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Federal Grant & Contract News for Nonprofits - February 2014

In our ongoing coverage of the 2013 release of the Office of Management and Budget's (OMB) "**Super Circular**" (see our **December** and **January** newsletters), we provide further information and guidance from OMB, through the Council on Financial Assistance Reform (COFAR). COFAR conducted an informational webinar on the Super Circular on January 27, 2014, and more recently provided **Frequently Asked Questions** (FAQs).

As detailed in our prior newsletters, the effective date of the Super Circular has been an area of confusion. COFAR provides additional information on this point, including its application to existing awards.

Q II-1: When does the uniform guidance become effective?

- The effective date is covered in section 200.110, Effective/applicability date.
- Federal agencies must implement the requirements to be effective by December 26, 2014.
- Subpart F, Audit requirements, will apply to audits of non-Federal entity fiscal years beginning on or after December 26, 2014. The revised audit requirements are not applicable to fiscal years beginning prior to that date.
- Administrative requirements and cost principles will apply to new awards and to additional funding (funding increments) to existing awards made after Dec 26, 2014.
- Existing Federal awards will continue to be governed by the terms and conditions of the Federal award.

Q II-2: Will this apply only to awards made after the effective date, or does it apply to awards made earlier?

- Once the uniform guidance goes into effect for non-Federal entities, it will apply to awards or funding increments after that date. It will not retroactively change the terms and conditions for funds a non-Federal entity has already received.
- We would anticipate that for many of the changes, non-Federal entities with both old and new awards may make changes to their entity-wide policies (for example to payroll or procurement systems). Practically speaking, these changes would impact their existing/older awards. Non-Federal entities wishing to implement entity-wide system changes to comply with the uniform guidance after the effective date of December 26, 2014 will not be penalized for doing so.

Q II-3: Should we continue using 2 CFR 220, 225, and 230 until December 2014, even though these regulations have now been removed from the CFR?

- The terms and conditions of the Federal award always govern, and even once the uniform guidance goes into effect, Federal agencies will need to ensure that all non-Federal entities have full access to the terms and conditions of Federal awards made prior to the uniform guidance becoming effective.
- The original circulars are also at http://www.whitehouse.gov/omb/grants_circulars.
- Federal agencies may not impose the uniform guidance prior to the effective date.

COFAR also clarified some points with respect to the Super Circular's effort to reduce the risk of waste, fraud, and abuse (one of the primary goals of the effort to create the consolidated circular).

Q I-7: What is the impact of this reform? How does this reform reduce administrative burden and risk of waste, fraud, and abuse?

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4. Providing for consistent and transparent treatment of costs:

- Updated policies on indirect cost reduce administrative burden by providing more consistent and transparent treatment governmentwide.
- The provisions set conditions that make transparent agency decisions to use other than approved indirect cost rates, and provide for a *de minimis* indirect cost rate for those non-Federal entities that have never had a rate and for whom existing requirements to negotiate might be a burden that prevents them from receiving assistance at all or implementing it effectively.
- It also clarifies allowable direct charges for administrative expenses and contingency costs.

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8. Strengthening oversight:

- New language requires Federal agencies and pass-through entities to review the risk associated with a potential recipient prior to making an award (including by making better use of available audit information where appropriate).
- It also requires disclosures of relevant conflict of interest or criminal violations, expressly prohibiting profit, requiring certifications by senior officials of the non-Federal entity, and providing Federal agencies with strong remedies to address situations of non-compliance.

9. Targeting audit requirements on risk of waste, fraud, and abuse:

- The uniform guidance focuses audits where there is greatest risk of waste, fraud, and abuse of taxpayer dollars.
- It strengthens existing requirements for Federal agencies to rely to the extent possible on the work of the Single Audit before initiating additional audits.
- It improves transparency and accountability by making single audit reports available to the public online and encourages Federal agencies to take a more cooperative approach to audit resolution that will more conclusively resolve underlying weaknesses in internal controls.
- Targets Federal oversight resources where the most Federal dollars are at risk by raising the threshold for the single audit requirement from \$500,000 to \$750,000, covering over 99% of the funds currently covered while eliminating the requirement for about 5,000 entities and saving the government about \$250 million per year.

The FAQs also addressed a number of specific items, including the following.

