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Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 75—DIRECT GRANT PROGRAMS

Authority: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.
Section 75.263 also issued under 2 CFR 200.308(e)(1).
Section 75.617 also issued under 31 U.S.C. 3504, 3505.
Section 75.740 also issued under 20 U.S.C. 1232g and 1232h.

Source: 45 FR 22497, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO DIRECT GRANT PROGRAMS

§ 75.1 Programs to which part 75 applies.

(a) ***General.***

(1) The regulations in this part apply to each direct grant program of the Department of Education, except as specified in these regulations for direct formula grant programs, as referenced in paragraph (c)(3) of this section.

(2) The Department administers two kinds of direct grant programs. A direct grant program is either a discretionary grant program or a formula grant program other than a State-administered formula grant program covered by 34 CFR part 76.

(3) If a direct grant program does not have implementing regulations, the Secretary implements the program under the applicable statutes and regulations and, to the extent consistent with the applicable statutes and regulations, under the General Education Provisions Act and the regulations in this part. With respect to the Impact Aid Program (Title VII of the Elementary and Secondary Education Act of 1965), see 34 CFR 222.19 for the limited applicable regulations in this part.

(b) ***Discretionary grant programs.*** A discretionary grant program is one that permits the Secretary to use discretionary judgment in selecting applications for funding.

(c) ***Formula grant programs.***

(1) A formula grant program is one that entitles certain applicants to receive grants if they meet the requirements of the program. Applicants do not compete with each other for the funds, and each grant is either for a set amount or for an amount determined under a formula.

(2) The Secretary applies the applicable statutes and regulations to fund projects under a formula grant program.

(3) For specific regulations in this part that apply to the selection procedures and grant-making processes for direct formula grant programs, see §§ 75.215 and 75.230.

Note 1 to § 75.1: See 34 CFR part 76 for the general regulations that apply to programs that allocate funds by formula among eligible States.

[89 FR 70320, Aug. 29, 2024]

§ 75.2 Exceptions in program regulations to part 75.

If a program has regulations that are not consistent with part 75, the implementing regulations for that program identify the sections of part 75 that do not apply.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.4 [Reserved]

ELIGIBILITY FOR A GRANT

§ 75.50 How to find out whether you are eligible.

Eligibility to apply for a grant under a program of the Department is governed by the applicable statutes and regulations for that program.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987; 89 FR 70320, Aug. 29, 2024]

§ 75.51 How to prove nonprofit status.

(a) Under some programs, an applicant must show that it is a nonprofit organization.

(b) An applicant may show that it is a nonprofit organization by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State attorney general certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

[45 FR 22497, Apr. 3, 1980, as amended at 85 FR 82126, Dec. 17, 2020; 89 FR 15702, Mar. 4, 2024; 89 FR 70320, Aug. 29, 2024]

§ 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.

(a)

(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other private organization.

(2)

(i) In the selection of grantees, the Department—

(A) May not discriminate for or against a private organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization; and

(B) Must ensure that all decisions about grant awards are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or the lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to this part.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of grant funds must apply equally to faith-based and non-faith-based organizations. All organizations that receive grants under a Department program, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by the Department may disqualify faith-based organizations from applying for or receiving grants under a Department program on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(6) The Department may not disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

(b) The provisions of § 75.532 apply to a faith-based organization that receives a grant under a program of the Department.

(c)

(1) A private organization that applies for and receives a grant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a grant from the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services funded by the grant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by "indirect Federal financial assistance."

(3) For purposes of 2 CFR 3474.15, this section, §§ 75.712 and 75.714, and appendices A and B to this part, the following definitions apply:

(i) ***Direct Federal financial assistance*** means financial assistance received by an entity selected by the Government or a pass-through entity (under this part) to carry out a service (e.g., by contract, grant, or cooperative agreement). References to *Federal financial assistance* will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of *indirect Federal financial assistance.*

(ii) ***Indirect Federal financial assistance*** means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other similar means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider. Federal financial assistance provided to an organization is *indirect* under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; and

(B) The organization receives the assistance wholly as the result of the genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.

(iii) ***Federal financial assistance*** means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

(iii) ***Federal financial assistance*** means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

(iv) ***Pass-through entity*** means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(v) ***Religious exercise*** has the meaning given to the term in 42 U.S.C. 2000cc-5(7)(A).

Note 1 to paragraph (c)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a recipient of Federal financial assistance as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)

(1) A faith-based organization that applies for or receives a grant under a program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protections of law.

(2) A faith-based organization that applies for or receives a grant under a program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services, or in outreach activities related to such services, on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from the Department.

(h) The Department shall not construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

[85 FR 82126, Dec. 17, 2020, as amended at 89 FR 15702, Mar. 4, 2024]

INELIGIBILITY OF CERTAIN INDIVIDUALS TO RECEIVE ASSISTANCE

Source: Sections 75.60 through 75.62 appear at 57 FR 30337, July 8, 1992, unless otherwise noted.

§ 75.60 Individuals ineligible to receive assistance.

An individual is ineligible to receive a fellowship, scholarship, or discretionary grant funded by the Department if the individual—

(a) Is not current in repaying a debt or is in default, as that term is used in 34 CFR part 668, on a debt—

(1) Under a program administered by the Department under which an individual received a fellowship, scholarship, or loan that they are obligated to repay; or

(2) To the Federal Government under a nonprocurement transaction; and

(b) Has not made satisfactory arrangements to repay the debt.

[89 FR 70320, Aug. 29, 2024]

§ 75.61 Certification of eligibility; effect of ineligibility.

(a) An individual who applies for a fellowship, scholarship, or discretionary grant from the Department shall provide with his or her application a certification under the penalty of perjury—

(1) That the individual is eligible under § 75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 421 of the Controlled Substances Act (21 U.S.C. 862).

(b) The Secretary specifies the form of the certification required under paragraph (a) of this section.

(c) The Secretary does not award a fellowship, scholarship, or discretionary grant to an individual who—

(1) Fails to provide the certification required under paragraph (a) of this section; or

(2) Is ineligible, based on information available to the Secretary at the time the award is made.

(d) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

[57 FR 30337, July 8, 1992, as amended at 89 FR 70320, Aug. 29, 2024]

§ 75.62 Requirements applicable to entities making certain awards.

(a) An entity that provides a fellowship, scholarship, or discretionary grant to an individual under a grant from, or an agreement with, the Secretary shall require the individual who applies for such an award to provide with his or her application a certification under the penalty of perjury—

(1) That the individual is eligible under § 75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 421 of the Controlled Substances Act (21 U.S.C. 862).

(b) An entity subject to this section may not award a fellowship, scholarship, or discretionary grant to an individual if—

(1) The individual fails to provide the certification required under paragraph (a) of this section; or

(2) The Secretary informs the entity that the individual is ineligible under § 75.60.

(c) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(d) The Secretary may require an entity subject to this section to provide a list of the individuals to whom fellowship, scholarship, or discretionary grant awards have been made or are proposed to be made by the entity.

[57 FR 30337, July 8, 1992, as amended at 89 FR 70320, Aug. 29, 2024]

§ 75.63 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 82128, Dec. 17, 2020]

Subpart B [Reserved]

Subpart C—How To Apply for a Grant

THE APPLICATION NOTICE

§ 75.100 Publication of an application notice; content of the notice.

(a) Each fiscal year the Secretary publishes application notices in the FEDERAL REGISTER that explain what kind of assistance is available for new grants under the programs that the Secretary administers.

(b) The application notice for a program explains one or more of the following:

(1) How to apply for a new grant.

(2) If preapplications are used under the program, how to preapply for a new grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 51 FR 20824, June 9, 1986; 59 FR 30261, June 10, 1994]

§ 75.101 Information in the application notice that helps an applicant apply.

(a) The Secretary may include such information as the following in an application notice:

(1) How an applicant can obtain an application package.

(2) The amount of funds available for grants, the estimated number of those grants, the estimated amounts of those grants and, if appropriate, the maximum award amounts of those grants.

(3) If the Secretary plans to approve multi-year projects, the project period that will be approved.

(4) Any priorities established by the Secretary for the program for that year and the method the Secretary will use to implement the priorities. (See § 75.105 *Annual priorities.*)

(5) Where to find the regulations that apply to the program.

(6) The statutory authority for the program.

(7) The deadlines established under § 75.102 (Deadline date for applications.) and 34 CFR 79.8 (How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?).

(b) If the Secretary either requires or permits preapplications under a program, an application notice for the program explains how an applicant can get the preapplication form.

Cross Reference:
See 34 CFR 77.1—definitions of "budget period" and "project period."

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980; 46 FR 3205, Jan. 14, 1981; 51 FR 20824, June 9, 1986; 51 FR 21164, June 11, 1986; 60 FR 63873, Dec. 12, 1995; 61 FR 8455, Mar. 4, 1996; 89 FR 70320, Aug. 29, 2024]

§ 75.102 Deadline date for applications.

(a) The application notice for a program sets a deadline date for the transmittal of applications to the Department.

(b)-(c) [Reserved]

(d) If the Secretary allows an applicant to submit a paper application, the applicant must show one of the following as proof of mailing by the deadline date:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(e) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[45 FR 22497, Apr. 3, 1980, as amended at 51 FR 20824, June 9, 1986; 69 FR 41201, July 8, 2004; 89 FR 70320, Aug. 29, 2024]

§ 75.103 Deadline date for preapplications.

(a) If the Secretary invites or requires preapplications under a program, the application notice for the program sets a deadline date for preapplications.

(b) An applicant shall submit its preapplication in accordance with the procedures for applications in § 75.102(d).

[57 FR 30337, July 8, 1992, as amended at 89 FR 70320, Aug. 29, 2024]

§ 75.104 Additional application provisions.

(a) The Secretary may make a grant only to an eligible party that submits an application.

(b) If a maximum award amount is established in a notice published in the FEDERAL REGISTER, the Secretary may reject without consideration or evaluation any application that proposes a project funding level that exceeds the stated maximum award amount.

(c) If an applicant wants a new grant, the applicant must submit an application in accordance with the requirements in the application notice.

[61 FR 8455, Mar. 4, 1996, as amended at 89 FR 70320, Aug. 29, 2024]

§ 75.105 Annual absolute, competitive preference, and invitational priorities.

(a) ***What programs are covered by this section?*** This section applies to any program for which the Secretary establishes priorities for selection of applications in a particular fiscal year.

(b) ***How does the Secretary establish annual priorities?***

(1) The Secretary establishes final annual priorities by publishing the priorities in a notice in the FEDERAL REGISTER, usually in the application notice for that program.

(2) The Secretary publishes proposed annual priorities for public comment, unless:

(i) The final annual priorities will be implemented only through invitational priorities (Cross-reference: See 34 CFR 75.105(c)(1));

(ii) The final annual priorities are chosen from a list of priorities already established in the program's regulations;

(iii) Publishing proposed annual priorities would be impracticable, unnecessary, or contrary to the public interest;

(iv) The program statute requires or authorizes the Secretary to establish specified priorities;

(v) The annual priorities are chosen from allowable activities specified in the program statute; or

(vi) The final annual priorities are developed under the exemption from rulemaking for the first grant competition under a new or substantially revised program authority pursuant to section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1), or an exemption from rulemaking under section 681(d) of the Individuals with Disabilities Education Act, 20 U.S.C. 1481(d), section 191 of the Education Sciences Reform Act, 20 U.S.C. 9581, or any other applicable exemption from rulemaking.

(c) ***How does the Secretary implement an annual priority?*** The Secretary may choose one or more of the following methods to implement an annual priority:

(1) ***Invitations.*** The Secretary may simply invite applications that meet a priority. If the Secetary chooses this method, an application that meets the priority receives no competitive or absolute preference over applications that do not meet the priority.

(2) ***Competitive preference.*** The Secretary may give one of the following kinds of competitive preference to applications that meet a priority.

(i) The Secretary may award some or all bonus points to an application depending on the extent to which the application meets the priority. These points are in addition to any points the applicant earns under the selection criteria (see § 75.200(b)). The notice states the maximum number of additional points that the Secretary may award to an application depending upon how well the application meets the priority.

(ii) The Secretary may select an application that meets a priority over an application of comparable merit that does not meet the priority.

(3) ***Absolute preference.*** The Secretary may give an absolute preference to applications that meet a priority. The Secretary establishes a separate competition for applications that meet the priority and reserves all or part of a program's funds solely for that competition. The Secretary may adjust the amount reserved for the priority after determining the number of high-quality applications received.

[46 FR 3205, Jan. 14, 1981, as amended at 57 FR 30337, July 8, 1992; 60 FR 63873, Dec. 12, 1995; 89 FR 70320, Aug. 29, 2024]

Application Contents Cross Reference:
See § 75.200 for a description of discretionary and formula grant programs.

§ 75.109 Changes to applications.

An applicant may make changes to its application on or before the deadline date for submitting the application under the program.

[89 FR 70321, Aug. 29, 2024]

§ 75.110 Information regarding performance measurement.

(a) The Secretary may establish, in an application notice for a competition, one or more program performance measurement requirements, including requirements for performance measures, baseline data, or performance targets, and a requirement that applicants propose in their applications one or more of their own project-specific performance measures, baseline data, or performance targets and ensure that the applicant's project-specific performance measurement plan would, if well implemented, yield quality data.

(b) If the application notice establishes program performance measurement requirements, the applicant must also describe in the application—

(1)

(i) The data collection and reporting methods the applicant would use and why those methods are likely to yield reliable, valid, and meaningful performance data; and

(ii) If the Secretary requires applicants to collect data after the substantive work of a project is complete in order to measure progress toward attaining certain performance targets, the data-collection and reporting methods the applicant would use during the post-performance period and why those methods are likely to yield quality data.

(2) The applicant's capacity to collect and report the quality of the performance data, as evidenced by quality data collection, analysis, and reporting in other projects or research.

(c) If an application notice requires applicants to propose project-specific performance measures, baseline data, or performance targets, the application must include the following, as required by the application notice:

(1) ***Project-specific performance measures.*** How each proposed project-specific performance measure would: accurately measure the performance of the project; be consistent with the program performance measures established under paragraph (a) of this section; and be used to inform continuous improvement of the project.

(2) ***Baseline data.***

(i) Why each proposed baseline is valid and reliable, including an assessment of the quality data used to establish the baseline; or

(ii) If the applicant has determined that there are no established baseline data for a particular performance measure, an explanation of why there is no established baseline and of how and when, during the project period, the applicant would establish a valid baseline for the performance measure.

(3) ***Performance targets.*** Why each proposed performance target is ambitious yet achievable compared to the baseline for the performance measure and when, during the project period, the applicant would meet the performance target(s).

[89 FR 70321, Aug. 29, 2024]

§ 75.112 Include a proposed project period, timeline, project narrative, and a logic model or other conceptual framework.

(a) An application must propose a project period for the project.

(b) An application must include a narrative that describes how the applicant plans to meet each objective of the project and, as appropriate, how the applicant intends to use continuous improvement strategies in its project implementation based on periodic review of research, data, community input, or other feedback to advance the programmatic objectives most effectively and efficiently, in each budget period of the project.

