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¶ 254 FEATURE COMMENT: Key Takeaways From OMB's 2024 Revisions To The Uniform Guidance For Federal Financial Assistance

As of Oct. 1, 2024, all new grants, cooperative agreements and other federal assistance agreements will be subject to revisions to the Uniform Guidance issued by the Office of Management and Budget on April 22, 2024. OMB Guidance for Federal Financial Assistance, 89 Fed. Reg. 30,046 (Apr. 22, 2024). The updates were issued following multiple rounds of public comments in response to a notice of request for information and a proposed rule. OMB officials described the final guidance as a completely overhauled version. But the updated guidance does not provide sweeping changes in how grants and other federal assistance agreements are awarded or administered. Rather, for the most part it offers incremental, but welcome and helpful, improvements in specific areas. There are also certain changes that may present additional risk for some recipients and subrecipients.

OMB said its objectives with the updates to the guidance were "(1) incorporating statutory requirements and administration priorities; (2) reducing agency and recipient burden; (3) clarifying sections that recipients or agencies have interpreted in different ways; and (4) rewriting applicable sections in plain language, improving flow, and addressing inconsistent use of terms within the guidance." 89 Fed. Reg. at 30,046. Along with the updated guidance, OMB provided implementation guidance, OMB Memo M-24-11, which stressed the measures to reduce the burden on agencies and recipients in the final guidance. OMB Memorandum M-24-11, Reducing Burden in the Administration of Federal Financial Assistance, Apr. 4, 2024.

The updated guidance makes various revisions intended to reduce administrative burden, including rolling out a new Notice of Funding Opportunity (NOFO) template and associated guidance; adjusting dollar thresholds that trigger compliance obligations; increasing the de minimis rate; providing other relief from cost requirements; and authorizing agencies to exempt foreign organizations and foreign entities from registering in the System for Award Management (SAM) in certain circumstances.

One change OMB made ostensibly "to better follow plain language principles" may create new obligations and risks for for-profit recipients: most references to the use of the term "non-Federal entity" have been changed to refer instead to "recipient," "subrecipient," or both. "Non-Federal entity" does not include for-profit companies,

whereas "recipient" and "subrecipient" do. As a result, many more sections of the Uniform Guidance will apply by default to for-profit companies.

The updated guidance makes notable revisions to the intangible property provisions, which address intellectual property, expanding the definition of "intangible property" and adding language about providing greater public access to research data. The amended guidance also makes targeted changes to the procurement standards, in particular authorizing Indian Tribes to use their own procurement policies and procedures instead of those prescribed in the guidance, and removing restrictions on the use of geographic preferences in federally funded procurements.

Finally, the final guidance makes an array of other changes worthy of mention, including expressly requiring agencies to have written procedures for disputes; aligning the mandatory disclosure rule for grants and agreements with the Federal Acquisition Regulation rule for Government contracts; and introducing new whistleblower protections and cybersecurity control requirements.

NOFO Template—The Uniform Guidance addresses NOFOs in 2 CFR § 200.204 and includes an Appendix I that provides a template with requirements for what awarding agencies must include in funding opportunity announcements (grant or assistance solicitations). OMB made a number of changes to § 200.204 in the April 2024 update, such as prescribing the use of an Executive Summary and limiting the length of program announcements. The NOFO template and guidance in Appendix I are one section of the Uniform Guidance that really did get a rewrite in the April 2024 update. The Council on Federal Financial Assistance (COFFA) developed the revised template. The changes to the template are intended to:

> (1) follow plain language principles; (2) group similar items together to streamline content; (3) align sections more closely to the application process; (4) include basic information at the top of a funding opportunity so that applicants can more easily make decisions about whether or not to apply; (5) clearly define what must be included in a section of the funding opportunity versus what is at an agency's discretion; and (6) provide flexibility to agencies while also giving applicants a common way to find information in every funding opportunity.

