
OMB Publishes Final Uniform Guidance Governing Grants, Cooperative and Other Funding Agreements With Federal Agencies

By C. Joël Van Over and Clare M. Cavaliero

As part of a larger Federal effort to increase efficiency and reduce waste, on December 26, 2013, the Office of Management and Budget (“OMB”) published a series of significant reforms to the Government’s policies relating to grants and cooperative agreements.

The Federal policies relating to the award and administration of Federal financial assistance agreements were previously contained in eight OMB circulars (A-21, A-50, A-87, A-89, A-102, A-110, A-122, and A-133). These eight circulars apply to numerous aspects of the financial assistance agreement life cycle and vary depending on the type of recipient (e.g., state, local, tribal governments, educational institutions, and nonprofits). Armed with a mandate to eliminate unnecessary and duplicative requirements and to reduce the potential for fraud, waste, and abuse, OMB undertook an extensive effort to review, clarify, and modernize the Federal policies relating to grants and cooperative agreements.

As a result of this effort, on December 26, 2013, OMB published final guidance in the Federal Register entitled “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (“Final Guidance”).¹ This Final Guidance consolidates and supersedes the eight OMB circulars referenced above and provides a government-wide framework for Federal award management.² The Final Guidance is technically effective December 26, 2013; although Federal agencies have one year to implement the policies and procedures applicable to Federal awards by promulgating regulations by December 26, 2014, unless otherwise required by statute. The standards set forth in Subpart F—Audit Requirements will apply to audits of fiscal years beginning on or after December 26, 2014. Future Notices of Funding Opportunities for covered agreements may however accelerate implementation by imposing the requirements of the Final Guidance through the Funding Opportunity and resulting funding agreement.



¹ 78 Fed. Reg. 78590, available at: <https://www.federalregister.gov/articles/2013/12/26/2013-30465/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards#h-265>.

² Copies of the OMB Circulars that are superseded by this Final Guidance are available on OMB’s website at http://www.whitehouse.gov/omb/circulars_default/.

The Final Guidance applies to Federal agencies that make Federal awards to non-Federal entities (“NFEs”). A non-Federal entity is defined in the Final Guidance as follows: “*Non-Federal entity* means 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.”³ As such, the Final Guidance applies directly to NFEs receiving virtually all types of Federal awards, including most commonly used grants and cooperative agreements. The Final Guidance applies indirectly to all subrecipients of a Federal award, including small and large commercial entities, as the most significant terms and conditions of Federal awards flow down to subawardees and subrecipients.⁴ The reach of the Final Guidance will be significant, applying to any entity that performs work and receives funding under a covered Federal financial assistance agreement, whether as a direct recipient or as an indirect recipient of such funding.⁵ Appendix II includes mandatory provisions for all contracts made by the NFE under covered Federal Awards and many other provisions of the Final Guidance must be flowed down to subrecipients to ensure that the NFE will be in compliance with the requirements of the Final Guidance.

The reforms streamline the language from the eight existing OMB circulars into one consolidated set of guidance in Title 2, Part 200 of the Code of Federal Regulations.⁶ The revised policies aim to improve both the clarity and accessibility of the regulations governing Federal awards. Among other things, the Final Guidance includes provisions that focus on performance over compliance to provide accountability for federal funds, encourage the efficient use of information technology and shared services, and provide for the consistent and transparent treatment of costs. The final changes to the existing circulars generally fall into three broad categories: (1) Administrative Requirements under Subparts A through D; (2) Cost Principles under Subpart E; and (3) Audit Requirements under Subpart F. In addition, however, the eleven Appendices to the Final Guidance are detailed and substantive, and augment the Final Guidance either generally or for specific types of NFEs.

1. Administrative Requirements (Subparts A–D)

First, the Final Guidance consolidates and reforms the administrative requirements set forth in OMB Circulars A-89, A-102, and A-110. Key proposed revisions include the following: (1) Agencies must design and execute a merit review process for proposals (applications). (2) Prior to making a Federal award, agencies must review information available through OMB-designated repositories of government wide eligibility qualification or financial integrity information (e.g., FAPIIS). (3) Agencies must generally make all funding opportunities available for at least 60 calendar days prior to the proposal deadline, and may determine to have a less than 60-day calendar day availability period, but no funding opportunity should be available for less than 30 calendar days unless exigent circumstances dictate otherwise. (4) The applicable periods for record retention and closeout completion are clarified and explained. (5) The proper means of accounting for program income is also described.