(c) The Secretary may establish, in an application notice, a requirement to include a logic model or other conceptual framework.

(Approved by the Office of Management and Budget under control number 1875-0102)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994; 89 FR 70321, Aug. 29, 2024]

§ 75.117 Information needed for a multi-year project.

An applicant that proposes a multi-year project shall include in its application:

(a) Information that shows why a multi-year project is needed; and

(b) A budget narrative accompanied by a budget form prescribed by the Secretary, that provides budget information for each budget period of the proposed project period.

(Approved by the Office of Management and Budget under control number 1875-0102)

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994; 89 FR 70321, Aug. 29, 2024]

§ 75.118 Requirements for a continuation award.

(a) A recipient that wants to receive a continuation award shall submit a performance report that provides the most current performance and financial expenditure information, as directed by the Secretary, that is sufficient to meet the reporting requirements of 2 CFR 200.328 and 200.329 and 34 CFR 75.590 and 75.720.

(b) If a recipient fails to submit a performance report that meets the requirements of paragraph (a) of this section, the Secretary denies continued funding for the grant.

(Approved by the Office of Management and Budget under control number 1875-0102)

Cross Reference:
See 2 CFR 200.327, Financial reporting, and 200.328, Monitoring and reporting program performance; and 34 CFR 75.117, Information needed for a multi-year project, 75.250 through 75.253, Approval of multi-year projects, 75.590, Evaluation by the grantee, and 75.720, Financial and performance reports.

[59 FR 30261, June 10, 1994, as amended at 64 FR 50391, Sept. 16, 1999; 79 FR 76091, Dec. 19, 2014; 89 FR 70321, Aug. 29, 2024]

§ 75.119 Information needed if private school students participate.

If a program requires the applicant to provide an opportunity for participation of students enrolled in private schools, the application must include the information required of subgrantees under 34 CFR 76.656.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

SEPARATE APPLICATIONS—ALTERNATIVE PROGRAMS

§ 75.125 Submit a separate application to each program.

An applicant shall submit a separate application to each program under which it wants a grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987; 60 FR 46493, Sept. 6, 1995]

§ 75.126 Application must list all programs to which it is submitted.

If an applicant is submitting an application for the same project under more than one Federal program, the applicant shall list these programs in its application. The Secretary uses this information to avoid duplicate grants for the same project.

(Authority: 20 U.S.C. 1221e-3 and 3474)

GROUP APPLICATIONS

§ 75.127 Eligible parties may apply as a group.

(a) Eligible parties may apply as a group for a grant.

(b) Depending on the program under which a group of eligible parties seeks assistance, the term used to refer to the group may vary. The list that follows contains some of the terms used to identify a group of eligible parties:

(1) Combination of institutions of higher education.

(2) Consortium.

(3) Partnership.

(4) Joint applicants.

(5) Cooperative arrangements.

(c) In the case of a group application submitted in accordance with §§ 75.127 through 75.129, all parties in the group must be eligible applicants under the competition.

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70321, Aug. 29, 2024]

§ 75.128 Who acts as applicant; the group agreement.

(a) If a group of eligible parties applies for a grant, the members of the group shall either:

(1) Designate one member of the group to apply for the grant; or

(2) Establish a separate, eligible legal entity to apply for the grant.

(b) The members of the group shall enter into an agreement that:

(1) Details the activities that each member of the group plans to perform; and

(2) Binds each member of the group to every statement and assurance made by the applicant in the application.

(c) The applicant shall submit the agreement with its application.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.129 Legal responsibilities of each member of the group.

(a) If the Secretary makes a grant to a group of eligible applicants, the applicant for the group is the grantee and is legally responsible for:

(1) The use of all grant funds;

(2) Ensuring that the project is carried out by the group in accordance with Federal requirements; and

(3) Ensuring that indirect cost funds are determined as required under § 75.564(e).

(b) Each member of the group is legally responsible to:

(1) Carry out the activities it agrees to perform; and

(2) Use the funds that it receives under the agreement in accordance with Federal requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 59581, Nov. 17, 1994]

Competition Exceptions

§ 75.135 Competition exception for proposed implementation sites, implementation partners, or service providers.

(a) When entering into a contract with implementation sites or partners, an applicant is not required to comply with the competition requirements in 2 CFR 200.320(b), if—

(1) The contract is with an entity that agrees to provide a site or sites where the applicant would conduct the project activities under the grant;

(2) The implementation sites or partner entities that the applicant proposes to use are identified in the application for the grant; and

(3) The implementation sites or partner entities are included in the application in order to meet a regulatory, statutory, or priority requirement related to the competition.

(b) When entering into a contract for data collection, data analysis, evaluation services, or essential services, an applicant may select a provider using the informal, small-purchase procurement procedures in 2 CFR 200.320(a)(2), regardless of whether that applicant would otherwise be subject to that part or whether the evaluation contract would meet the standards for a small purchase order, if—

(1) The contract is with the data collection, data analysis, evaluation service, or essential service provider;

(2) The data collection, data analysis, evaluation service, or essential service provider that the applicant proposes to use is identified in the application for the grant; and

(3) The data collection, data analysis, evaluation service, or essential service provider is identified in the application in order to meet a statutory, regulatory, or priority requirement related to the competition.

(c) If the grantee relied on the exceptions under paragraph (a) or (b) of this section, the grantee must certify in its application that any employee, officer, or agent participating in the selection, award, or administration of a contract is free of any real or apparent conflict of interest and, if the grantee relied on the exceptions of paragraph (b) of this section, that the grantee used small purchase procedures to obtain the product or service.

(d) A grantee must obtain the Secretary's prior approval for any change to an implementation site, implementation partner, or data collection, data analysis, evaluation service, or essential service provider, if the grantee relied on the exceptions under paragraph (a) or (b) of this section to select the entity.

(e) The exceptions in paragraphs (a) and (b) of this section do not extend to the other procurement requirements in 2 CFR part 200 regarding contracting by grantees and subgrantees.

(f) For the purposes of this section, *essential service* means a product or service directly related to the grant that would, if not provided, have a detrimental effect on the grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[78 FR 49352, Aug. 13, 2013, as amended at 79 FR 76091, Dec. 19, 2014; 80 FR 67264, Nov. 2, 2015; 89 FR 70321, Aug. 29, 2024]

STATE COMMENT PROCEDURES

§ 75.155 Review procedures if State may comment on applications: Purpose of §§ 75.156-75.158.

If applicable statutes and regulations require that a specific State agency be given an opportunity to comment on each application, the State and the applicant shall use the procedures in §§ 75.156-75.158 for that purpose.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross Reference:
See 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities) for the regulations implementing the application review procedures that States may use under E.O. 12372.

[57 FR 30338, July 8, 1992, as amended at 89 FR 70321, Aug. 29, 2024]

§ 75.156 When an applicant under § 75.155 must submit its application to the State; proof of submission.

(a) Each applicant under a program covered by § 75.155 shall submit a copy of its application to the State on or before the deadline date for submitting its application to the Department.

(b) The applicant shall attach to its application a copy of its letter that requests the State to comment on the application.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.157 The State reviews each application.

A State that receives an application under § 75.156 may review and comment on the application.

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70321, Aug. 29, 2024]

§ 75.158 Deadlines for State comments.

(a) The Secretary may establish a deadline date for receipt of State comments on applications.

(b) The State shall make its comments in a written statement signed by an appropriate State official.

(c) The appropriate State official shall submit comments to the Secretary by the deadline date for State comments. The procedures in § 75.102(d) (how to meet a deadline) of this part apply to this submission.

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70321, Aug. 29, 2024]

§ 75.159 Effect of State comments or failure to comment.

(a) The Secretary considers those comments of the State that relate to:

(1) Any selection criterion that applies under the program; or

(2) Any other matter that affects the selection of projects for funding under the program.

(b) If the State fails to comment on an application on or before the deadline date for the appropriate program, the State waives its right to comment.

(c) If the applicant does not give the State an opportunity to comment, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§§ 75.190-75.192 [Reserved]

§§ 75.190-75.192 Consultation.

Subpart D—How Grants Are Made

SELECTION OF NEW DISCRETIONARY GRANT PROJECTS

§ 75.200 How applications for new discretionary grants and cooperative agreements are selected for funding; standards for use of cooperative agreements.

(a) The Secretary uses selection criteria to evaluate the applications submitted for new grants under a discretionary grant program.

(b) To evaluate the applications for new grants under the program, the Secretary may use—

(1) Selection criteria established under § 75.209;

(2) Selection criteria in § 75.210; or

(3) Any combination of criteria from paragraphs (b)(1) and (2) of this section.

(c)

(1) The Secretary may award a cooperative agreement instead of a grant if the Secretary determines that substantial involvement between the Department and the recipient is necessary to carry out a collaborative project.

(2) The Secretary uses the selection procedures in this subpart to select recipients of cooperative agreements.

[89 FR 70322, Aug. 29, 2024]

§ 75.201 How the selection criteria will be used.

(a) In the application package or a notice published in the FEDERAL REGISTER, the Secretary informs applicants of—

(1) The selection criteria chosen; and

(2) The factors selected for considering the selection criteria, if any.

(b) If points or weights are assigned to the selection criteria or factors, the Secretary informs applicants in the application package or a notice published in the FEDERAL REGISTER of—

(1) The total possible score for all of the criteria for a program; and

(2) The assigned weight or the maximum possible score for each criterion or factor under that criterion.

(c) If no points or weights are assigned to the selection criteria or selected factors, the Secretary evaluates each criterion equally and, within each criterion, each factor equally.

[62 FR 10401, Mar. 6, 1997, as amended at 89 FR 70322, Aug. 29, 2024]

§§ 75.202-75.206 [Reserved]

§ 75.209 Selection criteria based on statutory or regulatory provisions.

The Secretary may establish selection criteria and factors based on statutory or regulatory provisions that apply to the authorized program, which may include, but are not limited to, criteria and factors that reflect—

(a) Criteria contained in the program statute or regulations;

(b) Criteria in § 75.210;

(c) Allowable activities specified in the program statute or regulations;

(d) Application content requirements specified in applicable statutes and regulations;

(e) Program purposes, as described in the program statute or regulations; or

(f) Other pre-award and post-award conditions specified in the program statute or regulations.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[78 FR 49353, Aug. 13, 2013, as amended at 89 FR 70322, Aug. 29, 2024]

§ 75.210 General selection criteria.

In determining the selection criteria to evaluate applications submitted in a grant competition, the Secretary may select one or more of the following criteria and may select from among the list of optional factors under each criterion. The Secretary may define a selection criterion by selecting one or more specific factors within a criterion or assigning factors from one criterion to another criterion.

(a) ***Need for the project.***

(1) The Secretary considers the need for the proposed project.

(2) In determining the need for the proposed project, the Secretary considers one or more of the following factors:

(i) The data presented (including a comparison to local, State, regional, national, or international data) that demonstrates the issue, challenge, or opportunity to be addressed by the proposed project.

(ii) The extent to which the proposed project demonstrates the magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(iii) The extent to which the proposed project will provide support, resources, or services; or otherwise address the needs of the target population, including addressing the needs of underserved populations most affected by the issue, challenge, or opportunity, to be addressed by the proposed project and close gaps in educational opportunity.

(iv) The extent to which the proposed project will focus on serving or otherwise addressing the needs of underserved populations.

(v) The extent to which the specific nature and magnitude of gaps or challenges are identified and the extent to which these gaps or challenges will be addressed by the services, supports, infrastructure, or opportunities described in the proposed project.

(vi) The extent to which the proposed project will prepare individuals from underserved populations for employment in fields and careers in which there are demonstrated shortages.

(b) ***Significance.***

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers one or more of the following factors:

(i) The extent to which the proposed project is relevant at the national level.

(ii) The significance of the problem or issue as it affects educational access and opportunity, including the underlying or related challenges for underserved populations.

(iii) The extent to which findings from the project's implementation will contribute new knowledge to the field by increasing knowledge or understanding of educational challenges, including the underlying or related challenges, and effective strategies for addressing educational challenges and their effective implementation.

(iv) The potential contribution of the proposed project to improve the provision of rehabilitative services, increase the number or quality of rehabilitation counselors, or develop and implement effective strategies for providing vocational rehabilitation services to individuals with disabilities.

(v) The likelihood that the proposed project will result in systemic change that supports continuous, sustainable, and measurable improvement.

(vi) The potential contribution of the proposed project to the development and advancement of theory, knowledge, and practices in the field of study, including the extent to which the contributions may be used by other appropriate agencies, organizations, institutions, or entities.

(vii) The potential for generalizing from the findings or results of the proposed project.

(viii) The extent to which the proposed project is likely to build local, State, regional, or national capacity to provide, improve, sustain, or expand training or services that address the needs of underserved populations.

(ix) The extent to which the proposed project involves the development or demonstration of innovative and effective strategies that build on, or are alternatives to, existing strategies.

(x) The extent to which the proposed project is innovative and likely to be more effective compared to other efforts to address a similar problem.

(xi) The likely utility of the resources (such as materials, processes, techniques, or data infrastructure) that will result from the proposed project, including the potential for effective use in a variety of conditions, populations, or settings.

(xii) The extent to which the resources, tools, and implementation lessons of the proposed project will be disseminated in ways to the target population and local community that will enable them and others (including practitioners, researchers, education leaders, and partners) to implement similar strategies.

(xiii) The potential effective replicability of the proposed project or strategies, including, as appropriate, the potential for implementation by a variety of populations or settings.

(xiv) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially contributions toward improving teaching practice and student learning and achievement.

(xv) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in employment, independent living services, or both, as appropriate.

(xvi) The importance or magnitude of the results or outcomes likely to be attained by the proposed project that demonstrate its impact for the targeted underserved populations in terms of breadth and depth of services.

(xvii) The extent to which the proposed project introduces an innovative approach, such as a modification of an evidence-based project component to serve different populations, an extension of an existing evidence-based project component, a unique composition of various project components to explore combined effects, or development of an emerging project component that needs further testing.

(c) ***Quality of the project design.***

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers one or more of the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified, measurable, and ambitious yet achievable within the project period, and aligned with the purposes of the grant program.

(ii) The extent to which the design of the proposed project demonstrates meaningful community engagement and input to ensure that the project is appropriate to successfully address the needs of the target population or other identified needs and will be used to inform continuous improvement strategies.

(iii) The quality of the logic model or other conceptual framework underlying the proposed project, including how inputs are related to outcomes.

(iv) The extent to which the proposed project's logic model or other conceptual framework was developed based on engagement of a broad range of community members and partners.

(v) The extent to which the proposed project proposes specific, measurable targets, connected to strategies, activities, resources, outputs, and outcomes, and uses reliable administrative data to measure progress and inform continuous improvement.

(vi) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to enable successful achievement of project objectives.

(vii) The quality of the proposed demonstration design, such as qualitative and quantitative design, and procedures for documenting project activities and results for underserved populations.

(viii) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including valid and reliable information about the effectiveness of the approach or strategies employed by the project.

(ix) The extent to which the proposed development efforts include adequate quality controls, continuous improvement efforts, and, as appropriate, repeated testing of products.

