

ALERT

Super Circular Changes Bring New Focus, New Requirements, and Greater Clarity for Federal Grants

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As Wiley previously reported, the Office of Management and Budget (OMB) recently announced multiple amendments to its *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (the “Super Circular”, codified in Title 2 of the Code of Federal Regulations), which governs federal grantmaking. These changes seek to incorporate management improvements linked to the Government’s Results-Oriented Accountability for Grants Cross Agency Priority Goal (Grants CAP Goal), implement statutory provisions from recent iterations of the National Defense Authorization Act (NDAA) and from the Federal Funding Accountability and Transparency Act (FFATA), and clarify areas of existing misinterpretation.

These revisions will go into effect on November 11, 2020, except for the changes to 2 C.F.R. §§ 200.216 (the “Huawei Ban”) and 200.340, which became effective on August 13, 2020.

OMB’s revisions to the Super Circular touch on a wide variety of issues impacting federal grant recipients, including program evaluation, certain foreign procurements, and spending transparency requirements.

Shifting Focus to Results-Oriented Accountability for Grant Program Results

Many of the recent changes to the Super Circular are intended to support the Grants CAP Goal Executive Steering Committee’s strategies for maximizing the value of grant funding by shifting the

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focus of awarding agencies away from strict compliance to balancing compliance with program performance. To this end, the Final Guidance:

- Encourages awarding agencies to apply a risk-based, data-driven framework that lessens compliance requirements for successful programs and formalizes a requirement that awarding agencies develop a robust program design by creating program goals, objectives, and indicators before grant applications are solicited.
- Furthers the Grants CAP Goal of results-oriented grantmaking by strengthening merit review, public notice of federal financial assistance programs, and notices of funding opportunities.
- Encourages agencies to measure recipient performance “to improve program goals and objectives,” generate lessons learned, and “spread the adoption of promising practices.”
- Permits awarding agencies to adjust grant program requirements when a risk evaluation indicates that a certain implementation approach is merited and to request exceptions to certain provisions of 2 C.F.R. Part 200 for innovative design programs.
- Strengthens awarding agencies’ ability to terminate grant awards when they “no longer effectuate program goals” or “agency priorities,” with the intent of ensuring that agencies prioritize ongoing support to grant programs that meet established goals.
- Expands the Super Circular’s definition of fixed amount awards, 2 C.F.R. § 200.45, to allow awarding agencies to include both grant agreements and cooperative agreements under this award type, thereby reducing the administrative burden for both the grant recipient and the awarding agency.

Expanded Use of De Minimis Rate

- The Final Guidance expands the use of the de minimis rate of 10 percent of modified total direct costs (MTDC) to all non-federal entities that propose using federal grant funds to pay for indirect costs. Previously, the de minimis rate could be used only by non-federal entities that had never received or negotiated an indirect cost rate with the awarding agency.
- It also clarifies that non-federal entities utilizing the de minimis rate do not need to provide evidence of the costs covered by that rate.

Promoting Free Speech

- The Final Guidance revises 2 C.F.R. §§ 200.300, *Statutory and national policy requirements*, 200.303, *Internal controls*, 200.339, *Remedies for noncompliance*, and 200.341, *Notification of termination requirement*, to align with recent Executive Orders addressing freedom of speech and freedom of inquiry (EOs 13798 and 13864).
- These revisions are intended to “underscore[] the importance of compliance with the First Amendment” in federal grantmaking.

Standardization of Terminology and Data Elements

To advance the Grants CAP Goal of streamlining the grants management business process and data, the Final Guidance standardizes terms across 2 C.F.R. Part 200, including:

- Replacing the term “obligation” with either “financial obligation” or “responsibility” to align the Uniform Guidance with definitions included in the Digital Accountability and Transparency Act of 2014 (DATA Act).
- Revising 2 C.F.R. §§ 200.207, *Specific conditions*, and 200.328, *Monitoring and reporting program performance*, to “promote uniform application of standard data elements in future information collection requests.”
- Revising the definition of “management decision” to emphasize that it means “a written determination provided by a Federal awarding agency or pass-through entity.”

Supporting Domestic Procurement Preferences

- The Final Guidance adds 2 C.F.R. § 200.322, *Domestic preferences for procurement*, which encourages grant recipients, “to the extent permitted by law,” to maximize their use of American goods, products, and materials when procuring goods and services under federal grant awards.
- The new part applies to both grants and cooperative agreements.