- Additional clarification “regarding changes to the term contractor and the elimination of the term vendor;” for instance, COFAR stated:
 - In existing guidance, the COFAR has found that some confusion results from the fact that OMB Circular A-133 makes a distinction between subrecipients and “vendors” while other circulars describe either subawards or “subcontracts”.
 - For purposes of this guidance, when a non-Federal entity provides funds from a Federal award to a non-Federal entity, the non-Federal entity receiving these funds may be either be a subrecipient or a contractor. The term contractor is used for purposes of consistency and clarity to replace areas in the previous guidance that referred to vendors, though substantively in the previous guidance, these two terms have always had the same meaning.
 - Section 200.330 Subrecipient and Contractor Determinations, as well as section 200.22 Contract and 200.92 Subaward provide guidance on making subrecipient and contractor determinations. This language was largely taken from existing guidance in OMB Circular A-133 on subrecipient and vendor determinations.
 - As described in the uniform guidance in the sections noted above, it is the substance of the award that determines how it should be treated, even though the pass-through entity or non-Federal entity receiving the award may call it by a different name.

- So, if a pass-through entity makes an award that it calls a “contract”, but which meets the criteria under section 200.330 to be a subaward to a subrecipient, the non-Federal entity must comply with the provisions of the uniform guidance relevant to subawards, regardless of the name used by the pass-through entity to refer to the award agreement.
- Likewise, any Federal awards that meet the criteria under section 200.330 for the non-Federal entity to be considered a contractor, whether the non-Federal entity providing the funds calls it a “vendor agreement” or a “subcontract”, the non-Federal entity must comply with the provisions of the uniform guidance relevant to a contractor.
- A description of COFAR’s expectation about a non-Federal entity’s compliance with the guidance in the Green Book:

The requirement is that the non-Federal entity must establish and maintain effective internal controls over Federal awards that provide reasonable assurance that awards are being managed in compliance with Federal statutes, regulation and the terms and conditions of the Federal award. The uniform guidance also refers non-Federal entities to the following three documents for best practices:

- “Standards for Internal Control in the Federal Government” (Green Book) issued by the Comptroller General.
- “Internal Control Framework” issued by the Committee on Sponsoring Organizations (COSO).
- Appendix XI, Compliance Supplement – Part 6 Internal Control (which currently follows COSO but will consider both the Green Book and COSO in the 2015 update (200.514(c)(1)).

While non-Federal entities must have effective internal control, there is no expectation or requirement that the non-Federal entity document or evaluate internal controls prescriptively in accordance with these three documents or that the non-Federal entity or auditor reconcile technical differences between them. They are provided solely to alert the non-Federal entity to source documents for best practices. Non-Federal entities and their auditors will need to exercise judgment in determining the most appropriate and cost effective internal control in a given environment or circumstance to provide reasonable assurance for compliance with Federal program requirements.

- And that measures prefaced with the word “should” were considered best practices, whereas items prefaced with “must” were requirements (“The word ‘must’ is used throughout section 200 to indicate requirements. The word ‘should’ is used to indicate best practices or recommended approaches that the COFAR wanted non-Federal entities to be aware of, but not necessarily required to comply with.”).

Finally, with respect to the notion that this may be the last of changes or guidance to grant regulation for the foreseeable future, COFAR clearly provides that there is more related guidance and regulation on the horizon.

Q I-3: How does this reform complement OMB’s work on the Evidence Agenda?

- These reforms complement targeted efforts by OMB and a number of Federal agencies to reform overall approaches to grant-making by implementing innovative, outcome-focused grant-making designs and processes in collaboration with their non-Federal partners as described in OMB Memorandum 13-17, Next Steps in the *Evidence and Innovation Agenda*.
- The uniform guidance will provide a backbone for sound financial management as Federal agencies and their partners continue to develop and advance innovative and effective practices.
- OMB plans to work with agencies to examine ways these new flexibilities can be used to support innovative, outcome-focused grants.
- Specifically this reform focuses on performance over compliance for accountability by; (see Q I-7 #2 under **What is the Impact of this reform?**).

Moreover, COFAR explained that the “FAQ document will be updated periodically to reflect further

COFAR clarifications when needed.”

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For more information, please contact **Dismas Locaria**, **Melanie Jones Totman**, **Elizabeth Buehler** or **Jeffrey Tenenbaum**.

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.