(x) The extent to which the proposed project demonstrates that it is designed to build capacity and yield sustainable results that will extend beyond the project period.

(xi) The extent to which the design of the proposed project reflects the most recent and relevant knowledge and practices from research and effective practice.

(xii) The extent to which the proposed project represents an exceptional approach to meeting program purposes and requirements and serving the target population.

(xiii) The extent to which the proposed project represents an exceptional approach to any absolute priority or absolute priorities used in the competition.

(xiv) The extent to which the proposed project will integrate or build on ideas, strategies, and efforts from similar external projects to improve relevant outcomes, using existing funding streams from other programs or policies supported by community, State, and Federal resources.

(xv) The extent to which the proposed project is informed by similar past projects implemented by the applicant with demonstrated results.

(xvi) The extent to which the proposed project will include coordination with other Federal investments, as well as appropriate agencies and organizations providing similar services to the target population.

(xvii) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards and increased social, emotional, and educational development for students, including members of underserved populations.

(xviii) The extent to which the proposed project includes explicit plans for authentic, meaningful, and ongoing community member and partner engagement, including their involvement in planning, implementing, and revising project activities for underserved populations.

(xix) The extent to which the proposed project includes plans for consumer involvement.

(xx) The extent to which performance feedback and formative data are integral to the design of the proposed project and will be used to inform continuous improvement.

(xxi) The extent to which fellowship recipients or other project participants are to be selected on the basis of academic excellence.

(xxii) The extent to which the applicant demonstrates that it has the resources to operate the project beyond the project period, including a multiyear financial and operating model and accompanying plan; the demonstrated commitment of any partners; demonstration of broad support from community members and partners (such as State educational agencies, teachers' unions, families, business and industry, community members, and State vocational rehabilitation agencies) that are critical to the project's long-term success; or a plan for capacity-building by leveraging one or more of these types of resources.

(xxiii) The extent to which there is a plan to incorporate the project purposes, activities, or benefits into the ongoing work of the applicant beyond the end of the project period.

(xxiv) The extent to which the proposed project will increase efficiency in the use of time, staff, money, or other resources in order to improve results and increase productivity.

(xxv) The extent to which the proposed project will integrate with, or build on, similar or related efforts in order to improve relevant outcomes, using nonpublic funds or resources.

(xxvi) The extent to which the proposed project demonstrates a rationale that is aligned with the purposes of the grant program.

(xxvii) The extent to which the proposed project represents implementation of the evidence cited in support of the proposed project with fidelity.

(xxviii) The extent to which the applicant plans to allocate a significant portion of its requested funding to the evidence-based project components.

(xxix) The strength of the commitment from key decision-makers at proposed implementation sites.

(xxx) The extent to which the proposed project is supported by promising evidence.

(d) ***Quality of project services.***

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equitable and adequate access and participation for project participants who experience barriers based on one or more of the following: economic disadvantage; gender; race; ethnicity; color; national origin; disability; age; language; migration; living in a rural location; experiencing homelessness or housing insecurity; involvement with the justice system; pregnancy, parenting, or caregiver status; and sexual orientation. This determination includes the steps developed and described in the form Equity For Students, Teachers, And Other Program Beneficiaries (OMB Control No. 1894-0005) (section 427 of the General Education Provisions Act (20 U.S.C. 1228a)).

(3) In addition, the Secretary considers one or more of the following factors:

(i) The extent to which the services to be provided by the proposed project were determined with input from the community to be served to ensure that they are appropriate and responsive to the needs of the intended recipients or beneficiaries, including underserved populations, of those services.

(ii) The extent to which the proposed project is supported by the target population that it is intended to serve.

(iii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge and an evidence-based project component.

(iv) The likely benefit to the intended recipients, as indicated by the logic model or other conceptual framework, of the services to be provided.

(v) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to build recipient and project capacity in ways that lead to improvements in practice among the recipients of those services.

(vi) The extent to which the services to be provided by the proposed project are likely to provide long-term solutions to alleviate the personnel shortages that have been identified or are the focus of the proposed project.

(vii) The likelihood that the services to be provided by the proposed project will lead to meaningful improvements in the achievement of students as measured against rigorous and relevant standards.

(viii) The likelihood that the services to be provided by the proposed project will lead to meaningful improvements in early childhood and family outcomes.

(ix) The likelihood that the services to be provided by the proposed project will lead to meaningful improvements in the skills and competencies necessary to gain employment in high-quality jobs, careers, and industries or build capacity for independent living.

(x) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners, including those from underserved populations, to maximize the effectiveness of project services.

(xi) The extent to which the services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(xii) The extent to which the services to be provided by the proposed project are focused on recipients, community members, or project participants that are most underserved as demonstrated by the data relevant to the project.

(e) ***Quality of the project personnel.***

(1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant demonstrates that it has project personnel or a plan for hiring of personnel who are members of groups that have historically encountered barriers, or who have professional or personal experiences with barriers, based on one or more of the following: economic disadvantage; gender; race; ethnicity; color; national origin; disability; age; language; migration; living in a rural location; experiencing homelessness or housing insecurity; involvement with the justice system; pregnancy, parenting, or caregiver status; and sexual orientation.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The extent to which the project director or principal investigator, when hired, has the qualifications required for the project, including formal training or work experience in fields related to the objectives of the project and experience in designing, managing, or implementing similar projects for the target population to be served by the project.

(ii) The extent to which the key personnel in the project, when hired, have the qualifications required for the proposed project, including formal training or work experience in fields related to the objectives of the project, and represent or have lived experiences of the target population.

(iii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(iv) The extent to which the proposed project team maximizes diverse perspectives, for example by reflecting the lived experiences of project participants, or relevant experience working with the target population.

(v) The extent to which the proposed planning, implementing, and evaluating project team are familiar with the assets, needs, and other contextual considerations of the proposed implementation sites.

(f) ***Adequacy of resources.***

(1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers one or more of the following factors:

(i) The adequacy of support for the project, including facilities, equipment, supplies, and other resources, from the applicant or the lead applicant organization.

(ii) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(iii) The extent to which the budget is adequate to support the proposed project and the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(iv) The extent to which the costs are reasonable in relation to the number of persons to be served, the depth and intensity of services, and the anticipated results and benefits.

(v) The extent to which the costs of the proposed project would permit other entities to replicate the project.

(vi) The level of initial matching funds or other commitment from partners, indicating the likelihood for potential continued support of the project after Federal funding ends.

(vii) The potential for the purposes, activities, or benefits of the proposed project to be institutionalized into the ongoing practices and programs of the applicant, agency, or organization and continue after Federal funding ends.

(g) ***Quality of the management plan.***

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers one or more of the following factors:

(i) The feasibility of the management plan to achieve project objectives and goals on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The adequacy of plans for ensuring the use of quantitative and qualitative data, including meaningful community member and partner input, to inform continuous improvement in the operation of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality and accessible products and services from the proposed project for the target population.

(iv) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(v) How the applicant will ensure that a diversity of perspectives, including those from underserved populations, are brought to bear in the design, implementation, operation, evaluation, and improvement of the proposed project, including those of parents, educators, community-based organizations, civil rights organizations, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

(h) ***Quality of the project evaluation or other evidence-building.***

(1) The Secretary considers the quality of the evaluation or other evidence-building of the proposed project.

(2) In determining the quality of the evaluation or other evidence-building, the Secretary considers one or more of the following factors:

(i) The extent to which the methods of evaluation or other evidence-building are thorough, feasible, relevant, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation or other evidence-building are appropriate to the context within which the project operates and the target population of the proposed project.

(iii) The extent to which the methods of evaluation or other evidence-building are designed to measure the fidelity of implementation of the project.

(iv) The extent to which the methods of evaluation or other evidence-building include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quality data that are quantitative and qualitative.

(v) The extent to which the methods of evaluation or other evidence-building will provide guidance for quality assurance and continuous improvement.

(vi) The extent to which the methods of evaluation or other evidence-building will provide performance feedback and provide formative, diagnostic, or interim data that is a periodic assessment of progress toward achieving intended outcomes.

(vii) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing and potential implementation in other settings.

(viii) The extent to which the methods of evaluation will, if well implemented, produce evidence about the effectiveness of the project on relevant outcomes that would meet the What Works Clearinghouse standards without reservations, as described in the What Works Clearinghouse Handbooks.

(ix) The extent to which the methods of evaluation will, if well implemented, produce evidence about the effectiveness of the project on relevant outcomes that would meet the What Works Clearinghouse standards with or without reservations, as described in the What Works Clearinghouse Handbooks.

(x) The extent to which the methods of evaluation include an experimental study, a quasi-experimental design study, or a correlational study with statistical controls for selection bias (such as regression methods to account for differences between a treatment group and a comparison group) to assess the effectiveness of the project on relevant outcomes.

(xi) The extent to which the evaluation employs an appropriate analytic strategy to build evidence about the relationship between key project components, mediators, and outcomes and inform decisions on which project components to continue, revise, or discontinue.

(xii) The quality of the evaluation plan for measuring fidelity of implementation, including thresholds for acceptable implementation, to inform how implementation is associated with outcomes.

(xiii) The extent to which the evaluation plan includes a dissemination strategy that is likely to promote others' learning from the project.

(xiv) The extent to which the evaluator has the qualifications, including the relevant training, experience, and independence, required to conduct an evaluation of the proposed project, including experience conducting evaluations of similar methodology as proposed and with evaluations for the proposed population and setting.

(xv) The extent to which the proposed project plan includes sufficient resources to conduct the project evaluation effectively.

(xvi) The extent to which the evaluation will access and link high-quality administrative data from authoritative sources to improve evaluation quality and comprehensiveness.

(i) ***Strategy to scale.***

(1) The Secretary considers the applicant's strategy to effectively scale the proposed project for recipients, community members, and partners, including to underserved populations.

(2) In determining the applicant's strategy to effectively scale the proposed project, the Secretary considers one or more of the following factors:

(i) The quality of the strategies to reach scale by expanding the project to new populations or settings.

(ii) The applicant's capacity (such as qualified personnel, financial resources, or management capacity), together with any project partners, to bring the proposed project effectively to scale on a national or regional level during the grant period.

(iii) The applicant's capacity (such as qualified personnel, financial resources, or management capacity), together with any project partners, to further develop and bring the proposed project effectively to scale on a national level during the grant period, based on the findings of the proposed project.

(iv) The quality of the mechanisms the applicant will use to broadly disseminate information and resources on its project to support further development, adaptation, or replication by other entities to implement project components in additional settings or with other populations.

(v) The extent to which there is unmet demand for broader implementation of the project that is aligned with the proposed level of scale.

(vi) The extent to which there is a market of potential entities that will commit resources toward implementation.

(vii) The quality of the strategies to scale that take into account and are responsive to previous barriers to expansion.

(viii) The quality of the plan to deliver project services more efficiently at scale and maintain effectiveness.

(ix) The quality of the plan to develop revenue sources that will make the project self-sustaining.

(x) The extent to which the project will create reusable data and evaluation tools and techniques that facilitate expansion and support continuous improvement.

[89 FR 70322, Aug. 29, 2024]

§ 75.211 Selection criteria for unsolicited applications.

(a) If the Secretary considers an unsolicited application under 34 CFR 75.222(a)(2)(ii), the Secretary uses the selection criteria and factors, if any, used for the competition under which the application could have been funded.

(b) If the Secretary considers an unsolicited application under 34 CFR 75.222(a)(2)(iii), the Secretary selects from among the criteria in § 75.210(b), and may select from among the specific factors listed under each criterion, the criteria that are most appropriate to evaluate the activities proposed in the application.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[62 FR 10403, Mar. 6, 1997]

SELECTION PROCEDURES

§ 75.215 How the Department selects a new project.

Sections 75.216 through 75.222 describe the process the Secretary uses to select applications for new grants. All these sections apply to a discretionary grant program. However, only § 75.216 applies also to a formula grant program. (See § 75.1(b) Discretionary grant programs, § 75.1(c) Formula grant programs, and § 75.200, How applications for new discretionary grants and cooperative agreements are selected for funding; standards for use of cooperative agreements.)

[89 FR 70326, Aug. 29, 2024]

§ 75.216 Applications that the Secretary may choose not to evaluate for funding.

The Secretary may choose not to evaluate an application if—

(a) The applicant does not comply with all of the procedural rules that govern the submission of the application; or

(b) The application does not contain the information required under the program.

[89 FR 70326, Aug. 29, 2024]

§ 75.217 How the Secretary selects applications for new grants.

(a) The Secretary selects applications for new grants on the basis of applicable statutes and regulations, the selection criteria, and any priorities or other requirements that have been published in the FEDERAL REGISTER and apply to the selection of those applications.

(b)

(1) The Secretary may use experts to evaluate the applications submitted under a program.

(2) These experts may include persons who are not employees of the Federal Government.

(c) The Secretary prepares a rank order of the applications based on the evaluation of their quality according to the selection criteria and any competitive preference points.

(d) The Secretary then determines the order in which applications will be selected for grants. The Secretary considers the following in making these determinations:

(1) The information in each application.

(2) The rank ordering of the applications.

(3) Any other information—

(i) Relevant to a criterion, priority, or other requirement that applies to the selection of applications for new grants;

(ii) Concerning the applicant's performance and use of funds under a previous award under any Department program; and

(iii) Concerning the applicant's failure under any Department program to submit a performance report or its submission of a performance report of unacceptable quality.

[52 FR 27804, July 24, 1987, as amended at 62 FR 4167, Jan. 29, 1997; 89 FR 70322, Aug. 29, 2024]

§ 75.218 Applications not evaluated or selected for funding.

(a) The Secretary informs an applicant if its application—

(1) Is not evaluated; or

(2) Is not selected for funding.

(b) If an applicant requests an explanation of the reason its application was not evaluated or selected Secretary provides that explanation.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[57 FR 30338, July 8, 1992]

§ 75.219 Exceptions to the procedures under § 75.217.

The Secretary may select an application for funding without following the procedures in § 75.217 if:

(a) The objectives of the project cannot be achieved unless the Secretary makes the grant before the date grants can be made under the procedures in § 75.217;

(b)

(1) The application was submitted under the program's preceding competition;

(2) The application was not selected for funding because the application was mishandled or improperly processed by the Department; and

(3) The application has been rated highly enough to deserve selection under § 75.217; or

(c) The Secretary receives an unsolicited application that meets the requirements of § 75.222.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 60 FR 12096, Mar. 3, 1995; 89 FR 70326, Aug. 29, 2024]

§ 75.220 Procedures the Department uses under § 75.219(a).

If the special circumstances of § 75.219(a) appear to exist for an application, the Secretary uses the following procedures:

(a) The Secretary assembles a board to review the application.

(b) The board consists of:

(1) A program officer of the program under which the applicant wants a grant;

(2) An employee from the Office of Finance and Operations (OFO) with responsibility for grant policy; and

(3) A Department employee who is not a program officer of the program but who is qualified to evaluate the application.

(c) The board reviews the application to decide if:

(1) The special circumstances under § 75.219(a) are satisfied;

(2) The application rates high enough, based on the selection criteria, priorities, and other requirements that apply to the program, to deserve selection; and

(3) Selection of the application will not have an adverse impact on the budget of the program.

