Not Pay data prior to dispersing funds, so they want to make sure that that is in place. And they are basically putting into the Uniform Guidance the statement that I think everyone – except for perhaps states – have been required to submit to receive their federal funds when they put in a drawdown request, and they're giving a little more guidance on what they expect to see in those brief written justification statements.

They've made a couple of changes to the procurement section. They're not a fan of cost reimbursement contracts, so they're strongly discouraging those. [Also, as you'll see on the slide,] they're just focusing on when you're contracting with a small business, just focusing on the fact that it's a small business, that's the main characteristic that you're looking at. And they are now taking a stronger position with respect to U.S. produced goods and directing federal agencies, rather than telling them, that they have to use basically their best efforts to maximize the use of goods or products produced in the U.S.

They are trying to consolidate everything under sam.gov so you'll see that reflected on this slide. They're reporting subawards on sam.gov. This is more of their focus on subawards, and they really want to make sure that federal agencies are taking corrective action against recipients if the subawards are not posted on sam.gov, and they also are requiring federal agencies to justify if they're going to waive performance reporting. There has always been the option to waive, now you just have to have a justification in writing with respect to why you're waiving it.

This is more of a focus on sub awards on these next two slides, talking about subrecipient and contractor determinations.

[Sorry, I was slow to move the slides forward.] This is the federal payment slide. This is a procurement slide, talking about the different changes here – no reimbursement contracts, focus on small businesses, domestic preferences. This is a focus on sub awards and directing federal agencies to take corrective action if subawards are not being reported, and then making sure that if there's any transfer of funds between related parties that those are done in a formal way through a subaward or a contract, and then also removing fixed amount subawards.

They added a few requirements to pass-through entities. Again, these are mostly focused on subawards, and basically saying that, again, reporting subawards on sam.gov, again making sure that pass-through entities are ensuring that subawards are classified as – or that any payments between related entities are classified as – subawards or contracts, and also ensuring that a subrecipient complies with the terms and conditions of a subaward. And, this is new, and does not significantly damage the reputation of the pass-through entity or the federal agency or the federal government. And if the pass-through entity believes that the reputation of the federal government has been damaged, then it would need to have conversations with the federal agency with respect to whether or not that subaward would need to be terminated. So that is new language, we don't really know what actions could specifically lead to reputational damage, so we're anticipating further guidance on that.

Okay, this is my last slide, which is talking about making sure that information is stored in an electronic form, and that confidential business information, again, you see this here, is given different treatment by the federal agency, that a federal agency can limit access to confidential business information. And with that, I'm going to turn it over to Emily.

[Emily Center-Bregasi, CAPLAW]

Thanks, Allison. Hi everyone. Again, I'm Emily Center-Bregasi. I'm a Staff Attorney here at CAPLAW.

I'll take us through the rest of the changes here to the NPRM, starting with section 339. This is the section that covers the remedies that federal agencies and pass-through entities have when recipients and subrecipients fail to comply with the law or with the terms and conditions of their awards.

In the NPRM, OMB adds language here to this section clarifying that federal agencies may cooperate with third parties that are pursuing private causes of action against recipients and subrecipients for this noncompliance. So, what does that mean? It really means that if people or organizations sue over non-compliance, federal agencies can cooperate in that litigation only if it's consistent with the law and it's in the best interests of the U.S. government. OMB explained that federal agencies can already cooperate in this kind of litigation regardless of this language, so it doesn't necessarily create any rights that didn't already exist, but I think the new language might be signaling to us that the government is more willing to join in these kinds of lawsuits, and so maybe it ups the stakes of non-compliance in that way by increasing those legal risks beyond the typical federal enforcement.

Next slide. OMB is proposing some pretty significant changes here to Section 340 which covers termination and suspension of an award. They're proposing to modify the right to terminate an award at the discretion of the federal agency or pass-through entity, and proposing to add the right to suspend an award at their discretion as well. So, starting on this side here with the changes to 340 on discretionary termination, the language added provides that a federal agency or pass-through entity can terminate a discretionary award if it decides that it's no longer in the interest of the agency. This could include termination where the award no longer effectuates the program goals, agency priorities, or the national interest at the time of termination.