Increasing Micro-Purchase and Simplified Acquisition Thresholds

- To align federal grant regulations with recent federal procurement legislation, OMB’s revisions increase the micro-purchase threshold from \$3,500 to \$10,000, raise the simplified acquisition threshold from \$100,000 to \$250,000, and permit non-federal entities to request a micro-purchase threshold higher than \$10,000 under certain circumstances.

Changes to Closeout Provisions

- The Final Guidance amends 2 C.F.R. § 200.344, *Closeout*, “to support timely closeout of awards, improve the accuracy of final closeout reporting, and reduce recipient burden,” primarily by increasing the number of days for recipients to submit closeout reports and liquidate financial obligations from 90 days to 120 days.
- To allow pass-through entities sufficient time to complete the closeout process, the Super Circular will continue to require subrecipients to submit their closeout reports within 90 days.
- Under the Final Guidance, OMB also now requires awarding agencies to report a non-federal entity’s failure to submit timely closeout reports as a breach of the award’s terms and conditions. Awarding agencies must report this compliance failure to the OMB-designated integrity and performance system.

Restricting Use of Certain Foreign Procurements

- The Final Guidance implements Section 889 of the Fiscal Year (FY) 2019 NDAA (Pub. L. 115-232) through 2 C.F.R. § 200.216, *Prohibition on certain telecommunications and video surveillance services or equipment*, which prohibits federal award recipients from using government funds to enter into contracts (or extend or renew them) with entities utilizing telecommunications equipment or services provided by Huawei Technologies Company, ZTE Corporation, and other covered entities. Wiley recently published a separate alert focusing on this addition to the federal grant regulations.
- OMB also added 2 C.F.R. § 200.183, *Never contract with the enemy*, which implements Title VIII, Subtitle E of the FY 2015 NDAA (Pub. L. 113-291), as amended by Sec. 822 of the FY 2020 NDAA (Pub. L. 116-92), and prohibits recipients from providing funds to persons or entities actively opposing United States or coalition forces involved in contingency operations.

Changes to SAM.gov Requirements

- The Final Guidance implements Sec. 852 of the FY 2013 NDAA (Pub. L. 112-239), which requires that the Federal Awardee Performance and Integrity Information System (FAPIIS) include information on a non-federal entity's parent, subsidiary, and successor entities. Further, the revisions require awarding agencies to consider all the information in FAPIIS regarding an applicant's immediate owner, highest-level owner and predecessor, or subsidiary, if applicable, before awarding a federal grant or cooperative agreement.
- OMB has also created a new exception to 2 C.F.R. Part 25, which establishes the System for Award Management (SAM) as the repository for information about applicants and recipients. Under 2 C.F.R. § 25.110(c)(2)(iii), awarding agencies may now waive SAM.gov registration requirements when they determine that "there are exigent circumstances that prohibit the applicant from . . . completing SAM registration prior to receiving a Federal award."

Increased Transparency in Federal Spending

The Final Guidance includes several revisions intended to increase transparency regarding federal spending, as required by the Federal Funding Accountability and Transparency Act of 2006 (FFATA) and the DATA Act, including:

- Expanding reporting requirements for federal financial assistance beyond grants and cooperative agreements to cover loans, insurance, contributions, and direct appropriations.
- Requiring awarding agencies to publicly report awards that equal or exceed the micro-purchase threshold and pass-through entities (PTEs) to report on the FFATA Subaward Reporting System (FSRS) subawards that equal or exceed \$30,000.
- Requiring awarding agencies to associate Federal Assistance Listings with the authorizing statute to make those listings more consistent.

Pass-Through Entities and Audit Findings

- The Final Guidance revises 2 C.F.R. § 200.332, *Requirements for pass-through entities*, to clarify that PTEs are only responsible for addressing a subrecipient's audit findings "that are specifically related to their subaward."
- The revised regulations also provide that PTEs may rely on a subrecipient's cognizant audit agency or oversight agency for addressing "entity-wide issues." This reliance, however, does not eliminate a PTE's responsibility "to issue subawards that conform to agency and award-specific requirements, to manage risk through ongoing subaward monitoring, and to monitor the status of the [audit] findings that are specifically related to the subaward."

Applicability of Uniform Guidance to Federal Agencies

- The Final Guidance amends 2 C.F.R. § 200.101, *Applicability*, to clarify that awarding agencies may apply the requirements of 2 C.F.R. Part 200, subparts A through E (covering definitions, general provisions, award requirements, and cost principles), to other federal agencies.

Wiley's Government Contracts team stands ready to assist federal grant recipients with navigating the Super Circular's new requirements.