89 Fed. Reg. at 30,104.

OMB's implementing guidance, OMB Memo M-24-11, reinforces the importance of streamlining NOFOs. Noting that "[i]n recent years, the annual paperwork burden imposed by Federal agencies on the public has been in excess of nine billion hours," OMB observes that this has presented "obstacles for too many otherwise qualified potential recipients of Federal financial assistance and undermines Federal programs." The Memo required federal agencies to submit NOFO simplification plans addressing how they would "increase the accessibility, readability, clarity, and design of their NOFOs for new discretionary assistance programs where Federal awards are selected on a competitive basis." The Memo elaborates on the guidance for streamlining NOFOs, with instructions to agencies reminiscent of William Strunk and E.B. White's classic Elements of Style:

> As a general guideline for existing NOFOs, agencies should aim to reduce word count by 25 percent over the previously issued version. Agencies should also eliminate unnecessary provisions, and move content that is not directly related to the core activities to be performed under the Federal award (such as any assurances) to appendices on linked webpages.

In addition to simplifying NOFOs, OMB encourages agencies to "consider how translating NOFOs into other languages may ensure people with limited English proficiency can access the information."

In addition to calling for simplification and streamlining, Appendix I includes a new paragraph stating that in NOFOs "[f]or infrastructure projects subject to Build America, Buy America requirements," the program description section may include "information on key items anticipated to be purchased under the program, and any related domestic sourcing concerns based on market research." Appendix I to Part 200, (b)(3)(ii)(C). This change may bring greater attention and scrutiny to Buy America sourcing issues earlier in the assistance lifecycle. One would hope it may also facilitate waivers when appropriate to help avoid project delays if domestic sources for certain items are unable to meet project requirements.

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Single Audit Act Threshold—The 2024 update to the Uniform Guidance increases the dollar threshold that triggers a statutory "single audit" for state, local government and non-profit organization federal grants or other federal assistance recipients, from $750,000 to $1,000,000 in total expenditures of federal funds for a single fiscal year. 2 CFR § 200.501 (Audit Requirements). In response to some comments opposing the increase, OMB noted that the "increased threshold represents the smallest percentage increase to the threshold to date" and "aligns closely with the Consumer Price Index since the last increase in 2014." 89 Fed. Reg. at 30,101. The updated guidance also authorized extension requests for Single Audit Reports, which are normally due nine months after the end of the period audited. 2 CFR § 200.512 (Report Submissions). The guidance was revised to conform to the Single Audit Act statute, which allows the cognizant agency for audit to authorize an extension when the nine-month timeframe would place an undue burden on the recipient.

Equipment and Supplies Thresholds—The updated guidance increases the thresholds for determining items that are considered to be "equipment" or "supplies" from $5,000 to $10,000. 2 CFR § 200.1 (definitions of "Equipment" and "Supply"); 2 CFR § 200.313 (Equipment); 2 CFR § 200.314 (Supplies). To qualify as "Equipment," tangible personal property must also have a useful life of more than one year, a timeframe unchanged in the 2024 guidance. The equipment threshold is significant because property purchased under an award that is considered equipment is subject to rules regarding use, management requirements, including inventory and control systems, as well as requirements for disposition when equipment is no longer needed, among other requirements. 2 CFR § 200.313. The supply threshold triggers obligations for disposition at the end of the period of performance: "When there is a residual inventory of unused supplies exceeding $10,000 in aggregate value at the end of the period of performance, and the supplies are not needed for any other Federal award, the recipient or subrecipient may retain or sell the unused supplies," and the "Federal agency or pass-through entity is entitled to compensation" for the value of its contribution towards the original purchase cost. 2 CFR § 200.314(a).