The proposal is calling for four different termination provisions to always be included in the terms and conditions of an award, and I'll quickly run through those. The first is for non-compliance with the terms and conditions of the award, and again, they've noted specifically that includes for SAM.gov failures, so like Allison was mentioning, OMB is doing a lot of clarifying here, emphasizing their desire for more transparency around sub-award funding. The second termination provision that has to be included is that an award can be terminated at the discretion of the agency or pass-through entity. Again, that's kind of the focus of all these changes in this section. The third is by mutual agreement of the parties. Fourth is upon notification by the recipient or subrecipient. If you, for example, want to terminate the award yourself as a recipient.

And then the NPRM offers a fifth ground for termination, which basically is that federal agencies and pass-through entities can add any other termination grounds in their terms and conditions. I know that this provision has caused some anxiety across recipients and subrecipients, so I wanted to just note that the language on discretionary termination is really just clarifying a right that already existed. The government's been able to terminate discretionary grants at their discretion for some time now. So, the government already had the right to do this, and here they're sort of broadening that existing right by adding reference to the national interest here, noting that the priorities are going to be measured at the time of termination. That's likely in response to a lot of the appeals and lawsuits we've seen over the last year, stemming from these termination actions. And then OMB is saying by default these provisions on termination should live in all terms and conditions. And then we see this is once again couched in that restriction of "to the extent permitted by law," which really means that statutory limitations still control here, so there's going to be some exceptions here where discretionary terminations don't apply to programs like CSBG and Weatherization. We can talk about some of those exceptions. I'll talk about them on the next slide here.

Alright, so staying with, again, proposed changes to 340, we think the more significant change we see in this area, is that OMB has added a suspension element. Federal agencies and pass-through entities can, under this proposed rule, temporarily suspend work under a grant up to 90 days if it's in the best interests of the agency. And so, some of you might know that there's already, again, an option to suspend an award within a specific timeframe, and there's a whole process for that suspension in another section of the Uniform Guidance on specific conditions. So, in a way, the government has always had the power to suspend funding if a specific risk was identified, but this sets up a whole new framework and establishes the right to suspend funding for discretionary purposes just where it doesn't align with priorities.

And I again wanted to draw attention to the fact that statutory limitations still control, so there were some revisions that were made to clarify exceptions to this language on termination and suspension programs, where statutes establish an entitlement to the funds. Those awards can't be terminated or suspended by discretion, because they're promised through statute. So that includes things like block grants, formula awards, disaster recovery grants. And what that means is CSBG grants, Weatherization, for example, are not implicated in any of this new language on 340 that I'm talking about. They are not implicated by this new language.

OMB gives a lot of reasoning as to what they're doing in this section. They essentially note that the whole purpose is to ensure the responsible management and safeguarding of taxpayer resources throughout the entire cycle of a grant, and to make sure that projects remain aligned with agency priorities. And they also rely quite a bit on the fact that similar regulations are applicable to federal contracts under FAR or the Federal Acquisition Regulations, which apply to government contractors and procurement contracts. The FAR already allows these things in a way for federal contractors, so OMB seems to be looking to align more so with the FAR with these changes.

And I'll do a really brief recap – I know a lot's going on in section 340. The suspension piece is new. The termination powers have already been there, and they're being expanded and clarified. The ability to suspend awards for discretionary purposes and to terminate, is not applicable to block grants and formula grants, who will not see any change in this area at all.

Next slide. Okay, so these three sections together basically focus on the procedures that follow those terminations we just talked about. Under 341, there's been some clarity added around notifications of termination, so agencies have to include a brief summary of why they've decided to terminate, if they're doing so. Really, just a brief summary – doesn't have to be super detailed based on what we see there. And the updates to this section also give recipients and subrecipients the chance to submit a written statement about their costs related to winding down if awards are terminated based on discretion.

342 clarifies here that federal agencies are only required to allow hearings and appeals related to those terminations for noncompliance. So, what that really means is that administrative procedures aren't required for discretionary terminations or suspensions. And OMB kind of argues essentially here that that's because recipients aren't really the ones that are able to speak to federal agency priorities, so OMB is saying an appeals process doesn't necessarily make sense in that context. But agencies do still have to comply with any administrative proceedings that are otherwise already required by statute or regulation.

And then 343, on the effects of suspension and termination, it's proposed to now give federal agencies the chance to consider how they want to address certain costs that might result from those discretionary terminations. So it doesn't necessarily require agencies to authorize any additional costs, but gives them the chance to consider certain reasonable costs that come out of those discretionary terminations. And essentially this slide is showing you what the government is offering in response to that discretionary suspension and termination that we talked about the last couple slides.