(d) The board forwards the results of its review to the Secretary.

(e) If each of the conditions in paragraph (c) of this section is satisfied, the Secretary may select the application for funding.

(f) Even if the Secretary does not select the application for funding, the applicant may submit its application under the procedures in Subpart C of this part.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 64 FR 50391, Sept. 16, 1999; 89 FR 70326, Aug. 29, 2024]

§ 75.221 Procedures the Department uses under § 75.219(b).

If the Secretary has documentary evidence that the special circumstances of § 75.219(b) exist for an application, the Secretary may select the application for funding.

[89 FR 70326, Aug. 29, 2024]

§ 75.222 Procedures the Department uses under § 75.219(c).

If the Secretary receives an unsolicited application, the Secretary may consider the application under the following procedures unless the Secretary has published a notice in the FEDERAL REGISTER stating that the program that would fund the application would not consider unsolicited applications:

(a)

(1) The Secretary determines whether the application could be funded under a competition planned or conducted for the fiscal year for which funds would be used to fund the application.

(2)

(i) If the application could be funded under a competition described in paragraph (a)(1) of this section and the deadline for submission of applications has not passed, the Secretary refers the application to the appropriate competition for consideration under the procedures in § 75.217.

(ii)

(A) If the application could have been funded under a competition described in paragraph (a)(1) of this section and the deadline for submission of applications has passed, the Secretary may consider the application only in exceptional circumstances, as determined by the Secretary.

(B) If the Secretary considers an application under paragraph (a)(2)(ii)(A) of this section, the Secretary considers the application under paragraphs (b) through (e) of this section.

(iii) If the application could not be funded under a competition described in paragraph (a)(1) of this section, the Secretary considers the application under paragraphs (b) through (e) of this section.

(b) If an application may be considered under paragraphs (a)(2)(ii) or (iii) of this section, the Secretary determines if—

(1) There is a substantial likelihood that the application is of exceptional quality and national significance for a program administered by the Department;

(2) The application meets the requirements of all applicable statutes and regulations that apply to the program; and

(3) Selection of the project will not have an adverse impact on the funds available for other awards planned for the program.

(c) If the Secretary determines that the criteria in paragraph (b) of this section have been met, the Secretary assembles a panel of experts that does not include any employees of the Department to review the application.

(d) The experts—

(1) Evaluate the application based on the selection criteria; and

(2) Determine whether the application is of such exceptional quality and national significance that it should be funded as an unsolicited application.

(e) If the experts highly rate the application and determine that the application is of such exceptional quality and national significance that it should be funded as an unsolicited application, the Secretary may fund the application.

Note 1 to § 75.222: To ensure prompt consideration, an applicant submitting an unsolicited application should send the application, marked “Unsolicited Application” on the outside, to U.S. Department of Education, OFO/G6 Functional Application Team, Mail Stop 5C231, 400 Maryland Avenue SW, Washington, DC 20202-4260.

[60 FR 12096, Mar. 3, 1995, as amended at 89 FR 70326, Aug. 29, 2024]

§ 75.223 [Reserved]

§ 75.224 What are the procedures for using a multiple tier review process to evaluate applications?

(a) The Secretary may use a multiple tier review process to evaluate applications.

(b) The Secretary may refuse to review applications in any tier that do not meet a minimum cut-off score established for the prior tier.

(c) The Secretary may establish the minimum cut-off score—

(1) In the application notice published in the FEDERAL REGISTER; or

(2) After reviewing the applications to determine the overall range in the quality of applications received.

(d) The Secretary may, in any tier—

(1) Use more than one group of experts to gain different perspectives on an application; and

(2) Refuse to consider an application if the application is rejected under paragraph (b) of this section by any one of the groups used in the prior tier.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[66 FR 60138, Nov. 30, 2001]

§ 75.225 What procedures does the Secretary use when deciding to give special consideration to new potential grantees?

(a) If the Secretary determines that special consideration of new potential grantees is appropriate, the Secretary may: provide competitive preference to applicants that meet one or more of the conditions in paragraph (b) of this section; or provide special consideration for new potential grantees by establishing one competition for those applicants that meet one or more of the conditions in paragraph (b) of this section and a separate competition for applicants that meet the corresponding conditions in paragraph (c) of this section.

(b) As used in this section, "new potential grantee" means an applicant that meets one or more of the following conditions—

(1) The applicant has never received a grant or cooperative agreement, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129 that received a grant or cooperative agreement, under the program from which it seeks funds;

(2) The applicant does not, as of the deadline date for submission of applications, have an active grant or cooperative agreement, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129 that has an active grant or cooperative agreement, under the program from which it seeks funds;

(3) The applicant has not had an active discretionary grant or cooperative agreement under the program from which it seeks funds, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129, within one of the following number of years before the deadline date for submission of applications under the program:

(i) 1 year;

(ii) 2 years;

(iii) 3 years;

(iv) 4 years;

(v) 5 years;

(vi) 6 years; or

(vii) 7 years;

(4) The applicant has not had an active discretionary grant or cooperative agreement from the Department, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129, within one of the following number of years before the deadline date for submission of applications under the program from which it seeks funds:

(i) 1 year;

(ii) 2 years;

(iii) 3 years;

(iv) 4 years;

(v) 5 years;

(vi) 6 years; or

(vii) 7 years;

(5) The applicant has not had an active contract from the Department within one of the following number of years before the deadline date for submission of applications under the program for which it seeks funds:

(i) 1 year;

(ii) 2 years;

(iii) 3 years;

(iv) 4 years;

(v) 5 years;

(vi) 6 years; or

(vii) 7 years; or

(6) Any combination of paragraphs (b)(1) through (5) of this section.

(c) As used in this section, an “application from a grantee that is not a new potential grantee” means an applicant that meets one or more of the following conditions—

(1) The applicant has received a grant or cooperative agreement, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129 that received a grant or cooperative agreement, under the program from which it seeks funds;

(2) The applicant has, as of the deadline date for submission of applications, an active grant or cooperative agreement, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129 that has an active grant or cooperative agreement, under the program from which it seeks funds;

(3) The applicant has had an active discretionary grant or cooperative agreement under the program from which it seeks funds, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129, within one of the following number of years before the deadline date for submission of applications under the program:

(i) 1 year;

(ii) 2 years;

(iii) 3 years;

(iv) 4 years;

(v) 5 years;

(vi) 6 years; or

(vii) 7 years;

(4) The applicant has had an active discretionary grant or cooperative agreement from the Department, including through membership in a group application submitted in accordance with §§ 75.127 through 75.129, within one of the following number of years before the deadline date for submission of applications under the program from which it seeks funds:

(i) 1 year;

(ii) 2 years;

(iii) 3 years;

(iv) 4 years;

(v) 5 years;

(vi) 6 years; or

(vii) 7 years;

(5) The applicant has had an active contract from the Department within one of the following number of years before the deadline date for submission of applications under the program from which it seeks funds:

(i) 1 year;

(ii) 2 years;

(iii) 3 years;

(iv) 4 years;

(v) 5 years;

(vi) 6 years; or

(vii) 7 years.

(d) For the purpose of this section, a grant, cooperative agreement, or contract is active until the end of the grant's, cooperative agreement's, or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

[89 FR 70326, Aug. 29, 2024]

§ 75.226 What procedures does the Secretary use if the Secretary decides to give special consideration to an application supported by strong evidence, moderate evidence, or promising evidence, or an application that demonstrates a rationale?

If the Secretary determines that special consideration of applications supported by strong evidence, moderate evidence, promising evidence, or evidence that demonstrates a rationale is appropriate, the Secretary may establish a separate competition under the procedures in § 75.105(c)(3), or provide competitive preference under the procedures in § 75.105(c)(2), for applications that are supported by—

(a) Strong evidence;

(b) Moderate evidence;

(c) Promising evidence; or

(d) Evidence that demonstrates a rationale.

[89 FR 70327, Aug. 29, 2024]

§ 75.227 What procedures does the Secretary use if the Secretary decides to give special consideration to rural applicants?

(a) If the Secretary determines that special consideration of rural applicants is appropriate, the Secretary may: provide competitive preference to applicants that meet one or more of the conditions in paragraph (b) of this section; or provide special consideration for rural applicants by establishing one competition for those applicants that meet one or more of the conditions in paragraph (b) of this section and a separate competition for applicants that meet the corresponding conditions in paragraph (c).

(b) As used in this section, “rural applicant” means an applicant that meets one or more of the following conditions:

(1) The applicant proposes to serve a local educational agency (LEA) that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under title V, part B of the Elementary and Secondary Education Act of 1965.

(2) The applicant proposes to serve a community that is served by one or more LEAs—

(i) With a locale code of 32, 33, 41, 42, or 43; or

(ii) With a locale code of 41, 42, or 43.

(3) The applicant proposes a project in which a majority of the schools served—

(i) Have a locale code of 32, 33, 41, 42, or 43; or

(ii) Have a locale code of 41, 42, or 43.

(4) The applicant is an institution of higher education with a rural campus setting, or the applicant proposes to serve a campus with a rural setting. Rural settings include one or more of the following: Town-Fringe, Town-Distant, Town-Remote, Rural Fringe, Rural-Distant, and Rural-Remote, as defined by the National Center for Education Statistics College Navigator search tool.

(c) As used in this section, a "non-rural applicant" means an applicant that meets one or more of the following conditions—

(1) The applicant does not propose to serve a local educational agency (LEA) that is eligible under the Small Rural School Achievement program or the Rural and Low-Income School program authorized under title V, part B of the Elementary and Secondary Education Act of 1965.

(2) The applicant does not propose to serve a community that is served by one or more LEAs—

(i) With a locale code of 32, 33, 41, 42, or 43; or

(ii) With a locale code of 41, 42, or 43.

(3) The applicant proposes a project in which a majority of the schools served—

(i) Have a locale code of 32, 33, 41, 42, or 43; or

(ii) Have a locale code of 41, 42, or 43.

(4) The applicant is not an institution of higher education with a rural campus setting, or the applicant proposes to serve a campus with a rural setting. Rural settings include one or more of the following: Town-Fringe, Town-Distant, Town-Remote, Rural Fringe, Rural-Distant, and Rural-Remote, as defined by the National Center for Education Statistics College Navigator search tool.

[89 FR 70327, Aug. 29, 2024]

PROCEDURES TO MAKE A GRANT]

§ 75.230 How the Department makes a grant.

(a) If the Secretary selects an application under § 75.217, § 75.220, or § 75.222, the Secretary follows the procedures in §§ 75.231 through 75.236 to set the amount and determine the conditions of a grant. Sections 75.235 through 75.236 also apply to grants under formula grant programs. (See § 75.200 for more information.)

[89 FR 70327, Aug. 29, 2024]

§ 75.231 Additional information.

After selecting an application for funding, the Secretary may require the applicant to submit additional information.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.232 The cost analysis; basis for grant amount.

(a) Before the Secretary sets the amount of a new grant, the Secretary does a cost analysis of the project. The Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations.

(b) The Secretary uses the cost analysis as a basis for determining the amount of the grant to the applicant. The cost analysis shows whether the applicant can achieve the objectives of the project with reasonable efficiency and economy under the budget in the application.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

§ 75.233 Setting the amount of the grant.

(a) Subject to any applicable matching or cost-sharing requirements, the Secretary may fund up to 100 percent of the allowable costs in the applicant's budget.

(b) In deciding what percentage of the allowable costs to fund, the Secretary may consider any other financial resources available to the applicant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[57 FR 30338, July 8, 1992]

§ 75.234 The conditions of the grant.

(a) The Secretary makes a grant to an applicant only after determining—

(1) The approved costs; and

(2) Any specific conditions.

(b) In awarding a cooperative agreement, the Secretary includes conditions that state the explicit character and extent of anticipated collaboration between the Department and the recipient.

[57 FR 30338, July 8, 1992, as amended at 89 FR 70328, Aug. 29, 2024]

§ 75.235 The notification of grant award.

(a) To make a grant, the Secretary issues a notification of grant award and sends it to the grantee.

(b) The notification of grant award sets the amount of the grant award and establishes other specific conditions, if any.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30338, July 8, 1992]

§ 75.236 Effect of the grant.

The grant obligates both the Federal Government and the grantee to the requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross Reference:
See 2 CFR 200.308, Revision of budget and program plans.

APPROVAL OF MULTI-YEAR PROJECTS

§ 75.250 Maximum project period.

The Secretary may approve a project period of up to 60 months to perform the substantive work of a grant unless an applicable statute provides otherwise.

[89 FR 70328, Aug. 29, 2024]

§ 75.251 Budget periods.

(a) The Secretary usually approves a budget period of not more than 12 months, even if the project has a multi-year project period.

(b) If the Secretary approves a multi-year project period, the Secretary:

(1) Makes a grant to the project for the initial budget period; and

(2) Indicates his or her intention to make contination awards to fund the remainder of the project period.

(c) If the Secretary funds a multi-year data collection period, the Secretary may fund the data collection period through separate budget periods and fund those budget periods in the same manner as those periods are funded during the project period.

[45 FR 22497, Apr. 3, 1980, as amended at 78 FR 49354, Aug. 13, 2013]

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.253 Continuation of a multiyear project after the first budget period.

(a) ***Continuation award.*** A grantee, in order to receive a continuation award from the Secretary for a budget period after the first budget period of an approved multiyear project, must—

(1) Either—

(i) Demonstrate that it has made substantial progress in achieving—

(A) The goals and objectives of the project; and

(B) The performance targets in the grantee's approved application, if the Secretary established performance measurement requirements for the grant in the application notice; or

(ii) Obtain the Secretary's approval for changes to the project that—

(A) Do not increase the amount of funds obligated to the project by the Secretary; and

(B) Enable the grantee to achieve the goals and objectives of the project and meet the performance targets of the project, if any, without changing the scope or objectives of the project;

(2) Submit all reports as required by § 75.118;

(3) Continue to meet all applicable eligibility requirements of the grant program;

(4) Maintain financial and administrative management systems that meet the requirements in 2 CFR 200.302 and 200.303; and

(5) Receive a determination from the Secretary that continuation of the project is in the best interest of the Federal Government.

(b) ***Information considered in making a continuation award.*** In determining whether the grantee has met the requirements described in paragraph (a) of this section, the Secretary may consider any relevant information regarding grantee performance. This includes considering reports required by § 75.118, performance measures established under § 75.110, financial information required by 2 CFR part 200, and any other relevant information.

(c) ***Funding for continuation awards.*** Subject to the criteria in paragraphs (a) and (b) of this section, in selecting applications for funding under a program, the Secretary gives priority to continuation awards over new grants.

(d) ***Budget period.*** If the Secretary makes a continuation award under this section—

(1) The Secretary makes the award under §§ 75.231 through 75.236; and

(2) The new budget period begins on the day after the previous budget period ends.

(e) ***Amount of continuation award.***

(1) Within the original project period of the grant and notwithstanding any requirements in 2 CFR part 200, a grantee may expend funds that have not been obligated at the end of a budget period for obligations in subsequent budget periods if—

(i) The obligation is for an allowable cost within the approved scope and objectives of the project; and

(ii) The obligation is not otherwise prohibited by applicable statutes, regulations, or the conditions of an award.