"De Minimis Rate" Adjustments—The updated guidance increases the de minimis rate from 10 percent to 15 percent of modified direct total costs. 2 CFR § 200.414 (Indirect costs), paragraph (f) (De minimis rate). The "de minimis" rate is a default indirect cost rate that the Uniform Guidance allows qualifying recipients to use instead of negotiating an indirect cost rate with the Government. The advantage of the de minimis rate is that no documentation is required to justify the rate. OMB explained that this increase "would allow for a more reasonable and realistic recovery of indirect costs, particularly for new or inexperienced organizations that may not have the capacity to undergo a formal rate negotiation, but still deserve to be fully compensated for their overhead costs." 89 Fed. Reg. at 30,093. The updated guidance also increases the threshold for including subawards as part of the "Modified Total Direct Cost" base. OMB is increasing that threshold to permit the first $50,000 of each subaward to be included in modified total direct costs, up from $25,000, allowing for greater recovery of indirect costs associated with subawards. 2 CFR § 200.1 (definition of "Modified Total Direct Cost" (MTDC).

Other Relief from Cost Requirements—*Prior Written Approval Requirements Reduced*: The Uniform Guidance no longer requires recipients to obtain prior written approval for nine categories of costs. These include real property, equipment, direct costs, entertainment costs, memberships, participant support costs, selling and marketing costs, and taxes. 89 Fed. Reg. at 30,091–92; 2 CFR § 200.407. OMB had also proposed to remove prior approvals for exchange rates as well, but opted to retain the requirement for that cost category in the final guidance. 89 Fed. Reg. at 30,092. OMB stressed that "recipients and subrecipients must still follow applicable cost principles under subpart E even in cases in which prior approval is not required." OMB also amends the definition of "prior approval" to specifically mention such approval is "obtained in advance." 2 CFR § 200.1 (definition of "Prior approval"). The preamble to the 2024 update explains:

> OMB added the words "obtained in advance" to the definition to clarify that, generally, obtaining approval

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> in advance is a definitional element of prior approval, which is required where stated in the guidance. However, this change is not intended to prohibit Federal agencies from using appropriate procedures to retroactively provide prior approval, if necessary, under a Federal award in specific cases. OMB does not directly address this topic in the definition of the term, but Federal agencies may exercise reasonable discretion in providing "after the fact" prior approval when warranted on a case-by-case basis under Federal awards and otherwise consistent with law.

89 Fed. Reg. at 30,061.

Requirement to Accept Federally Negotiated Indirect Cost Rates: The 2024 update to the Uniform Guidance adds language expressly requiring that awarding agencies accept recipients' active federally negotiated indirect cost rates, and that pass-through entities accept subrecipients' active federal negotiated indirect rates. 2 CFR § 200.414(c)(1). The updated guidance also provides that recipients or subrecipients may notify OMB about disputes with awarding agencies over the application or acceptance of federally negotiated indirect cost rates, though OMB declined to make itself the formal arbiter of such disputes. 89 Fed. Reg. at 30,092–93; 2 CFR § 200.414(c)(2).

Use of Fixed Amount Subawards: Fixed amount subawards bear similarities to fixed price Government contracts—they are awards for a specific amount that do not require monitoring or review of actual costs. OMB is increasing the value of fixed amount subawards recipients are permitted to issue. The Uniform Guidance had limited the value of fixed amount subawards to the simplified acquisition threshold, $250,000. The proposed guidance would have removed this ceiling altogether. In the final guidance, OMB decided to double the ceiling to $500,000 instead of eliminating it. OMB also opted to continue to require prior approval for fixed amount subawards, resisting comments suggesting that the requirement be removed. 89 Fed. Reg. at 30,088; 2 CFR § 200.333 (Fixed Amount Subawards).

Foreign Entity SAM Registration—In response to comments that SAM.gov registration and unique entity identification (UEI) are major barriers for foreign organizations and foreign public entities, the 2024 updated guidance allows federal agencies to exempt foreign organizations or foreign public entities from completing full registration in SAM.gov for Federal awards less than $500,000 that will be performed outside the U.S. 89 Fed. Reg. at 30,050–52; 2 CFR § 25.110 (Exceptions to This Part), subparagraph (a)(2)(iii). Entities so exempted must still obtain a UEI. 2 CFR § 25.110(a)(2)(iii). The updated guidance could not authorize agencies to provide similar flexibility for obtaining a UEI, because the $25,000 threshold for UEIs is a statutory threshold established in the Federal Funding Accountability and Transparency Act. More broadly, the final guidance here actually does not go as far as proposed (which would have allowed additional exceptions and flexibilities), because OMB could not find authority to allow further relief for foreign organizations and foreign public entities. 89 Fed. Reg. at 30,051.

