

PUBLICATION

OMB Proposed Rule Would Revise the Suspension and Debarment and Uniform Grant Administration Regulations

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The Office of Management and Budget (OMB) has completed its every-five-year review of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, commonly known as the "Uniform Guidance" or "2 C.F.R. Part 200," and proposed changes. These rules are adopted by federal agencies and apply to nearly all federal financial assistance programs. The last update in 2020 resulted in a few tweaks. This time around, OMB proposes changes to the entire volume of rules in Title 2 of the Code of Federal Regulations, including the procurement and suspension and debarment rules. Comments are due by Monday, December 4, 2023.

The following is only a sample of the many changes proposed in the rule:

- Defining "Equipment": OMB proposes to increase the per unit acquisition cost threshold from \$5,000 to \$10,000 for determining that an item is "equipment," and to clarify that agencies may permit the non-federal entity to retain equipment with no further obligation to the federal government when it is not prohibited by federal statute or regulation.
- Defining "Supplies": All tangible personal property that is not equipment is a supply. By increasing the equipment threshold, it means that items less than \$10,000 would be categorized as supplies. OMB proposes to increase the threshold for computing devices from \$5,000 to \$10,000. OMB also proposes to clarify that the disposition requirements for unused supplies apply to the aggregate value of all supply types, and not just like-item supplies.
- Prior Written Approval Requirements: The proposed rule would remove ten items from the prior written approval requirements to reduce federal agency and recipient burden, including for expending funds on real property, equipment, direct costs, entertainment costs, exchange rates, memberships, participant support costs, selling and marketing costs, and taxes.
- SAM.gov Registration: OMB proposes to clarify that the requirement to obtain a Unique Entity Identifier (UEI) and register in SAM.gov does not apply to second-tier subrecipients or contractors but would apply to recipients of loan guarantees and may apply to beneficiary borrowers.
- Program Income Uses: OMB proposes to revise the section on program income by providing clarifications regarding the use and expenditure of program income, including allowing program income for certain closeout costs. OMB also proposes to revise and provide further clarifying guidance for each of the three methods for the use of program income.
- Lifting the Geographic Preference Prohibition: OMB proposes to remove the prohibition in the Uniform Guidance on using geographic preference requirements in procurements but cautions that any geographic preferences or scoring mechanisms must be consistent with the U.S. Constitution, applicable state and federal statutes and regulations, and the terms and conditions of the Federal Award.
- No Public Bid Opening: The proposed rule would remove the requirements that local and tribal governments must open sealed bids in public.
- Soliciting Veteran-Owned Business: OMB proposes to add "veteran-owned business" to the types of businesses that recipients and subrecipients are encouraged to consider for procurement contracts under a federal award.

- Suspension and Debarment Changes: OMB proposes the rules to clarify available administrative actions in lieu of debarment and that before initiating a suspension, officials may consider "other indicators of adequate evidence that may include, but are not limited to, warrants and their accompanying affidavits." OMB also proposes adding text to address factors influencing a debarment decision; and adding text on "whether your business, technical, or professional license(s) has been suspended, terminated, or revoked."
- Raising the Single Audit Threshold: With respect to audits, OMB proposes increasing the single audit threshold from \$750,000 to \$1,000,000.

Within the preamble to the rule, OMB also expresses a desire for comments on proposed ideas that are not reflected in the draft rules. These include:

- A proposal to delete the existing paragraph (b) in 2 CFR 200.324, requiring the recipient to negotiate profit as a separate element of the price for each contract in which there is no price competition.
- OMB proposes to raise the de minimis indirect cost rate from 10 percent to 15 percent.
- The proposed changes would allow recipients and subrecipients to apply a rate lower than 15 percent at their own discretion. At the same time, the proposed guidance clarifies that federal agencies may not compel recipients and subrecipients to use an indirect rate lower than the proposed 15 percent rate, unless required by statute. OMB also proposes to clarify that the de minimis rate may not be applied to cost reimbursement contracts, and recipients and subrecipients are not required to use the de minimis rate. OMB seeks comments that include analysis on the advantages and disadvantages of raising the de minimis rate in the way proposed.
- When exigent circumstances exist, the current guidance allows agencies to provide recipients up to 30 days after the Federal Award date to obtain a Unique Entity Identifier (UEI) and complete SAM.gov registration. In recognition of the issues that sometimes arise when organizations attempt to register in SAM.gov, particularly for new or inexperienced applicants, OMB's proposal would provide federal agencies with the option to give recipients an additional 90 days if exigent circumstances persist. If included in the final revisions to the guidance, OMB proposes to further clarify that federal agencies should not issue payments to a recipient who is unable to obtain a UEI or complete registration in SAM.gov.
- OMB proposes to clarify in section 200.201 that recipients are entitled to any unexpended funds under a fixed amount award if the required activities were completed in accordance with the terms and conditions of the award. OMB is considering requiring additional pre-award certifications for fixed-amount awards to address the potential increased risk of fraud under fixed-amount awards. OMB invites comments on appropriate pre-award certifications for fixed-amount awards and notes that it may include a requirement for such certifications in the final guidance document. OMB also proposes to specifically identify certain prior approval requirements that explicitly relate to fixed-amount awards.

OMB also seeks comments on the following topics for future consideration:

- Establishing specific audit requirements for for-profit entities, which are not subject to the requirements of Subpart F;
- Incorporating the requirements of National Security Presidential Management (NSPM)- 33 on research security requirements;
- Providing additional guidance in 2 CFR concerning the relationship of specific aspects of the guidance to loans and loan guarantees;
- Establishing mechanisms to automatically adjust certain thresholds due to inflation or other triggering events (where permitted by law).
- Removing additional prior approval requirements.

- Challenges related to negotiating indirect costs, working with cognizant agencies, or any other topics related to indirect costs that could be addressed in future updates; and
- Expanding the guidance in Subpart F to include more specific requirements on the scope of an audit (proper perspective) so that agencies have additional contextual information to guide them in resolving audit findings.

The changes above are just a few examples of the proposed changes. The proposed rule was published in the Federal Register and is available here: <https://www.federalregister.gov/documents/2023/10/05/2023-21078/guidance-for-grants-and-agreements>

OMB seeks comment on all aspects of its proposed rule. If you have specific recommendations for improvement to 2 CFR, or concerns with the proposed revisions, comments are due by December 4, 2023. If you have any questions, please contact [Erin Greten](#) or any member of Baker Donelson's [Disaster Recovery Team](#).