(2) The Secretary may—

(i) Require the grantee to submit a written statement describing how the funds made available under paragraph (e)(1) of this section will be used; and

(ii) Determine the amount of new funds that the Department will make available for the subsequent budget period after considering the statement the grantee provides under paragraph (e)(2)(i) of this section and any other information available to the Secretary about the use of funds under the grant.

(3) In determining the amount of new funds to make available to a grantee under this section, the Secretary considers whether the unobligated funds made available are needed to complete activities that were planned for completion in the prior budget period.

(4) A decision to reduce the amount of a continuation award under this paragraph (e) does not entitle a grantee to reconsideration under 2 CFR 200.342.

(f) ***Decision not to make a continuation award.*** The Secretary may decide not to make a continuation award if—

(1) A grantee fails to meet any of the requirements in paragraph (a) of this section; or

(2) A grantee fails to ensure that data submitted to the Department as a condition of the grant meet the definition of "quality data" in 34 CFR 77.1(c) and does not have a plan acceptable to the Secretary for addressing data-quality issues in the next budget period.

(g) ***Request for reconsideration.*** If the Secretary decides not to make a continuation award under this section, the Secretary will notify the grantee of that decision, the grounds on which it is based, and, consistent with 2 CFR 200.342, provide the grantee with an opportunity to request reconsideration of the decision.

(1) A request for reconsideration must—

(i) Be submitted in writing to the Department official identified in the notice denying the continuation award by the date specified in that notice; and

(ii) Set forth the grantee's basis for disagreeing with the Secretary's decision not to make a continuation award and include relevant supporting documentation.

(2) The Secretary will consider the request for reconsideration.

(h) ***No-cost extension when a continuation award is not made.*** If the Secretary decides not to make a continuation award under this section, the Secretary may authorize a no-cost extension of the last budget period of the grant in order to provide for the orderly closeout of the grant.

(i) ***A decision to reduce or not to make a continuation award does not constitute withholding.*** A decision by the Secretary to reduce the amount of a continuation award under paragraph (e) of this section or to not make a continuation award under paragraph (f) of this section does not constitute a withholding under section 455 of GEPA (20 U.S.C. 1234d).

[89 FR 70328, Aug. 29, 2024]

§ 75.254 Data collection period.

(a) The Secretary may approve a data collection period for a grant for a period of up to 72 months after the end of the project period and provide funds for the data collection period for the purpose of collecting, analyzing, and reporting performance measurement data on the project.

(b) If the Secretary plans to approve a data collection period, the Secretary may inform applicants of the Secretary's intent to approve data collection periods in the application notice published for a competition or may decide to fund data collection periods after grantees have started their project periods.

(c) If the Secretary informs applicants of the intent to approve data collection periods in the notice inviting applications, the Secretary may require applicants to include in the application a budget for, and description of, a data collection period for a period of up to 72 months, as specified in the notice inviting applications, after the end of the project period.

[89 FR 70328, Aug. 29, 2024]

MISCELLANEOUS

§ 75.260 Allotments and reallotments.

(a) Under some of the programs covered by this part, the Secretary allots funds under a statutory or regulatory formula.

(b) Any reallotment to other grantees will be made by the Secretary in accordance with applicable statutes and regulations.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 89 FR 70329, Aug. 29, 2024]

§ 75.261 Extension of a project period.

(a) ***One-time extension of project period without prior approval.*** A grantee may extend the project period of an award one time, for a period up to 12 months, without the prior approval of the Secretary, if—

(1) The grantee meets the requirements for extension in 2 CFR 200.308(e)(2); and

(2) The extension is not otherwise prohibited by statute, regulation, or the conditions of an award.

(b) ***Extension of project period with prior approval.*** At the conclusion of the project period extension authorized under paragraph (a) of this section, or in any case in which a project period extension is not authorized under paragraph (a) of this section, a grantee, with prior approval of the Secretary, may extend a project for an additional period if—

(1) The extension is not otherwise prohibited by statute, regulations, or the conditions of an award;

(2) The extension does not involve the obligation of additional Federal funds;

(3) The extension is to carry out the approved objectives and scope of the project; and

(4)

(i) The Secretary determines that, due to special or unusual circumstances applicable to a class of grantees, the project periods for the grantees should be extended; or

(ii)

(A) The Secretary determines that special or unusual circumstances would delay completion of the project beyond the end of the project period;

(B) The grantee requests an extension of the project period at least 45 calendar days before the end of the project period; and

(C) The grantee provides a written statement, before the end of the project period, of the reasons the extension is appropriate under paragraph (b)(4)(ii)(A) of this section and the period for which the project extension is requested.

(c) ***Waiver.*** The Secretary may waive the requirement in paragraph (b)(4)(ii) of this section if—

(1) The grantee could not reasonably have known of the need for the extension on or before the start of the 45-day period; or

(2) The failure to give notice on or before the start of the 45-day period was unavoidable.

[89 FR 70329, Aug. 29, 2024]

§ 75.262 Conversion of a grant or a cooperative agreement.

(a)

(1) The Secretary may convert a grant to a cooperative agreement or a cooperative agreement to a grant at the time a continuation award is made under § 75.253.

(2) In deciding whether to convert a grant to a cooperative agreement or a cooperative agreement to a grant, the Secretary considers the factors included in § 75.200(b) (4) and (5).

(b) The Secretary and a recipient may agree at any time to convert a grant to a cooperative agreement or a cooperative agreement to a grant, subject to the factors included in § 75.200(b) (4) and (5).

(Authority: 20 U.S.C. 1221e-3 and 3474)

[57 FR 30339, July 8, 1992]

§ 75.263 Pre-award costs; waiver of approval.

A grantee may incur pre-award costs as specified in 2 CFR 200.308(d)(1) unless—

(a) The Department regulations other than 2 CFR part 200 or a statute prohibit these costs; or

(b) The conditions of the award prohibit these costs.

[80 FR 67264, Nov. 2, 2015, as amended at 89 FR 70329, Aug. 29, 2024]

§ 75.264 Transfers among budget categories.

A grantee may make transfers as specified in 2 CFR 200.308 unless—

(a) ED regulations other than those in 2 CFR part 200 or a statute prohibit these transfers; or

(b) The conditions of the grant prohibit these transfers.

[79 FR 76092, Dec. 19, 2014, as amended at 89 FR 70329, Aug. 29, 2024]

Subpart E—What Conditions Must Be Met by a Grantee?

NONDISCRIMINATION

§ 75.500 Constitutional rights, freedom of inquiry, and Federal statutes and regulations on nondiscrimination.

(a) Each grantee must comply with the following statutes and regulations:

TABLE 1 TO PARAGRAPH (a)

Subject	Statute	Regulations
Discrimination on the basis of race, color, or national origin	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*)	34 CFR part 100.
Discrimination on the basis of disability	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)	34 CFR part 104.
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)	34 CFR part 106.
Discrimination on the basis of age	Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*)	34 CFR part 110.

(b)

(1) Each grantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is public and that is legally required to abide by the First Amendment to the U.S. Constitution (hereinafter "public institution"), must also comply with the First Amendment to the U.S. Constitution, including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom, as a material condition of the Department's grant. The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment. A final judgment is a judgment that the public institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the public institution to be in compliance with the First Amendment.

(2) Each grantee that is a public institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(c)

(1) Each grantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is private (hereinafter "private institution") must comply with its stated institutional policies regarding freedom of speech, including academic freedom, as a material condition of the Department's grant. The Department will determine that a private institution has not complied with these stated institutional policies only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution,

violated its stated institutional policy regarding freedom of speech or academic freedom. A final judgment is a judgment that the private institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the private institution to be in compliance with its stated institutional policies.

(2) Each grantee that is a private institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(d) As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

(e) A grantee that is a covered entity as defined in 34 CFR 108.3 shall comply with the nondiscrimination requirements of the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 CFR part 108.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[85 FR 59978, Sept. 23, 2020, as amended at 89 FR 70329, Aug. 29, 2024]

PROJECT STAFF

§ 75.511 Waiver of requirement for a full-time project director.

(a) If regulations under a program require a full-time project director, the Secretary may waive that requirement under the following conditions:

(1) The project will not be adversely affected by the waiver.

(2)

(i) The project director is needed to coordinate two or more related projects; or

(ii) The project director must teach a minimum number of hours to retain faculty status.

(b) The waiver either permits the grantee:

(1) To use a part-time project director; or

(2) Not to use any project director.

(c)

(1) An applicant or a grantee may request the waiver.

(2) The request must be in writing and must demonstrate that a waiver is appropriate under this section.

(3) The Secretary gives the waiver in writing. The waiver is effective on the date the Secretary signs the waiver.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross Reference:
See 2 CFR 200.308, Revision of budget and program plans.

§ 75.515 Use of consultants.

(a) Subject to Federal statutes and regulations, a grantee shall use its general policies and practices when it hires, uses, and pays a consultant as part of the project staff.

(b) The grantee may not use its grant to pay a consultant unless:

(1) There is a need in the project for the services of that consultant; and

(2) The grantee cannot meet that need by using an employee rather than a consultant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.516 Compensation of consultants—employees of institutions of higher education.

If an institution of higher education receives a grant for research or for educational services, it may pay a consultant's fee to one of its employees only in unusual circumstances and only if:

(a) The work performed by the consultant is in addition to his or her regular departmental load; and

(b)

(1) The consultation is across departmental lines; or

(2) The consultation involves a separate or remote operation.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.517 [Reserved]

§ 75.519 Dual compensation of staff.

A grant may not use its grant to pay a project staff member for time or work for which that staff member is compensated from some other source of funds, consistent with the cost principles described in 2 CFR part 200.

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70329, Aug. 29, 2024]

CONFLICT OF INTEREST

§ 75.524 Conflict of interest: Purpose of § 75.525.

(a) The conflict of interest regulations of the Department that apply to a grant are in § 75.525.

(b) These conflict of interest regulations do not apply to a “local government,” as defined in 2 CFR 200.64, or a “State,” as defined in 2 CFR 200.90.

(c) The regulations in § 75.525 do not apply to a grantee's procurement contracts. The conflict of interest regulations that cover those procurement contracts are in 2 CFR part 200.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 64 FR 50391, Sept. 16, 1999; 79 FR 76092, Dec. 19, 2014]

§ 75.525 Conflict of interest: Participation in a project.

(a) A grantee may not permit a person to participate in an administrative decision regarding a project if:

(1) The decision is likely to benefit that person or a member of his or her immediate family; and

(2) The person:

(i) Is a public official; or

(ii) Has a family or business relationship with the grantee.

(b) A grantee may not permit any person participating in the project to use his or her position for a purpose that is—or gives the appearance of being—motivated by a desire for a private financial gain for that person or for others.

(Authority: 20 U.S.C. 1221e-3 and 3474)

ALLOWABLE COSTS

§ 75.530 General cost principles.

The general principles to be used in determining costs applicable to grants and cost-type contracts under grants are specified at 2 CFR part 200, subpart E—Cost Principles.

(Authority: 20 U.S.C. 1221e-3 and 3474)

CROSS REFERENCE: See 2 CFR part 200, subpart D—Post Federal Award Requirements.

[79 FR 76092, Dec. 19, 2014]

§ 75.531 Limit on total cost of a project.

A grantee shall ensure that the total cost to the Federal Government is not more than the amount stated in the notification of grant award.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70329, Aug. 29, 2024]

§ 75.532 Use of funds for religion prohibited.

(a) No grantee may use its grant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004]

§ 75.533 Acquisition of real property; construction.

No grantee may use its grant for acquisition of real property or for construction unless specifically permitted by the applicable statutes and regulations.

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70329, Aug. 29, 2024]

§ 75.534 Training grants—automatic increases for additional dependents.

The Secretary may increase a grant to cover the cost of additional dependents not specified in the notice of award under § 75.235 if—

(a) Allowances for dependents are authorized by applicable statutes and regulations and are allowable under the grant; and

(b) Appropriations are available to cover the cost.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992; 89 FR 70329, Aug. 29, 2024]

Indirect Cost Rates

§ 75.560 General indirect cost rates and cost allocation plans; exceptions.

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for—

(1) All grantees, other than hospitals and commercial (for-profit) organizations, at 2 CFR part 200, subpart E;

(2) Hospitals, at 45 CFR part 75, appendix XI; and

(3) Commercial (for-profit) organizations, at 48 CFR part 31.

(b) Except as specified in paragraph (c) of this section, a grantee must have obtained a current indirect cost rate agreement or approved cost allocation plan from its cognizant agency, to charge indirect costs to a grant. To obtain a negotiated indirect cost rate agreement or approved cost allocation plan, a grantee must submit an indirect cost rate proposal or cost allocation plan to its cognizant agency within 90 days after the date on which the Department issues the Grant Award Notification (GAN).

(c) A grantee that meets the requirements in 2 CFR 200.414(f) may elect to charge the *de minimis* rate of modified total direct costs (MTDC) specified in that provision, which may be used indefinitely. The *de minimis* rate may not be used on programs that have statutory or regulatory restrictions on the indirect cost rate. No documentation is required to justify the *de minimis* rate.

(1) If the grantee has established a threshold for equipment that is lower than the amount specified in the Uniform Guidance, the grantee must use that threshold to exclude equipment from the MTDC base.

(2) For purposes of the MTDC base and application of the *de minimis* rate, MTDC includes up to the amount specified in the definition of MTDC in the Uniform Guidance of each subaward, each year.

(d) If a grantee is required to, but does not, have a federally recognized indirect cost rate agreement or approved cost allocation plan, the Secretary may permit the grantee to charge its grant for indirect costs at a temporary rate of 10 percent of budgeted direct salaries and wages.

(e)

(1) If a grantee fails to submit an indirect cost rate proposal or cost allocation plan to its cognizant agency within the required 90 days, the grantee may not charge indirect costs to its grant from the end of the 90-day period until it obtains a federally recognized indirect cost rate agreement applicable to the grant.

(2) If the Secretary determines that exceptional circumstances warrant continuation of a temporary indirect cost rate, the Secretary may authorize the grantee to continue charging indirect costs to its grant at the temporary rate specified in paragraph (d) of this section even though the grantee has not submitted its indirect cost rate proposal within the 90-day period.

(3) Once a grantee obtains a federally recognized indirect cost rate that is applicable to the affected grant, the grantee may use that indirect cost rate to claim indirect cost reimbursement for expenditures made on or after the date on which the grantee submitted its indirect cost proposal to its cognizant agency or the start of the project period, whichever is later. However, this authority is subject to the following limitations:

(i) The total amount of funds recovered by the grantee under the federally recognized indirect cost rate is reduced by the amount of indirect costs previously recovered under the temporary indirect cost rate specified in paragraph (d) of this section.

(ii) The grantee must obtain prior approval from the Secretary to shift direct costs to indirect costs in order to recover indirect costs at a higher negotiated indirect cost rate.

(iii) The grantee may not request additional funds to recover indirect costs that it cannot recover by shifting direct costs to indirect costs.