New Risks and Obligations for For-Profit Recipients and Subrecipients Due to Terminology Change—OMB is making a change in terminology that may create new risks and obligations for for-profit recipients and subrecipients. The Uniform Guidance originally included numerous references to the term "non-Federal entity," defined as "a State, local government, Indian Tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient." 2 CFR § 200.1 (definition of "Non-Federal entity (NFE)"). For-profit companies are conspicuously absent from that definition and were not automatically subject to requirements targeted at non-Federal entities. In the 2024 update to the Uniform Guidance, supposedly on grounds of plain language principles, OMB replaces most references to "non-Federal entity" throughout the guidance with "recipient," "subrecipient," or both—terms that *do* include for-profit companies.

> In support of [its objective to] rewrit[e] applicable sections in plain language, improv[e] flow, and address[] inconsistent use of terms—OMB revised the guidance to better follow plain language principles. OMB focused on using simple words and phrases, avoiding jargon, using terms consistently, and being concise.
>
> As a result, throughout subparts A through E of part 200, OMB now uses the terms "recipient," "subrecipi-

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> ent," or both in place of "non-Federal entity." OMB found that using the term "non-Federal entity" in subparts A through E of the prior version of part 200 presented challenges to readers and made it difficult to quickly understand which entity was being addressed, especially in situations in which Federal agencies apply part 200 to Federal agencies, for-profit organizations, foreign public entities, or foreign organizations under 2 CFR 200.101. In the revisions to part 200, OMB now uses the term "non-Federal entity," as defined in section 200.1, only when that entity is specifically intended, such as in subpart F implementing the Single Audit Act. In many cases in part 200, OMB replaced "non-Federal entity" with either "recipient and subrecipient" or "recipient or subrecipient." In cases where the guidance in part 200 relates specifically to only either "recipients" or "subrecipients," but not both, OMB refers specifically to the applicable entity.
>
> Revisions in the final guidance relating to use of the terms "non-Federal entity," "recipient," and "subrecipient" do not change the existing scope or applicability of the guidance. The applicability provision for part 200, at section 200.101, continues to provide Federal agencies discretion on whether to apply subparts A through E of part 200 to Federal agencies, for-profit entities, foreign public entities, or foreign organizations. In the same section, the final guidance encourages Federal agencies to apply the requirements in subparts A to E of part 200 to all recipients in a consistent and equitable manner, but does not require them to do so. In cases in which Federal agencies apply part 200 to such entities, OMB's final guidance now further clarifies how the guidance applies to those entities as either recipients or subrecipients.

89 Fed. Reg. at 30,047. OMB notes that it did not change references to "non-Federal entity" in connection with Single Audit Act requirements, because by statute such requirements apply only to non-Federal entities and not to other recipients or subrecipients. See 31 USCA § 7501(a)(13) ("'non-Federal entity' means a State, local government, or nonprofit organization").

Notwithstanding OMB's assurances that the change in terminology does not have substantive effect, the result of the sweeping change in terms is that many requirements of the Uniform Guidance now apply by default to for-profit recipients and subrecipients, unless federal agencies opt to *exempt* them, whereas the requirements previously did not include for-profit recipients unless the awarding agency opted to *include* them. Thus, although not reflected as changes, many requirements throughout the Uniform Guidance now apply to for-profit entities unless awarding agencies change their grant and agreement regulations to exclude for-profit companies from such requirements (or unless for-profit entities are exempt already under the applicable agency regulation).