Next slide. Alright, moving into Subpart E, which is the cost principles that govern the allowability of costs under your federal awards. We've got a few minutes left, we're going to plug right through these and hopefully be all set in a few minutes. Starting with 407, this is a section on prior written approvals. Nothing substantive here, it's just kind of aligning with what's going on elsewhere in the changes.

Section 421 on advertising and public relations costs. It's proposed that all PR costs are going to be allowable unless specifically required by statute. And now, instead of having a list of allowable advertising costs, there's basically a blanket prohibition on advertising costs with three exceptions. Each of those three exceptions were already allowable. So really, this is just a reframe of now talking about them as exceptions to the ban on advertising with your federal dollars. The one real change here is that there's no exception for recruitment of personnel, which used to be allowable, so ads for recruitment are now unallowable.

Section 429 covers commencement and convocation costs. They remove any reference to institutes of higher education, and now apply this across the board, that commencement and convocation costs are unallowable. I think Allison mentioned earlier a lot of these proposed changes really seem aimed at higher education and research, but I wanted to call attention to this one, and the chance that it could impact others, if you're trying to recognize achievements or have commencements as a formalized way of recognizing trainings or certifications, maybe for your staff.

Next is conferences. The NPRM proposes to add that the costs of attending conferences are only allowable if that participation is expressly approved by the federal agency and is included in the terms and conditions of an award. So, knowing that many of you attend conferences throughout the year, this one could have implications and would require that you obtain agency approval before incurring any kind of conference costs under your award.

Section 442 on fundraising and investment management costs. There's been changes just to the investment management part of this section. Organized fundraising costs, you might be aware, have already required prior written approval for some time. Now, it's proposed that prior written approvals are also required for the costs of investment counsel and for costs related to the physical control of money. Seemingly really aimed at endowments and things like that.

Next slide on lobbying, 450. The changes here expand on unallowable lobbying activities to include three new things. They're now proposing to prohibit the use of federal funds for voter registration campaigns and drives. Those of you that are CSBG and Head Start recipients know probably that you already couldn't do these things with those specific funds. Issue advocacy, or public messaging, and promoting or opposing a certain policy position – again, issue advocacy has kind of always been a little bit tricky, as well. There's a lot of factors that the IRS has laid out to determine whether issue advocacy is permissible nonpartisan activity, or if it crosses over into partisan activity, which is unallowable. For example, if a more general advocacy on an issue gets too close to a campaign, or it's too associated with a candidate, then that becomes unallowable regardless of this language, but now they're making it clear that you can't engage in partisan or nonpartisan political activities at all with your grant funds by calling out issue advocacy in this way. So not entirely new for CAAs or Head Start recipients to be limited in these areas, but it does mean that you really need to have unrestricted funds to engage in any kind of nonpartisan activities.

And then finally they're proposing that it would be unallowable to influence state executive branches on matters that are unrelated to the performance of the award. So again, overall, a lot of these restrictions existed in some capacity, at least the first two for CSBG and Head Start, and then at the end they're bringing in state executive branches as well.

In section 454 there's some proposals to add a few restrictions here, including prior written approval for costs of membership in certain organizations, the costs of membership in organizations whose primary purpose is lobbying and issue advocacy. Here, the change is adding issue advocacy. Membership in lobbying organizations is already an unallowable cost. Now, membership in issue advocacy organizations is also unallowable with your federal award, and the costs of subscriptions are unallowable as well.

And the proposed changes – moving right along, we're almost there – in section 461 on publication and printing costs, proposing that publication costs, things like page changes, open access fees, they're unallowable unless they're expressly required. Printing costs, like distribution and general handling, are allowable, so it seems like things like annual reports and their printing costs would still be allowable.

Finally, section 477 is new, so a proposed addition of 477 which says that the costs associated with elective abortions are now unallowable under federal awards, unless they're expressly authorized by federal law. This is really just codifying the Hyde Amendment, which already stated the same and already applied to federal funding.

All right, I know we're at time. We've at least gotten through that portion of the presentation. I'm going to say just a couple words on some audit requirements, and note that there's a few changes to the appendices if you want to stick around for a few more minutes, but we have gotten through the bulk of things by 2:15.