(f) The Secretary accepts a current indirect cost rate and cost allocation plan approved by a grantee's cognizant agency but may establish a restricted indirect cost rate or cost allocation plan compliant with 34 CFR 76.564 through 76.569 to satisfy the statutory requirements of certain programs administered by the Department.

[89 FR 70329, Aug. 29, 2024]

§ 75.561 Approval of indirect cost rates and cost allocation plans.

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate or cost allocation plan for a grantee that is eligible and does not elect a *de minimis* rate, and is not a local educational agency. For the purposes of this section, the term “local educational agency” does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[59 FR 59583, Nov. 17, 1994, as amended at 89 FR 70330, Aug. 29, 2024]

§ 75.562 Indirect cost rates for educational training projects; exceptions.

(a) Educational training grants provide funds for training or other educational services. Examples of the work supported by training grants are summer institutes, training programs for selected participants, the introduction of new or expanded courses, and similar instructional undertakings that are separately budgeted and accounted for by the sponsoring institution. These grants do not usually support activities involving research, development, and dissemination of new educational materials and methods. Training grants largely implement previously developed materials and methods and require no significant adaptation of techniques or instructional services to fit different circumstances.

(b) The Secretary uses the definition in paragraph (a) of this section to determine which grants are educational training grants.

(c)

(1) Indirect cost reimbursement on a training grant is limited to the lesser of the recipient's approved indirect cost rate, or 8 percent of the modified total direct cost (MTDC) base. MTDC is defined in 2 CFR 200.1.

(2) If the grantee does not have a federally recognized indirect cost rate agreement on the date on which the training grant is awarded, the grantee may elect to use the temporary indirect cost rate authorized under § 75.560(d)(3) or a rate of 8 percent of the MTDC base. The *de minimis* rate may not be used on educational training programs.

(i) If the grantee has established a threshold for equipment that is lower than the amount specified in the Uniform Guidance, the grantee must use that threshold to exclude equipment from the MTDC base.

(ii) For purposes of the MTDC base and application of the 8 percent rate, MTDC includes up to the amount specified in the definition of MTDC in the Uniform Guidance of each subaward, each year.

(3) The 8 percent indirect cost rate reimbursement limit specified in paragraph (c)(1) of this section also applies when subrecipients issue subawards that fund training, as determined by the Secretary under paragraph (b) of this section.

(4) The 8 percent limit does not apply to agencies of Indian Tribal governments, local governments, and States as defined in 2 CFR 200.1.

(5) Indirect costs in excess of the 8 percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(d) A grantee using the training rate of 8 percent is required to maintain documentation to justify the 8 percent rate.

[89 FR 70330, Aug. 29, 2024]

§ 75.563 Restricted indirect cost rate or cost allocation plans—programs covered.

If a grantee or subgrantee decides to charge indirect costs to a program that is subject to a statutory prohibition on using Federal funds to supplant non-Federal funds, the grantee must—

(a) Use a negotiated restricted indirect cost rate or restricted cost allocation plan compliant with 34 CFR 76.564 through 76.569; or

(b) Elect to use an indirect cost rate of 8 percent of the modified total direct costs (MTDC) base if the grantee or subgrantee does not have a negotiated restricted indirect cost rate. MTDC is defined in 2 CFR 200.1. If the Secretary determines that the grantee or subgrantee would have a lower rate under 34 CFR 76.564 through 76.569, the lower rate must be used on the affected program.

(c) If the grantee has established a threshold for equipment that is lower than the amount specified in the Uniform Guidance, the grantee must use that threshold to exclude equipment from the MTDC base.

(d) For purposes of the MTDC base and application of the 8 percent rate, MTDC includes up to the amount specified in the definition of MTDC in the Uniform Guidance of each subaward, each year.

[89 FR 70330, Aug. 29, 2024]

§ 75.564 Reimbursement of indirect costs.

(a) Reimbursement of indirect costs is subject to the availability of funds and statutory or administrative restrictions.

(b) The application of the negotiated indirect cost rate (determination of the direct cost base) or cost allocation plan (charging methodology) must be in accordance with the agreement/plan approved by the grantee's cognizant agency.

(c) Indirect cost reimbursement is not allowable under grants for—

(1) Fellowships and similar awards if Federal financing is exclusively in the form of fixed amounts such as scholarships, stipend allowances, or the tuition and fees of an institution;

(2) Construction grants;

(3) Grants to individuals;

(4) Grants to organizations located outside the territorial limits of the United States;

(5) Grants to Federal organizations; and

(6) Grants made exclusively to support conferences.

(d) Indirect cost reimbursement on grants received under programs with statutory restrictions or other limitations on indirect costs must be made in accordance with the restrictions in 34 CFR 76.564 through 76.569 and other applicable restrictions.

(e)

(1) Indirect costs for a group of eligible parties (See §§ 75.127 through 75.129) are limited to the amount derived by applying the rate of the applicant, or a restricted rate when applicable, to the direct cost base of the grant in keeping with the terms of the applicant's federally recognized indirect cost rate agreement and program requirements.

(2) If a group of eligible parties applies for a training grant under the group application procedures in §§ 75.127 through 75.129, the grant funds allocated among the members of the group are not considered subawards for the purposes of applying the indirect cost rate in § 75.562(c).

[59 FR 59583, Nov. 17, 1994, as amended at 72 FR 69148, Dec. 7, 2007; 89 FR 70331, Aug. 29, 2024]

§ 75.580 Coordination with other activities.

A grantee shall, to the extent possible, coordinate its project with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992; 89 FR 70331, Aug. 29, 2024]

EVALUATION

§ 75.590 Evaluation by the grantee.

(a) If the application notice for a competition required applicants to describe how they would evaluate their projects, each grantee under that competition must demonstrate to the Department that—

(1) The evaluation meets the standards of the evaluation in the approved application for the project; and

(2) The performance measurement data collected by the grantee and used in the evaluation meet the performance measurement requirements of the approved application.

(b) If the application notice for a competition did not require applicants to describe how they would evaluate their projects, each grantee must provide information in its performance report demonstrating—

(1) The progress made by the grantee in the most recent budget period, including progress based on the performance measurement requirements for the grant, if any;

(2) The effectiveness of the grant, including fulfilling the performance measurement requirements of the approved application, if any; and

(3) The effect of the project on the participants served by the project, if any.

(c) An application notice for a competition may require each grantee under that competition to do one or more of the following:

(1) Conduct an independent evaluation;

(2) Make public the final report, including results of any required independent evaluation;

(3) Ensure that the data from the independent evaluation are made available to third-party researchers consistent with the requirements in 34 CFR part 97, Protection of Human Subjects, and other applicable laws;

(4) Submit the final evaluation to the Education Resources Information Center (ERIC), which is administered by the Institute of Education Sciences; or

(5) Submit the final performance report under the grant to ERIC.

[78 FR 49354, Aug. 13, 2013, as amended at 89 FR 70331, Aug. 29, 2024]

§ 75.591 Federal evaluation—cooperation by a grantee.

A grantee must cooperate in any evaluation of the program by the Secretary. If requested by the Secretary, a grantee must, among other types of activities—

(a) Cooperate with the collection of information, including from all or a subset of subgrantees and potential project beneficiaries, including both participants and non-participants, through surveys, observations, administrative records, or other data collection and analysis methods. This information collection may include program characteristics, including uses of program funds, as well as beneficiary characteristics, participation, and outcomes; and

(b) Pilot its Department-funded activities with a subset of subgrantees, potential project beneficiaries, or eligible participants and allow the Department or its agent to randomly select the subset for the purpose of providing a basis for an experimental evaluation that could meet What Works Clearinghouse standards, with or without reservations.

[89 FR 70331, Aug. 29, 2024]

§ 75.592 Federal evaluation—satisfying requirement for grantee evaluation.

If a grantee cooperates in a Federal evaluation of a program, the Secretary may determine that the grantee meets the evaluation requirements of the program, including § 75.590.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Construction Cross Reference:
See 2 CFR part 200.317-200.326 for procurement requirements.

§ 75.600 Applicability of using grant funds for construction or real property.

(a) As used in this section, the terms “construction” and “minor remodeling” have the meanings given those terms in 34 CFR 77.1(c).

(b) Except as provided in paragraph (c) of this section, §§ 75.600 through 75.618 apply to—

(1) An applicant that requests funds for construction or real property acquisition; and

(2) A grantee whose grant includes funds for construction or real property acquisition.

(c) Sections 75.600 through 75.618 do not apply to grantees in—

(1) Programs prohibited from using funds for construction or real property acquisition under § 75.533; and

(2) Projects determined by the Secretary to be minor remodeling under 34 CFR 77.1(c).

[89 FR 70331, Aug. 29, 2024]

§ 75.601 Approval of the construction.

(a) The Secretary approves a direct grantee construction project—

(1) When the initial grant application is approved; or

(2) After the grant has been awarded.

(b) A grantee may not advertise or place the construction project on the market for bidding until after the Secretary has approved the project.

[89 FR 70331, Aug. 29, 2024]

§ 75.602 Planning the construction.

(a) In planning the construction project, a grantee—

(1) Must ensure that the design is functional, economical, and not elaborate in design or extravagant in the use of materials compared with facilities of a similar type constructed in the State or other applicable geographic area;

(2) May consider excellence of architecture and design and inclusion of works of art. A grantee must not spend more than 1 percent of the cost of the project on works of art; and

(3) May make reasonable provision, consistent with the other uses to be made of the construction, for areas that are adaptable for artistic and other cultural activities.

(b) In developing the proposed budget for the construction project, a grantee—

(1) Must ensure that sufficient funds are available to meet any non-Federal share of the cost of the construction project;

(2) May include sufficient funds for commissioning of energy, HVAC, and water systems and to train personnel in the proper operation of such building systems;

(3) For new construction and major rehabilitation projects, may consider life-cycle cost analysis for major design decisions to the extent possible;

(4) May budget for reasonable and predictable contingency costs consistent with 2 CFR 200.433; and

(5) May budget for school and community education about the construction project including its energy, environmental, and health features and benefits.

(c) Prior to approving a construction project under § 75.601, the Secretary considers a grantee's compliance with the following requirements, as applicable:

(1) Title to site (§ 75.610).

(2) Environmental impact assessment (§ 75.611).

(3) Avoidance of flood hazards (§ 75.612).

(4) Compliance with the Coastal Barrier Resources Act (§ 75.613).

(5) Preservation of historic sites (§ 75.614).

(6) Build America, Buy America Act (§ 75.615).

(7) Energy conservation (§ 75.616).

(8) Access for individuals with disabilities (§ 75.617).

(9) Safety and health standards (§ 75.618).

[89 FR 70331, Aug. 29, 2024]

§ 75.603 Beginning the construction.

(a) A grantee must begin work on the construction project within a reasonable time after the Secretary has approved the project under § 75.601.

(b) A grantee must follow all applicable procurement standards in 2 CFR part 200, subpart D, when advertising or placing the project on the market for bidding.

[89 FR 70331, Aug. 29, 2024]

§ 75.604 During the construction.

(a) A grantee must maintain competent architectural engineering supervision and inspection at the construction site to ensure that the work conforms to the approved final working specifications.

(b) A grantee must complete the construction in accordance with the approved final working specifications unless a revision is approved.

(c) If a revision to the timeline, budget, or approved final working specifications is required, the grantee must request prior written approval consistent with 2 CFR 200.308(h).

(d) A grantee must comply with Federal laws regarding prevailing wages on construction and minor remodeling projects assisted with Department funding, including, as applicable, subchapter IV of chapter 31 of title 40, United States Code (commonly known as the "Davis-Bacon Act"; as applied through section 439 of GEPA; 20 U.S.C. 1232b) and any tribally determined prevailing wages.

(e) A grantee must submit periodic performance reports regarding the construction project containing information specified by the Secretary consistent with 2 CFR 200.329(d).

[89 FR 70332, Aug. 29, 2024]

§ 75.605 After the construction.

(a) A grantee must ensure that sufficient funds will be available for effective operation and maintenance of the facilities after the construction is complete.

(b) A grantee must operate and maintain the facilities in accordance with applicable Federal, State, and local requirements.

(c) A grantee must maintain all financial records, supporting documents, statistical records, and other non-Federal entity records pertinent to the construction project consistent with 2 CFR 200.334.

[89 FR 70332, Aug. 29, 2024]

§ 75.606 Real property requirements.

(a) The Secretary approves a direct grantee real property project—

(1) When the initial grant application is approved;

(2) After the grant has been awarded; or

(3) With the approval of a construction project under § 75.601.

(b) A grantee using any grant funds for real property acquisition must—

(1) Comply with the Real Property Standards of the Uniform Guidance (2 CFR 200.310 through 200.316);

(2) Not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without written permission and instructions from the Secretary;

(3) In accordance with agency directives, record the Federal interest in the title of the real property in the official real property records for the jurisdiction in which the facility is located and include a covenant in the title of the real property to ensure nondiscrimination; and

(4) Report at least annually on the status of real property in which the Federal Government retains an interest consistent with 2 CFR 200.330.

(c) A grantee is subject to the regulations on relocation assistance and real property acquisition in 34 CFR part 15 and 49 CFR part 24, as applicable.

[89 FR 70332, Aug. 29, 2024]

§§ 75.607-75.609 [Reserved]

§ 75.610 Title to site.

A grantee must have or obtain a full title or other interest in the site (such as a long-term lease), including right of access, that is sufficient to ensure the grantee's undisturbed use and possession of the facilities for at least 25 years after completion of the project or for the useful life of the construction, whichever is longer.

[89 FR 70332, Aug. 29, 2024]

§ 75.611 Environmental impact assessment.

(a) When a grantee's construction or real property acquisition project is considered a “Major Federal Action,” as defined in 40 CFR 1508.1(q), the grantee must include an assessment of the impact of the proposed construction on the quality of the environment in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(2)(C)) and Executive Order 11514 (35 FR 4247).

(b) If a grantee's construction or real property project is not considered a “Major Federal Action” under NEPA, a NEPA environmental impact assessment is not required; however—

(1) An environmental impact assessment may be required under State or local requirements; and

(2) Grantees are encouraged to perform some type of environmental assessment for projects that involve breaking ground, such as projects to expand the size of an existing building or replace an outdated building.

[89 FR 70332, Aug. 29, 2024]

§ 75.612 Avoidance of flood hazards.

In planning the construction or real property project, a grantee must, consistent with Executive Order (E.O.) 11988 of May 24, 1977, E.O. 13690 of January 30, 2015, and E.O. 14030 of May 20, 2021—

(a) Evaluate flood hazards in connection with the construction;

(b) As far as practicable, avoid uneconomic, hazardous, or unnecessary use of flood plains in connection with the construction;

(c) Mitigate flood hazards through design such as elevating systems and first floor elevations above flood level plus freeboard; and

(d) Summarize remaining flood risks in a memorandum. CITA>[89 FR 70332, Aug. 29, 2024]

§ 75.613 Compliance with the Coastal Barrier Resources Act.

A grantee may not use, within the Coastal Barrier Resources System, funds made available under a program administered by the Secretary for any purpose prohibited by the Coastal Barrier Resources Act (16 U.S.C. 3501-3510).