Examples of notable sections that previously applied by default only to non-Federal entities and now apply to for-profit recipients and subrecipients include access to records, property management, and intangible property. Under the access to records provisions, a "Federal agency or pass-through entity, Inspectors General, the Comptroller General of the United States, or any of their authorized representatives must have the right of access to any records of the *recipient or subrecipient* pertinent to the Federal award to perform audits, execute site visits, or for any other official use." 2 CFR § 200.337 (Access to records) (emphasis added). Equipment purchased by for-profit entities under federal awards is now subject to the same use, property management, and disposition rules that apply to equipment purchased by non-Federal entities, unless the awarding agency affirmatively provides for an exemption. 2 CFR § 200.313 (Equipment). And unless modified under an agency's grant regulations, the Uniform Guidance rights allocation scheme in intangible property now applies to for-profit entities. 2 CFR § 200.315 (Intangible property).

Again, individual agencies have in some cases already been applying these and other requirements to for-profit entities that receive federal awards and subawards under their grant regulations. Whether or to what extent there are new requirements for for-profit recipients and subrecipients will depend on the awarding agency. For instance, the terminology change does not affect awards of the Department of Energy because DOE specifically had already defined "non-Federal entity" for purposes of its grant and assistance regulations to include for-profit entities. 2 CFR § 910.120(b).

Intangible Property (Intellectual Property)—In the 2024 update, OMB revises the intangible property

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provisions of the Uniform Guidance, governing intellectual property, by expanding the definition of "intangible property," and by adding language supporting broader public access to research data under federal awards.

The intangible property definition is amended to demonstrate breadth of coverage of intellectual property, including trade secrets, data, software, and software licenses (italicized language was added in the update):

> Intangible property means property having no physical existence, such as trademarks, copyrights, *data (including data licenses), websites, IP licenses, trade secrets,* patents, patent applications, and property such as loans, notes and other debt instruments, lease agreements, stocks and other instruments of property ownership *of either tangible or intangible property, such as intellectual property, software, or software subscriptions or licenses*.

2 CFR § 200.1, definition of "Intangible property" (emphasis added).

OMB adds language in the intangible property section of the Uniform Guidance to expressly provide that the federal agency's rights in works developed, or for which ownership was acquired, under a federal award, include "the right to require recipients and subrecipients to make such works available through agency-designated public access repositories." 2 CFR § 200.315(b). In discussing its decision not to add a new definition for "voluntarily created works" in the final guidance, OMB notes in the preamble that: "The term 'work' in paragraph (b) is a term of art in copyright. This term ... speaks only to copyright and not all intangible property. Paragraph (b) also refers to works 'developed' or 'acquired' under a Federal award." OMB says the added reference to public access repositories "reinforce[s] the potential requirement for recipients and subrecipients to make intangible property publicly available on agency-designated websites." 89 Fed. Reg. at 30,083. The updated guidance also adds a new paragraph (f) regarding public access to federally funded research results and data:

> 2 C.F.R. § 200.315 Intangible property.
>
> . . .
>
> (f) Federal agencies should work with recipients to maximize public access to Federally funded research results and data in a manner that protects data providers' confidentiality, privacy, and security. Agencies should provide guidance to recipients to make restricted-access data available through a variety of mechanisms. FOIA may not be the most appropriate mechanism for providing access to intangible property, including Federally funded research results and data.

Regarding paragraph (f), OMB explains in the preamble to the 2024 update:

> OMB added a new paragraph (f) in the final guidance in response to comments noting that access to Federally funded data is a priority for a variety of reasons. The new paragraph reminds agencies of their responsibilities to provide public access to research data, possibly through exerting their Federal purpose licenses when needed, with appropriate privacy and confidentiality protections. The new language also reminds agencies to rely on FOIA to provide access only as a last resort. Specifically, the new paragraph (f) states that Federal agencies should work with recipients to maximize public access to Federally funded research results and data in a manner that protects data providers' confidentiality, privacy, and security. The new paragraph also states that agencies should provide guidance to recipients to make restricted-access data available through a variety of mechanisms. Finally, the new paragraph states that FOIA may not be the most appropriate mechanism for providing access to intangible property, including federally funded research results and data.

