

Alert | Government Contracts



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Office of Management and Budget Releases Significant Changes to the Uniform Guidance

Go-To Guide:

- The Office of Management and Budget’s (OMB) revision of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), which applies to federal financial assistance (including grants and cooperative agreements), is the most significant revision to the Uniform Guidance since it became effective in December 2013.
- The revisions are intended to reduce administrative burdens for agencies and recipients and make the guidance more accessible and easier to understand.
- Changes highlighted by OMB in furtherance of these goals include replacing non-Federal entity with “recipient,” “subrecipient,” or both where appropriate to make it easier to understand what entities are being referred to in each section, streamlining the template for Notices of Funding Opportunity (NOFOs) and directing agencies to write NOFOs in plain language, and increasing certain monetary thresholds, among other changes.
- The new guidance will take effect Oct. 1, but agencies have the option to apply it to awards issued before that date if the award is issued more than 60 days after the Final Rule is published in the Federal Register. Because the guidance is only a model for agencies, it will not apply to recipients and subrecipients of an agency until that agency has implemented the guidance in codified regulations.

On April 4, OMB released its **Final Rule** revising its Guidance for Grants and Agreements (now titled Guidance for Federal Financial Assistance). With certain exceptions, Federal financial assistance subject to the guidance generally includes grants, cooperative agreements (not including cooperative research and development agreements), loans and loan guarantees, subsidies, insurance, and certain other types of assistance. The revisions include significant changes to the Uniform Guidance at 2 C.F.R. Part 200, as well as other portions of title 2 of the Code of Federal Regulations. These revisions are the most extensive changes to the Uniform Guidance since it went into effect on Dec. 26, 2013.

In a webinar announcing the release of the Final Rule, OMB and officials from other agencies emphasized that the revisions will streamline and simplify the requirements for and reduce burdens on agencies and recipients and subrecipients. Government officials highlighted the benefits that will flow from directing agencies to write NOFOs in plain language and the plain language revisions to the guidance overall.

As with the **Proposed Rule**, the Final Rule describes OMB's four goals for this re-write:

1. Incorporate statutory requirements and administration priorities;
2. Reduce agency and recipient burden;
3. Clarify sections that recipients or agencies have interpreted in different ways; and
4. Rewrite applicable sections in plain language to improve flow and address inconsistent use of terms within the guidance.

In the Executive Summary for the Final Rule's preamble, OMB highlighted certain changes made in furtherance of these goals. OMB generally replaced the term "non-Federal entity" with "recipient," "subrecipient," or both throughout the guidance (except in subpart F because non-Federal entity is a defined term in the Single Audit Act). OMB stated that, prior to this change, readers found it difficult to quickly identify which entity was being referred to in many sections, especially in situations where agencies apply the Uniform Guidance to Federal agencies, for-profit organizations, foreign public entities, or foreign organizations (which are not included in the definition of non-Federal entity). OMB also increased several monetary thresholds to reduce agency and recipient burden. This includes increasing the single audit threshold from \$750,000 to \$1,000,000 and increasing the threshold for considering items to be equipment from \$5,000 to \$10,000.

The revised guidance changes certain provisions in 2 C.F.R. Part 25 related to obtaining unique entity identifiers (UEIs) and registering in the System for Award Management (SAM.gov), including clarifying that second-tier subrecipients and contractors under grants do not need to obtain a UEI and permitting agencies to exempt foreign organizations and foreign public entities from completing a full SAM.gov registration for Federal awards under \$500,000.

The revised guidance takes effect Oct. 1. Federal agencies may elect to apply the final guidance to Federal awards issued prior to Oct. 1, but if they do so, the effective date used must be no earlier than 60 days after the Final Rule's publication in the Federal Register. The Uniform Guidance is not binding on recipients and subrecipients—each agency must implement the guidance through codified regulations for it to apply to that agency's recipients and subrecipients. To encourage uniformity and consistency in the grants process, agencies are required to adopt the revised Uniform Guidance in full unless different provisions are required by Federal statute or are approved by OMB. But, because of the flexibility to implement the revised guidance prior to Oct. 1, there may be different effective dates for different agencies.