[89 FR 70332, Aug. 29, 2024]

§ 75.614 Preservation of historic sites.

(a) A grantee must describe the relationship of the proposed construction to, and probable effect on, any district, site, building, structure, or object that is—

(1) Included in the National Register of Historic Places; or

(2) Eligible under criteria established by the Secretary of the Interior for inclusion in the National Register of Historic Places.

(b) In deciding whether to approve a construction project, the Secretary considers—

(1) The information provided by the grantee under paragraph (a) of this section; and

(2) Any comments received by the Advisory Council on Historic Preservation (see 36 CFR part 800).

[89 FR 70332, Aug. 29, 2024]

§ 75.615 Build America, Buy America Act.

A grantee must comply with the requirements of the Build America, Buy America Act, Pub. L. 117-58, § 70901 through 70927 and implementing regulations, as applicable.

[89 FR 70333, Aug. 29, 2024]

§ 75.616 Energy conservation.

(a) To the extent practicable, a grantee must design and construct facilities to maximize the efficient use of energy. A grantee that is constructing a new school building or conducting a major rehabilitation of a school building may evaluate life-cycle costs and benefits of highly efficient, all-electric systems or a net zero energy project in the early design phase.

(b) A grantee must comply with ASHRAE 90.1-2022 in their construction project.

(c) ANSI/ASHRAE/IES Standard 90.1-2022 (I-P), Energy Standard for Sites and Buildings Except Low-Rise Residential Buildings (I-P Edition), 2022 ("ASHRAE Standard 90.1-2022"), is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This material is available for inspection at the Department of Education (the Department) and at the National Archives and Records Administration (NARA). Contact the Department at: Department of Education, 400 Maryland Avenue SW, room 4C212, Washington, DC, 20202-8472; phone: (202) 245-6776; email: *EDGAR@ed.gov*. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov*. The material may be obtained from the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) at American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc., 180 Technology Parkway, Peachtree Corners, GA 30092; *www.ashrae.org;* 404-636-8400.

[89 FR 70333, Aug. 29, 2024]

§ 75.617 Access for individuals with disabilities.

A grantee must comply with the following Federal regulations on access by individuals with disabilities that apply to the construction of facilities:

(a) For residential facilities: 24 CFR part 40.

(b) For non-residential facilities: 41 CFR 102-76.60 to 102-76.95.

[89 FR 70333, Aug. 29, 2024]

Equipment and Supplies Cross Reference:
See 2 CFR 200.311, Real property; 200.313, Equipment; 200.314, Supplies; and 200.59, Intangible property; and 200.315, Intangible property.

§ 75.618 Safety and health standards.

In planning for and designing a construction project,

(a) A grantee must comply with the following:

(1) The standards under the Occupational Safety and Health Act of 1970 (See 29 CFR part 1910).

(2) State and local codes, to the extent that they are more stringent.

(b) A grantee may use additional standards and best practices to support health and wellbeing of students and staff.

[89 FR 70333, Aug. 29, 2024]

§ 75.619 Charges for use of equipment or supplies.

A grantee may not charge students or school personnel for the ordinary use of equipment or supplies purchased with grant funds.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 89 FR 70333, Aug. 29, 2024]

PUBLICATIONS AND COPYRIGHTS

§ 75.620 General conditions on publication.

(a) ***Content of materials.*** Subject to any specific requirements that apply to its grant, a grantee may decide the format and content of project materials that it publishes or arranges to have published.

(b) ***Required statement.*** The grantee must ensure that any publication that contains project materials also contains the following statement: The contents of this [insert type of publication; such as book, report, film, website, and web page] were developed under a grant from the U.S. Department of Education (Department). The Department does not mandate or prescribe practices, models, or other activities described or discussed in this document. The contents of this [insert type of publication] may contain examples of, adaptations of, and links to resources created and maintained by another public or private organization. The Department does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. The content of this [insert type of publication] does not necessarily represent the policy of the Department. This publication is not intended to represent the views or policy of, or be an endorsement of any views expressed or materials provided by, any Federal agency.

[89 FR 70333, Aug. 29, 2024]

§ 75.621 [Reserved]

§ 75.622 Definition of "project materials."

As used in §§ 75.620 through 75.621, "project materials" means a copyrightable work developed with funds from a grant of the Department. (See 2 CFR 200.307 and 200.315.)

[89 FR 70333, Aug. 29, 2024]

§ 75.623 Public availability of grant-supported research publications.

(a) Grantees must make final peer-reviewed scholarly publications resulting from research supported by Department grants available to the Education Resources Information Center (ERIC), which is administered by the Institute of Education Sciences, upon acceptance for publication.

(b) A final, peer-reviewed scholarly publication is the final version accepted for publication and includes all edits made as part of the peer review process, as well as all graphics and supplemental materials that are associated with the article.

(c) The Department will make the final, peer-reviewed scholarly publication available to the public through ERIC at the same time as the publication becomes available on the publisher's website.

(d) Grantees are responsible for ensuring that any publishing or copyright agreements concerning submitted articles fully comply with this section.

(e) Grantees must make scientific data that inform the findings in a peer-reviewed scholarly publication publicly available, consistent with requirements in 34 CFR part 97, Protection of Human Subjects, and other applicable laws.

[89 FR 70333, Aug. 29, 2024]

§ 75.626 Show Federal support.

Any patent application filed by a grantee for an invention made under a grant must include the following statement in the first paragraph:

> The invention described in this application was made under a grant from the Department of Education.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 57 FR 30339, July 8, 1992; 89 FR 70333, Aug. 29, 2024]

Other Requirements for Certain Projects Cross Reference:
See 2 CFR 200.302, Financial management, and 200.326, Contract provisions.

§ 75.650 Participation of students enrolled in private schools.

If applicable statutes and regulations provide for participation of students enrolled in private schools and, as applicable, their teachers or other educational personnel, and their families, the grantee must provide, as applicable, services in accordance with §§ 76.650 through 76.662.

[89 FR 70333, Aug. 29, 2024]

§ 75.681 Protection of human research subjects.

If a grantee uses a human subject in a research project, the grantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross Reference:
See 34 CFR part 97—Protection of Human Subjects.

§ 75.682 Treatment of animals.

If a grantee uses an animal in a project, the grantee must provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act.

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70333, Aug. 29, 2024]

§ 75.683 Health or safety standards for facilities.

A grantee shall comply with any Federal health or safety requirements that apply to the facilities that the grantee uses for the project.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.684 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[85 FR 59979, Sept. 23, 2020]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 75.700 Compliance with the U.S. Constitution, statutes, regulations, stated institutional policies, and applications.

A grantee must comply with § 75.500, applicable statutes, regulations, Executive orders, stated institutional policies, and applications, and must use Federal funds in accordance with the U.S. Constitution and those statutes, regulations, Executive orders, stated institutional policies, and applications.

[89 FR 70334, Aug. 29, 2024]

§ 75.701 The grantee administers or supervises the project.

A grantee shall directly administer or supervise the administration of the project.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.702 Fiscal control and fund accounting procedures.

A grantee shall use fiscal control and fund accounting procedures that ensure proper disbursement of, and accounting for, Federal funds as required in 2 CFR part 200, subpart D—Post Federal Award Requirements.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[79 FR 76093, Dec. 19, 2014, as amended at 89 FR 70334, Aug. 29, 2024]

§ 75.703 Obligation of funds during the grant period.

A grantee may use grant funds only for obligations it makes during the grant period.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.707 When obligations are made.

The following table shows when a grantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property	On the date the grantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the grantee	When the services are performed.
(c) Personnal services by a contractor who is not an employee of the grantee	On the date on which the grantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the grantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the grantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the grantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary under the cost principles in 2 CFR part 200, Subpart E—Cost Principles	On the first day of the project period.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30340, July 8, 1992; 79 FR 76093, Dec. 19, 2014]

§ 75.708 Subgrants.

(a) A grantee may not make a subgrant under a program covered by this part unless authorized by statute or by paragraph (b) of this section.

(b) The Secretary may, through an announcement in the FEDERAL REGISTER or other reasonable means of notice, authorize subgrants when necessary to meet the purposes of a program. In this announcement, the Secretary will—

(1) Designate the types of entities, e.g., State educational agencies, local educational agencies, institutions of higher education, and nonprofit organizations, to which subgrants can be awarded; and

(2) Indicate whether subgrants can be made to entities identified in an approved application or, without regard to whether the entity is identified in an approved application, have to be selected through a competitive process set out in subgranting procedures established by the grantee.

(c) If authorized under paragraph (b) of this section, a subgrant is allowed if it will be used by that entity to directly carry out project activities described in that application.

(d) The grantee, in awarding subgrants under paragraph (b) of this section, must—

(1) Ensure that subgrants are awarded on the basis of an approved budget that is consistent with the grantee's approved application and all applicable Federal statutory, regulatory, and other requirements;

(2) Ensure that every subgrant includes any conditions required by applicable law; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation, including the Federal nondiscrimination laws enforced by the Department.

(e) Grantees that are not allowed to make subgrants under paragraph (b) of this section are authorized to contract, as needed, for supplies, equipment, and other services, in accordance with 2 CFR part 200, subpart D (2 CFR 200.317 through 200.326).

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 64 FR 50392, Sept. 16, 1999; 78 FR 49534, Aug. 13, 2013; 79 FR 76093, Dec. 19, 2014; 89 FR 70334, Aug. 29, 2024]

§ 75.712 Beneficiary protections: Written notice.

(a) An organization providing social services to beneficiaries under a Department program supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must provide the notice at the earliest available opportunity.

(c) The Department may determine that the notice described in paragraph (a) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from the Department as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(d) The notice that an organization uses to notify beneficiaries or prospective beneficiaries of the rights under paragraphs (a) through (c) of this section must include language substantially similar to that in appendix C to this part.

[89 FR 15703, Mar. 4, 2024]

§ 75.713 [Reserved]

§ 75.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a discretionary grant program of the Department has the authority under the grant to select a private organization to provide services supported by direct Federal financial assistance under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 75.52 and 75.532, appendices A and B to this part, and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

[85 FR 82128, Dec. 17, 2020]

Reports Cross Reference:
See 2 CFR 200.327-200.337, which appear after the undesignated center heading "Performance and Financial Monitoring and Reporting."

§ 75.720 Financial and performance reports.

(a) This section applies to the reports required under—

(1) 2 CFR 200.328 (Financial reporting); and

(2) 2 CFR 200.329 (Monitoring and reporting program performance).

(b) A grantee shall submit these reports annually, unless the Secretary allows less frequent reporting.

(c) The Secretary may require a grantee to report more frequently than annually, as authorized under 2 CFR 200.207, Specific conditions, and may impose high-risk conditions in appropriate circumstances under 2 CFR 3474.10.

(d) Upon request of the Secretary, a grantee must, at the time of submission to the Secretary, post any performance and financial reports required by this section on a public-facing website maintained by the grantee, after redacting any privacy or confidential business information.

[79 FR 76093, Dec. 19, 2014, as amended at 89 FR 70334, Aug. 29, 2024]

§ 75.721 [Reserved]

Records Cross Reference:
See 2 CFR 200.333-200.337, which follow the undesignated center heading "Record Retention and Access."

§ 75.730 Records related to grant funds.

A grantee shall keep records that fully show:

(a) The amount of funds under the grant;

(b) How the grantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 75.731 Records related to compliance.

A grantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 75.732 Records related to performance.

(a) A grantee shall keep records of significant project experiences and results.

(b) The grantee shall use the records under paragraph (a) to:

(1) Determine progress in accomplishing project objectives; and

(2) Inform periodic review and continuous improvement of the project plans; and

(3) Revise those project objectives, if necessary.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross Reference:
See 2 CFR 200.308, Revision of budget and program plans.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988; 89 FR 70334, Aug. 29, 2024]

§ 75.733 [Reserved]

PRIVACY

§ 75.740 Protection of and access to student records; student rights in research, experimental programs, and testing.

(a) Most records on present or past students are subject to the requirements of section 444 of GEPA and its implementing regulations in 34 CFR part 99. (Section 444 of GEPA (20 U.S.C. 1232g) is commonly referred to as the "Family Educational Rights and Privacy Act of 1974" or "FERPA".)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 445 of GEPA and its implementing regulations at 34 CFR part 98; 20 U.S.C. 1232h, commonly known as the "Protection of Pupil Rights Amendment" or "PPRA"; and the Common Rule for the protection of Human Subjects and its implementing regulations at 34 CFR part 97, as applicable.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30340, July 8, 1992; 60 FR 46493, Sept. 6, 1995; 89 FR 70334, Aug. 29, 2024]

§ 75.741 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[85 FR 59979, Sept. 23, 2020]

Subpart G—What Procedures Does the Department Use To Get Compliance?

Cross Reference:
See 2 CFR 200.338-200.342 which follow the undesignated center heading "Remedies for Noncompliance."

§ 75.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of the Department may waive any regulation that applies to a Department program, unless the regulation specifically provides that it may be waived.

(b) No act or failure to act by an official, agent, or employee of the Department can affect the authority of the Secretary to enforce regulations.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 89 FR 70334, Aug. 29, 2024]

§ 75.901 Suspension and termination.

The Secretary may use the Office of Administrative Law Judges to resolve disputes. See, for cross-reference, the following:

(a) 2 CFR 200.338 (Remedies for noncompliance).

(b) 2 CFR 200.339 (Termination).

(c) 2 CFR 200.340 (Notification of termination requirement).

(d) 2 CFR 200.341 (Opportunities to object, hearings and appeals).

(e) 2 CFR 200.342 (Effects of suspension and termination).

(f) 2 CFR 200.344 (Post-closeout adjustments and continuing responsibilities).

[79 FR 76093, Dec. 19, 2014, as amended at 89 FR 70334, Aug. 29, 2024]

§ 75.902 [Reserved]

§ 75.903 Effective date of termination.

Termination is effective on the latest of:

(a) The date of delivery to the grantee of the notice of termination;

(b) The termination date given in the notice of termination; or

(c) The date of a final decision of the Secretary under part 81 of this title.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 79 FR 76093, Dec. 19, 2014]

§ 75.910 [Reserved]

Appendix A to Part 75—Notice or Announcement of Award Opportunities

(a) Faith-based organizations may apply for this award on the same basis as any other private organization, as set forth at, and subject to the protections and requirements of, this part and any applicable constitutional and statutory requirements, including 42 U.S.C. 2000bb *et seq.* The Department will not, in the selection of grantees, discriminate for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.

(b) A faith-based organization that participates in this program will retain its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(c) A faith-based organization may not use direct Federal financial assistance from the Department to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

[89 FR 15703, Mar. 4, 2024]

Appendix B to Part 75—Notice of Award or Contract

(a) A faith-based organization that participates in this program retains its independence from the Government and may continue to carry out its mission consistent with religious freedom and conscience protections in Federal law.