89 Fed. Reg. at 30,083–84. Recipients and subrecipients should be aware of this provision and the potential for public release of intangible property under federal awards. Recipients and subrecipients will need to be vigilant to safeguard their proprietary information.

Procurement—*Tribal Procurements*: In recognition of tribal sovereignty, the updated guidance provides for Indian Tribes to use their own procurement policies and procedures in contracting under grant and assistance awards. 2 CFR § 200.317. See also 89 Fed. Reg. at 30,084; OMB Memorandum M-24-11, at 3–4. This mirrors the rule for state government recipient procurements.

Geographic Preferences: The Uniform Guidance previously prohibited recipient procurements from us-

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ing "statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference." 2 CFR § 200.319(c) (version effective Nov. 12, 2020 to Sept. 30, 2024). The 2024 update to the guidance removes this restriction, allowing geographic preferences in procurements under federal assistance agreements, provided they are "consistent with the U.S. Constitution, applicable Federal statutes and regulations, and the terms and conditions of the Federal award." 89 Fed. Reg. at 30,085; 2 CFR § 200.319(f).

Other Notable Changes—*Disputes*: The 2024 updated guidance clarifies requirements for agencies to have written procedures for processing objections, hearing, and appeals. The guidance also now expressly states that agency remedies for noncompliance that recipients must be able to object to and formally challenge include disallowed costs, corrective action plans, and terminations.

> 2 C.F.R. § 200.342 Opportunities to object, hearings, and appeals.
>
> The Federal agency must maintain written procedures for processing objections, hearings, and appeals. Upon initiating a remedy for noncompliance (for example, disallowed costs, a corrective action plan, or termination), the Federal agency must provide the recipient with an opportunity to object and provide information challenging the action. The Federal agency or pass-through entity must comply with any requirements for hearings, appeals, or other administrative proceedings to which the recipient or subrecipient is entitled under any statute or regulation applicable to the action involved.

OMB suggests that the changes in this section were in the nature of plain language revisions and were not intended "to change the policy in this section in a substantive way." Relative to the proposed and prior versions of the guidance, 2 CFR § 200.342 "continues to require Federal agencies to provide administrative appeal rights for recipients upon initiating a remedy for noncompliance, and to maintain written procedures for processing objections, hearings, and appeals." 89 Fed. Reg. at 30,090.

Mandatory Disclosure Rule: The updated guidance revises the mandatory disclosure requirements for federal assistance agreements to align with the FAR rule for Government contracts, by (1) adopting the "credible evidence" standard, and (2) requiring written disclosure to the agency Office of Inspector General (in addition to the agency and pass-through entity, as already required).

> 2 C.F.R. § 200.113 Mandatory Disclosures.
>
> An applicant, recipient, or subrecipient of a Federal award must promptly disclose whenever, in connection with the Federal award (including any activities or subawards thereunder), it has credible evidence of the commission of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act (31 U.S.C. 3729–3733). The disclosure must be made in writing to the Federal agency, the agency's Office of Inspector General, and pass-through entity (if applicable). Recipients and subrecipients are also required to report matters related to recipient integrity and performance in accordance with Appendix XII of this part. Failure to make required disclosures can result in any of the remedies described in § 200.339. (See also 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313.)

See also 89 Fed. Reg. at 30,067.

New Whistleblower Protections: The 2024 update adds a new section describing protections for whistleblowers. In addition to prohibiting recipient and subrecipient reprisals for reporting of waste, fraud, or abuse, the guidance also now requires recipients and subrecipients to inform employees in writing of whistleblower rights and protections, an additional requirement added in the final guidance (not originally included in the proposed guidance).

> 2 C.F.R. § 200.217 Whistleblower protections.
>
> An employee of a recipient or subrecipient must not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (a)(2) of 41 U.S.C. 4712 information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or

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> negotiation of a contract) or grant. The recipient and subrecipient must inform their employees in writing of employee whistleblower rights and protections under 41 U.S.C. 4712. See statutory requirements for whistleblower protections at 10 U.S.C. 4701, 41 U.S.C. 4712, 41 U.S.C. 4304, and 10 U.S.C. 4310.