2. Cost Principles (Subpart E)

Second, the Final Guidance consolidates and reforms the cost principles set forth in OMB Circulars A-21, A-87, and A-122, and 45 C.F.R. Part 75. The Final Guidance includes substantial guidance, clarifications, limits, and exclusions concerning specific types of costs considered allowable or unallowable. Several areas formerly

³ Note that the Final Guidance does not broaden nor limit the applicability of other independent government-wide requirements affecting Federal awards to NFEs including state and local governments, Indian tribes, institutions of higher education, and nonprofit organizations.

⁴ Commercial entities that are direct awardees of grants and cooperative agreements are subject to the specific regulations of the Federal awarding agency. It is reasonably likely that regulations covering such direct awards to commercial entities will be affected by the Final Guidance as agencies adopt and implement the Final Guidance during 2014, and move to align certain of their own grant and cooperative agreement regulations covering awards to commercial entities.

⁵ Note that, in the Final Guidance, Appendix XI to Part 200 provides the following website as containing a compliance supplement: <http://www.whitehouse.gov/omb/circulars/> (e.g., under “Agency Info,” there are Bulletins, Circulars, Memoranda, and other guidance).

⁶ The Final Guidance replaces the regulations at 2 C.F.R. Parts 215 through 230. Additional regulations governing grants and cooperative agreements not superseded by the Final Guidance are located in 2 C.F.R. Subpart B—Federal Agency Regulations for Grants and Agreements, §§ 376 *et seq.* Further, each agency has supplemental regulations specific to grants and cooperative agreements in the agency’s own C.F.R. part (e.g., those for the Department of Energy are located at 10 C.F.R. Part 600).

subject to interpretation are now more clearly addressed on the issue of allowability, and many definitions are added that will affect compliance with the cost principles. For example, to the extent that a recipient or subrecipient has not adopted written internal controls, the Final Guidance includes a reasonably clear definition of the scope that is expected for such internal controls. Although not an actual change in policy, the Final Guidance makes it clear that NFEs are prohibited from earning or keeping any profit resulting from Federal financial assistance, unless expressly authorized by the terms and conditions of the Federal award. The revisions also make a number of changes to the negotiation and recoverability of indirect (facility and administrative or "F&A") costs, as well as to the classification of costs as direct or indirect. One noteworthy example is that any NFE that has a federally negotiated indirect cost rate may apply for a one-time extension of that rate for up to four years, which would eliminate the need for annual rate negotiations. In addition, the Final Guidance provides for an indirect cost rate of 10% of modified total direct costs to NFEs that have never had a negotiated indirect cost rate. Another example is that the Final Guidance establishes that identification with the Federal award, rather than the nature of the goods and services involved, is the determining factor in distinguishing direct costs from indirect costs. In particular, certain administrative costs may be treated as direct costs if the NFE demonstrates that such costs are directly allocable to a Federal award.

3. Audit Requirements (Subpart F)

Third, the Final Guidance consolidates and reforms the audit requirements set forth in OMB Circulars A-50 and A-133. Many of the revisions are targeted at better focusing audit resolution and oversight resources on higher dollar, higher risk awards, and promoting interagency cooperation to reduce the burdens on pass-through entities and subrecipients. The Final Guidance, among other things, provides standards for determining when audits are required, mandates online publication of audit reports, and focuses audits on programs with internal control deficiencies identified as material weaknesses.

In Summary, all recipients and subrecipients of federal funding under non-procurement funding arrangements would be well advised to review the Final Guidance, 2 C.F.R. Part 200, and to consider whether changes or additional internal policies may be advisable given the clarifications and changes adopted by the Final Guidance.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

C. Joël Van Over (bio)
Northern Virginia
+1.703.770.7604
joel.vanover@pillsburylaw.com

Clare M. Cavaliero (bio)
Northern Virginia
+1.703.770.7676
clare.cavaliero@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2014 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.