Below are highlights of some of the Final Rule's most significant provisions.

Mandatory Disclosures (Section 200.113)

- Applicants, recipients, and subrecipients must “promptly” disclose “credible evidence” of the commission of a violation of the civil False Claims Act or Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations under Title 18 of the United States Code.
- Consistent with the Federal Acquisition Regulation (FAR) mandatory disclosure rule, “credible evidence” is intended to mean a higher standard than “reasonable grounds to believe,” indicating that recipients and subrecipients will be able to take some time for preliminary examination of the evidence’s credibility.
- “Promptly” indicates that the investigation should not be open-ended or longer than necessary to make a preliminary assessment of credibility, but using “promptly” instead of “timely” (which is the term used in the FAR) is not otherwise intended to diverge from the general principles on the timing of disclosures discussed in the FAR mandatory disclosure rule.

Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment (Section 200.216)

- Recipients and subrecipients are not prohibited from using prohibited equipment and services, provided they do not purchase such equipment and services using Federal funds.

Fixed Amount Awards and Subawards (Sections 200.101, 200.201, 200.302, 200.333, and 200.400(g))

- Identifies specific provisions of the cost principles applicable to fixed amount awards and clarifies that fixed amount awards cannot be used for unallowable costs.
- Departs from proposal to eliminate the cap on fixed amount subawards, instead raising the cap from \$250,000 to \$500,000.
- Revises proposed changes to provide that fixed amount awards should only be used if there is “accurate,” as opposed to “adequate,” data available to establish a fixed budget based on a reasonable estimate of actual costs.
- Clarifies that fixed amount awards are subject to 2 C.F.R. 200 subparts A-D (including the requirements for financial management systems) and subpart F of the Uniform Guidance, but notes that agencies have discretion to apply less restrictive requirements for anything except statutory requirements and audit requirements in subpart F.
- Clarifies that if program activities are completed in accordance with the terms and conditions of the award, unexpended funds a recipient or subrecipient retains will not be considered profit.
- Requires recipients and subrecipients to identify activities that were not completed at the conclusion of a fixed amount award to facilitate return of funds associated with the costs of uncompleted activities.

Internal Controls (Section 200.303)

- Introduces requirement that recipients and subrecipients take “reasonable” cybersecurity measures to safeguard information but does not establish a specific framework for cybersecurity requirements.

Procurement Standards (Sections 200.317–200.327)

- Expands section 200.317 to allow Indian Tribes to follow their own procurement policies and procedures.
- Eliminates the prohibition on using geographic preferences, so long as any preferences are otherwise consistent with governing law.
- Clarifies that recipients and subrecipients are permitted, but not required, to use practices such as Project Labor Agreements, offering employees of predecessor contracts rights of first refusal or setting hiring preferences for disadvantaged areas, women, and people from underserved communities.
- Clarifies that subpart D does not prohibit the use of a scoring mechanism that rewards bidders committing specific numbers and types of U.S. jobs or certain compensation and benefits.
- Clarifies that documents must be maintained supporting a decision to make micro-purchase awards without soliciting competitive price quotations.
- Removes the requirement to negotiate profit as a separate element of price for contracts where there is no price competition.

Termination (Section 200.340)

- Clarifies that agencies may include an award term and condition that permits termination if an award no longer effectuates program goals or agency priorities.

Opportunities to Object, Hearings, and Appeals (Section 200.342)

- Requires agencies to establish and maintain written procedures for disputes.
- Removes Proposed Rule's requirement for pass-through entities to maintain written procedures for disputes. Obligations for pass-through entities are limited to complying with any requirements for disputes or proceedings to which the recipient or subrecipient is entitled under any statute or regulation applicable to the action involved.

Direct Costs (Section 200.413)

- Reverts to original rule based on comments that unallowable costs should only be treated as direct costs when calculating indirect cost rates if such costs would logically be considered direct cost activities.

Indirect Costs (Section 200.414)

- Increases the *de minimis* indirect cost rate from 10% to 15% of modified total direct costs.
- Relatedly, the Final Rule revises definition of modified total direct costs in section 200.1 to increase the value of each subaward that can be included in modified total direct costs from \$25,000 to \$50,000.

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