See also 89 Fed. Reg. at 30,074.

New Cybersecurity Requirement: The 2024 update introduces a new requirement for recipients and subrecipients to implement "reasonable cybersecurity" internal controls and to take other measures to safeguard sensitive information:

> 2 C.F.R. § 200.303 Internal controls.
>
> The recipient and subrecipient must ...
>
> (e) Take reasonable cybersecurity and other measures to safeguard information including protected personally identifiable information (PII) and other types of information. This also includes information the Federal agency or pass-through entity designates as sensitive or other information the recipient or subrecipient considers sensitive and is consistent with applicable Federal, State, local, and tribal laws regarding privacy and responsibility over confidentiality.

See also 89 Fed. Reg. at 30,076–77. The updated guidance stops short of imposing detailed requirements or a specific framework.

Effectiveness Date—The updated final guidance is effective for federal awards issued on or after Oct. 1, 2024, but agencies were given the option to adopt it early, but no earlier than 60 days from the date the final guidance was published, June 21, 2024. 89 Fed. Reg. at 30,046. Agencies were required by Memo M-24-11 to submit implementation plans for the new guidance by May 15, 2024, addressing timing and other details for their rollouts of the final guidance. The plans were not publicly released, however.

Timetable for Future Revisions—The timetable for Uniform Guidance revisions itself was revised in the 2024 update. 2 CFR § 200.109 previously stated (before Oct. 1, 2024): "OMB will review this part *at least every five years* after December 26, 2013." It now reads "OMB will review this part *periodically*." (Emphasis added).

COFFA Implementation Guidance—The Council on Federal Financial Assistance published supplementary information to assist agencies in consistently implementing the 2024 revised guidance, available at *www.cfo.gov/assets/files/FY-2024-Revisions-to-2-CFR-Supplementary-Information-for-Federal-Agency-Implementation.pdf*:

- *NOFOs and Applications.* Notices of Funding Opportunity to be awarded after Oct. 1, 2024, are supposed to reflect that the revised guidance will apply. Federal agencies may ask prospective recipients that submitted applications before October 1 that will be awarded after that date to "submit a revised budget to reflect the higher *de minimis* indirect cost rate and other changes."

- *Existing Awards.* The revised guidance does not automatically apply to existing awards issued before Oct. 1, 2024. COFFA encourages agencies to amend existing awards to apply the 2024 revisions, particularly when providing additional funds or when otherwise amending awards that will extend into FY 2025 or beyond. Any application of the 2024 revisions "will generally apply prospectively to activities on or after the date of the amendment" and may never apply retroactively "to past activities that preceded the effective date of the amendment if doing so would impose additional substantive requirements on recipients (such as requirements increasing burden)." Agency amendments to existing awards also "must generally be executed by agreement with the recipient" unless otherwise provided by law—so recipients are not *required* to accept the application of the updated guidance to existing awards.

- *Partial Application of Revisions.* Agencies and recipients have the option to "apply one or more, but not all, provisions of the 2024 Revisions to an existing award," by "using [the agency's] case-by-case exception authority under 2 CFR 200.102(c) as an alternative to formally amending the award." COFFA notes that with a properly documented case-by-case exception, an agency could allow a recipient to use the new de minimis indirect cost rate for an existing award,

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including the new definition of modified total direct cost, without applying the 2024 revisions in their entirety.

- *Subawards.* If an agency amends an existing award predating Oct. 1, 2024, to apply the 2024 revisions, the pass-through entity must in turn amend existing subawards to apply the 2024 revisions to them as well. On the other hand, if an existing award is not amended to apply the revisions, "the pass-through entity must not apply the 2024 Revisions to a subaward issued under that Federal award—even if the subaward itself is executed on or after October 1, 2024."