I'll quickly go through. There are some changes here to the audit requirements. Many of them mirror what Allison was already talking about and mentioned that I might speak to. They're proposing some changes around GAO, and when they can impose additional audits. They remove the word "annual" from before the phrase "compliance supplement," so they're basically explaining that they're reevaluating the proper frequency for that compliance supplement – for any compliance supplements.

And then they're discussing the standards and scope of audits, which again Allison has touched on, so I'll kind of breeze right by these. The only relevant changes we thought to the appendices, were in Appendix I, which has some limited changes, which essentially align with the NPRM's proposed changes on program application and design that Allison again has spoken about already. So, I'll keep going.

Calling your attention to the fact that there were no changes made to indirect costs. The preamble did seem to leave open the possibility for future changes here to negotiated indirect cost rates, but hasn't made any of those changes yet.

There's some agency notes. HHS is really pushing the same thing that was pushed elsewhere in the proposal, which is compliance with RFRA, making sure you're not discriminating on the base of religion.

And then finally – just one minute over – we wanted to give a shout out to some other resources that have done a really great job speaking to the NPRM: Ropes & Gray law firm wrote a really great article, which includes a redline and a nice chart that summarizes some of what's going on. And here are a few other webinars as well, who have recordings available. Which brings me to wrap our session up here. This webinar was recorded and will be available to all of you, as well as the slides. And with that, I don't know if Allison has any final remarks, but thanks so much for joining us.

[Allison]

Yeah, thank you so much for joining us. I just want to real quickly [touch on a few questions] – I did do a quick skim of the questions, and of course, we can't really answer all of them. There were some good ones in there. I think some of them are comment materials, so [if] you're so inclined, the federal government wants to hear from you and wants to hear your comments. So think about that with respect to what's been generated here today in your mind after watching this presentation.

So someone asked about the application of these changes to the Community Services Block Grant, to LIHEAP, to block grants. And Emily touched on this when she talked about the termination provisions, but that applicability provision that I talked about very early on is very clear, that only certain parts of the Uniform Guidance apply to Community Services Block Grant, and very, very few provisions apply to LIHEAP. And so a lot of what was discussed here doesn't actually apply to CSBG or LIHEAP or other block grants or entitlement grants, and that's because the federal statute has requirements in it. And then because [of the nature of the grant], it's a block grant . . . or its [an] entitlement grant, the state has a certain level of authority to facilitate the funding, and as long as the federal act is silent, then the state can step in and put in rules and requirements to help facilitate that federal funding. So that's how that relationship works.

And so the notice of proposed rule does recognize the statutory structure that governs those types of funding that a lot of Community Action Agencies receive. Now, Head Start is a direct funded discretionary grant. It is not an entitlement grant, so everything we discussed today could potentially apply to Head Start. Head Start does have a very fleshed out funding source statute, and a funding source statute will always control over a regulation issued either by the federal agency or the Office of Management and Budget. So that's where there'll need to be some reconciliation with respect to what's in the act, and then what's in these regulations.

Somebody asked about community needs assessment. Again, that's something that's required by these statutes, and so for CSBG and LIHEAP, it's really for the state to decide how those would be conducted. But the state is, for CSBG, giving an assurance that they will review a Community Action Agency's needs assessment, and that there's language about needs assessment in the Head Start Act. So, as long as that language is there, that language will control with respect to how those are conducted and what information is gathered with respect to those.

It is our understanding that subrecipients would have to use e-verify. Usually requirements that apply to recipients flow down to subrecipients. I'm sure we'll get further clarity on that once that hits. And someone made a good point about fixed-amount awards being removed, as well as cost reimbursement contracts, so it's sort of two things that would seem to be on different ends of the spectrum. So then, what does that leave us with? And I think that's a good comment to ask about that, and to seek further guidance on what that means for how the federal government sees awards.

Alright, with that, I'm going to call it a day. How about that? Someone said they're exhausted, and we totally agree. This can be an exhausting process, and, if, and when, this is finalized, we will do another webinar, and probably spend much more time on the final rules that you would need to be aware of and comply with.

So, with that, I'm going to say thank you for joining us. We really appreciate it. We know it was a lot. Hopefully, we didn't stumble over too many words, and you were able to get some takeaways, and stay tuned for further information from CAPLAW, as we move through the Uniform Guidance and all other changes to the rules that apply to the federal grants you receive. So, thanks everybody. Bye.

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