- *Transition Issues.* Recipients may be in the position of simultaneously implementing some awards subject to the previous guidance and some awards subject to the 2024 revisions. COFFA notes that recipients may need to "implement certain systematic changes across their organization to implement new awards incorporating the 2024 Revisions," but cautions recipients that "not all flexibilities provided by the 2024 Revisions will be available through existing Federal awards issued prior to the effective date of the 2024 Revisions." COFFA encourages agencies to communicate requirements that apply to individual awards, and engage with recipients on whether recipient system changes, such as internal controls or mandatory disclosure procedures, could affect compliance under existing awards.

- *Indirect Costs.* Negotiated Indirect Cost Rate Agreements (NICRAs) negotiated before Oct. 1, 2024, remain valid and must be honored by federal agencies and recipients; however, "OMB encourages cognizant agencies for indirect costs to accommodate requests to renegotiate existing NICRAs that are in effect beyond October 1, 2025" and issue revised agreements to reflect the new MTDC base.

- *De Minimis Rates.* Agencies must generally honor the new 15 percent de minimis indirect cost rate used in any award executed on or after Oct. 1, 2024, even if applications are submitted before that date. If there are sufficient funds, an agency may allow a recipient to apply the 15 percent de minimis rate to an existing award; however the rate can only be charged for costs incurred after the effective date of the amendment.

- *Single Audits.* The $1,000,000 Single Audit threshold applies to non-Federal entity fiscal years beginning on or after Oct. 1, 2024.

OMB Reference Guide—OMB issued a guide, Key Features of 2024 Uniform Grants Guidance, available at *www.cfo.gov/assets/files/Uniform%20Guidance%20_Reference%20Guides%20FINAL%204-2024.pdf*. The guide highlights and describes provisions of the revised guidance that allow recipients to spend portions of award funding on evaluation activities, data gathering and analysis activities, public participation and community engagement activities. OMB also summarizes changes to NOFOs intended to increase accessibility, certain changes to address labor standards, and revisions intended to reduce the burden for recipients.

Agency Adoption of Updated Guidance—Federal agencies are required to fully implement the revised guidance in their assistance regulations unless different provisions are required by statute or approved by OMB. 2 CFR § 200.106. A number of federal agencies have issued final rules formally amending their grant and agreement regulations to align with the 2024 Uniform Guidance update. Such agencies include the U.S. Agency for International Development (89 Fed. Reg. 63,037 (Aug. 2, 2024)), Department of Agriculture (89 Fed. Reg. 68,321 (Aug. 26, 2024)) and NASA (89 Fed. Reg. 75,947 (Sept. 17, 2024)). The Department of Education has also issued a Frequently Asked Questions document addressing the 2024 update. *www.ed.gov/media/document/faqs-uniform-guidance* (July 2024).

Conclusion—Taken together, the preamble to the revised guidance and the implementation guides from OMB and COFFA provide useful, detailed resources for agencies, recipients and subrecipients to understand

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and carry out the 2024 revisions. Recipients and subrecipients should monitor new agency rules adopting the guidance, and agency implementing documentation, including informal resources such as frequently asked questions, to understand how the 2024 revisions will apply to each of their awards. It is not possible to anticipate every circumstance and every consequence of the revisions, however. Recipients and subrecipients will need to consider potential effects of the changes at each stage of the grant lifecycle, particularly in the near-term transition period as all parties and stakeholders adjust to the new rules.

This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Dan Ramish (Daniel.Ramish@haynesboone.com) and Jonathan Shaffer (Jonathan.Shaffer@haynesboone.com). Mr. Ramish is counsel and Mr. Shaffer is a partner in Haynes Boone's Federal Assistance and Government Contracts practice groups. They are co-authors of Federal Grant Practice (Thomson Reuters 2024 ed.), available in print and ProView ebook and on Westlaw. This Feature Comment is adapted from a section of the 2024 update to the treatise. For further information about the treatise, please visit https://legal.thomsonreuters.com.

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