(b) A faith-based organization may not use direct Federal financial assistance from the Department to support or engage in any explicitly religious activities except when consistent with the Establishment Clause of the First Amendment and any other applicable requirements. Such an organization also may not, in providing services funded by the Department, or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

[89 FR 15703, Mar. 4, 2024]

Appendix C to Part 75—Written Notice of Beneficiary Protections

Name of Organization:

Name of Program:

Contact Information for Program Staff: [provide name, phone number, and email address, if appropriate]

Because this program is supported in whole or in part by financial assistance from the U.S. Department of Education, we are required to provide you the following information:

(1) We may not discriminate against you on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

(2) We may not require you to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) that may be offered by our organization, and any participation by you in such activities must be purely voluntary.

(3) We must separate in time or location any privately funded explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) from activities supported with direct Federal financial assistance.

(4) You may report violations of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the U.S. Department of Education at [insert applicable contact information].

[When required by the Department, the notice must also state:] (5) If you would like information about whether there are any other federally funded organizations that provide the services available under this program in your area, please contact the awarding agency.

This written notice must be given to you before you enroll in the program or receive services from the program, unless the nature of the service provided or exigent circumstances make it impracticable to provide such notice before we provide the actual service. In such an instance, this notice must be given to you at the earliest available opportunity.

[89 FR 15703, Mar. 4, 2024]

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 76—STATE-ADMINISTERED FORMULA GRANT PROGRAMS

Authority: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

Section 76.101 also issued under 20 U.S.C. 1221e-3, 3474, and 7844(b).

Section 76.127 also issued under 48 U.S.C. 1469a.

Section 76.128 also issued under 48 U.S.C. 1469a.

Section 76.129 also issued under 48 U.S.C. 1469a.

Section 76.130 also issued under 48 U.S.C. 1469a.

Section 76.131 also issued under 48 U.S.C. 1469a.

Section 76.132 also issued under 48 U.S.C. 1469a.

Section 76.134 also issued under 48 U.S.C. 1469a.

Section 76.136 also issued under 48 U.S.C. 1469a.
Section 76.140 also issued under 20 U.S.C. 1221e-3, 1231g(a), and 3474.
Section 76.301 also issued under 20 U.S.C. 1221e-3, 3474, and 7846(b).
Section 76.401 also issued under 20 U.S.C. 1221e-3, 1231b-2, and 3474.
Section 76.709 also issued under 20 U.S.C. 1221e-3, 1225(b), and 3474.
Section 76.710 also issued under 20 U.S.C. 1221e-3, 1225(b), and 3474.
Section 76.720 also issued under 20 U.S.C. 1221e-3, 1231a, and 3474.
Section 76.740 also issued under 20 U.S.C. 1221e-3, 1232g, 1232h, and 3474.
Section 76.783 also issued under 20 U.S.C. 1231b-2.
Section 76.785 also issued under 20 U.S.C. 7221e.
Section 76.786 also issued under 20 U.S.C. 7221e
Section 76.787 also issued under 20 U.S.C. 7221e.
Section 76.788 also issued under 20 U.S.C. 7221e.
Section 76.901 also issued under 20 U.S.C. 1234.

Source: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which this part applies.

(a) The regulations in this part apply to each State-administered formula grant program of the Department.

(b) If a State-administered formula grant program does not have implementing regulations, the Secretary implements the program under the applicable statutes and, to the extent consistent with the authorizing statute, under the GEPA and the regulations in this part. For the purposes of this part, the term State-administered formula grant program means a program whose applicable statutes or implementing regulations provide a formula for allocating program funds among eligible States.

[89 FR 70334, Aug. 29, 2024]

§ 76.2 Exceptions in program regulations to part 76.

If a program has regulations that are not consistent with part 76, the implementing regulations for that program identify the sections of part 76 that do not apply.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 54 FR 21776, May 19, 1989; 89 FR 70335, Aug. 29, 2024]

ELIGIBILITY FOR A GRANT OR SUBGRANT

§ 76.50 Basic requirements for subgrants.

(a) Under a program covered by this part, the Secretary makes a grant—

(1) To the State agency designated by applicable statutes and regulations for the program; or

(2) To the State agency designated by the State in accordance with applicable statutes and regulations.

(b) Unless prohibited by applicable statutes or regulations or by the terms and conditions of the grant award, a State may use State-administered formula grant funds—

(1) Directly;

(2) To make subgrants to eligible applicants, as determined by applicable statutes or regulations, or if applicable statutes and regulations do not address eligible subgrantees, as determined by the State; or

(3) To authorize a subgrantee to make subgrants.

(c) Grantees are responsible for monitoring subgrantees consistent with 2 CFR 200.332.

(d) Grantees, in cases where subgrants are prohibited by applicable statutes or regulations or the terms and conditions of a grant award, are authorized to contract, as needed, for supplies, equipment, and other services, in accordance with 2 CFR part 200, subpart D (2 CFR 200.317 through 200.326).

(e) No subgrant that a State chooses to make in accordance with paragraph (b) may change the amount of Federal funds for which an entity is eligible through a formula in the applicable Federal statute or regulation.

[89 FR 70335, Aug. 29, 2024]

§ 76.51 A State distributes funds by formula or competition.

If applicable statutes and regulations authorize a State to make subgrants, the statute:

(a) Requires the State to use a formula to distribute funds;

(b) Gives the State discretion to select subgrantees through a competition among the applicants or through some other procedure; or

(c) Allows some combination of these procedures.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 54 FR 21776, May 19, 1989; 89 FR 70335, Aug. 29, 2024]

§ 76.52 Eligibility of faith-based organizations for a subgrant and nondiscrimination against those organizations.

(a)

(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization.

(2)

(i) In the selection of subgrantees, States—

(A) May not discriminate for or against a private organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization; and

(B) Must ensure that all decisions about subgrants are free from political interference, or even the appearance of such interference, and are made on the basis of merit, not on the basis of religion or religious belief, or a lack thereof.

(ii) Notices or announcements of award opportunities and notices of award or contracts must include language substantially similar to that in appendices A and B, respectively, to 34 CFR part 75.

(3) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States in administering a Department program may require faith-based organizations to provide assurances or notices if they are not required of non-faith-based organizations. Any restrictions on the use of subgrant funds must apply equally to faith-based and non-faith-based organizations. All organizations that receive a subgrant from a State under a State-administered formula grant program of the Department, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(4) No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by States may disqualify faith-based organizations from applying for or receiving subgrants under a State-administered formula grant program of the Department on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disqualify a similarly situated secular organization.

(5) Nothing in this section may be construed to preclude the Department from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws.

(6) Neither a State nor the Department may disqualify an organization from participating in any Department program for which it is eligible on the basis of the organization's indication that it may request an accommodation with respect to one or more program requirements, unless the organization has made clear that the accommodation is necessary to its participation and the Department has determined that it would deny the accommodation.

(b) The provisions of § 76.532 apply to a faith-based organization that receives a subgrant from a State under a State-administered formula grant program of the Department.

(c)

(1) A private organization that applies for and receives a subgrant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a subgrant from a State under a State-administered formula grant program of the Department. Attendance or participation in any such explicitly religious activities by beneficiaries of the programs and services supported by the subgrant must be voluntary.

(2) The limitations on explicitly religious activities under paragraph (c)(1) of this section do not apply to a faith-based organization that provides services to a beneficiary under a program supported only by "indirect Federal financial assistance."

(3) For purposes of 2 CFR 3474.15, this section, and §§ 76.712 and 76.714, the following definitions apply:

(i) ***Direct Federal financial assistance*** means financial assistance received by an entity selected by the Government or a pass-through entity (under this part) to carry out a service (e.g., by contract, grant, or cooperative agreement). References to "Federal financial assistance" will be deemed to be references to direct Federal financial assistance, unless the referenced assistance meets the definition of "indirect Federal financial assistance."

(ii) ***Indirect Federal financial assistance*** means financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of service provider. Federal financial assistance provided to an organization is *indirect* under this definition if—

(A) The government program through which the beneficiary receives the voucher, certificate, or other similar means of government-funded payment is neutral toward religion; and

(B) The organization receives the assistance wholly as the result of the genuine and independent private choice of the beneficiary, not a choice of the Government. The availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.

(iii) ***Federal financial assistance*** means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption.

(iv) ***Pass-through entity*** means an entity, including a nonprofit or nongovernmental organization, acting under a contract, grant, or other agreement with the Federal Government or with a State or local government, such as a State administering agency, that accepts direct Federal financial assistance as a primary recipient or grantee and distributes that assistance to other organizations that, in turn, provide government-funded social services.

(v) ***Religious exercise*** has the meaning given to the term in 42 U.S.C. 2000cc-5(7)(A).

Note 1 to paragraph (c)(3): The definitions of *direct Federal financial assistance* and *indirect Federal financial assistance* do not change the extent to which an organization is considered a *recipient* of *Federal financial assistance* as those terms are defined under 34 CFR parts 100, 104, 106, and 110.

(d)

(1) A faith-based organization that applies for or receives a subgrant from a State under a State-administered formula grant program of the Department will retain its independence, autonomy, right of expression, religious character, and authority over its governance. A faith-based organization that receives Federal financial assistance from the Department does not lose the protection of law.

(2) A faith-based organization that applies for or receives a subgrant from a State under a State-administered formula grant program of the Department may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without concealing, removing, or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members on the basis of their acceptance of or adherence to the religious tenets of the organization; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) An organization that receives any Federal financial assistance under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services, or in outreach activities related to such services, on the basis of religion or religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. However, an organization that participates in a program funded by indirect Federal financial assistance need not modify its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization's program.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives Federal financial assistance from the Department.

(h) The Department shall not construe these provisions in such a way as to advantage or disadvantage faith-based organizations affiliated with historic or well-established religions or sects in comparison with other religions or sects.

[85 FR 82128, Dec. 17, 2020, as amended at 89 FR 15704, Mar. 4, 2024; 89 FR 70335, Aug. 29, 2024]

§ 76.53 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 82130, Dec. 17, 2020]

Subpart B—How a State Applies for a Grant

STATE PLANS AND APPLICATIONS

§ 76.100 Effect of this subpart.

This subpart establishes general requirements that a State must meet to apply for a grant under a program covered by this part. Additional requirements are in applicable statutes and regulations for the program.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[52 FR 27804, July 24, 1987, as amended at 89 FR 70335, Aug. 29, 2024]

§ 76.101 State plans in general.

(a) Except as provided in paragraph (b) of this section, a State that makes subgrants to local educational agencies under a program subject to this part must have on file with the Secretary a State plan that meets the requirements of section 441 of GEPA (20 U.S.C. 1232d), which may include information about how the State intends use continuous improvement strategies in its program implementation based on periodic review of research, data, community input, and other feedback.

(b) The requirements of section 441 of GEPA do not apply to a State plan submitted for a program under the Elementary and Secondary Education Act of 1965.

[89 FR 70335, Aug. 29, 2024]

§ 76.102 Definition of "State plan" for this part.

As used in this part, *State plan* means any document that applicable statutes and regulations for a State-administered formula grant program require a State to submit in order to receive funds for the program. To the extent that any provision of this part conflicts with program-specific implementing regulations related to the plan, the program-specific implementing regulations govern.

[89 FR 70335, Aug. 29, 2024]

§ 76.103 Multiyear State plans.

Unless otherwise specified by statute, regulations, or the Secretary, each State plan is effective for a period of more than one fiscal year, to be determined by the Secretary or by regulations.

[89 FR 70335, Aug. 29, 2024]

§ 76.104 A State shall include certain certifications in its State plan.

(a) A State shall include the following certifications in each State plan:

(1) That the plan is submitted by the State agency that is eligible to submit the plan.

(2) That the State agency has authority under State law to perform the functions of the State under the program.

(3) That the State legally may carry out each provision of the plan.

(4) That all provisions of the plan are consistent with State law.

(5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.

(6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.

(7) That the agency that submits the plan has adopted or otherwise formally approved the plan.

(8) That the plan is the basis for State operation and administration of the program.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.106 State documents are public information.

A State shall make the following documents available for public inspection:

(a) All State plans and related official materials.

(b) All approved subgrant applications.

(c) All documents that the Secretary transmits to the State regarding a program.

(Authority: 20 U.S.C. 1221e-3 and 3474)

CONSOLIDATED GRANT APPLICATIONS FOR INSULAR AREAS

Authority: Title V, Pub. L. 95-134, 91 Stat. 1159 (48 U.S.C. 1469a).

§ 76.125 What is the purpose of these regulations?

(a) Sections 76.125 through 76.137 of this part contain requirements for the submission of an application by an Insular Area for the consolidation of two or more grants under the programs described in paragraph (c) of this section.

(b) For the purpose of §§ 76.125-76.137 of this part the term *Insular Area* means the Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.

(c) The Secretary may make an annual consolidated grant to assist an Insular Area in carrying out one or more State-administered formula grant programs of the Department, consistent with applicable law.

[47 FR 17421, Apr. 22, 1982, as amended at 54 FR 21776, May 19, 1989; 57 FR 30341, July 8, 1992; 89 FR 70335, Aug. 29, 2024]

§ 76.126 What regulations apply to the consolidated grant applications for insular areas?

The following regulations apply to those programs included in a consolidated grant:

(a) The regulations in §§ 76.125 through 76.137; and

(b) The regulations that apply to each specific program included in a consolidated grant for which funds are used.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.127 What is the purpose of a consolidated grant?

An Insular Area may apply for a consolidated grant for two or more State-administered formula grant programs . This procedure is intended to:

(a) Simplify the application and reporting procedures that would otherwise apply for each of the programs included in the consolidated grant; and

(b) Provide the Insular Area with flexibility in allocating the funds under the consolidated grant to achieve any of the purposes to be served by the programs that are consolidated.

[47 FR 17421, Apr. 22, 1982, as amended at 89 FR 70335, Aug. 29, 2024]

§ 76.128 What is a consolidated grant?

A consolidated grant is a grant to an Insular Area for any two or more State-administered formula grant programs. The amount of the consolidated grant is the sum of the allocations the Insular Area receives under each of the programs included in the consolidated grant if there had been no consolidation.

> *Example 1 to § 76.128.* Assume the Virgin Islands applies for a consolidated grant that includes funds under the Carl D. Perkins Career and Technical Education Act of 2006 and title I, part A; title II, part A; and title IV, part A of the Elementary and Secondary Education Act of 1965. If the Virgin Islands' allocation under the formula for each of these four programs is $150,000, the total consolidated grant to the Virgin Islands would be $600,000.

[47 FR 17421, Apr. 22, 1982, as amended at 89 FR 70335, Aug. 29, 2024]

§ 76.129 How does a consolidated grant work?

(a) An Insular Area shall use the funds it receives under a consolidated grant to carry out, in its jurisdiction, one or more of the programs included in the grant.

> *Example 1 to paragraph (a). Assume that Guam receives, under the consolidated grant, funds from Carl D. Perkins Career and Technical Education Act of 2006, Title I, part A of the ESEA, and Title IV, part A of the ESEA. The sum of the allocations under these programs is $600,000. Guam may choose to allocate this $600,000 among one, two, or all three of the programs.*

(b) An Insular Area shall comply with the statutory and regulatory requirements that apply to each program under which funds from the consolidated grant are expended.

> *Example 2 to paragraph (b). Assume that American Samoa uses part of the funds under a consolidated grant to carry out programs and activities under Title IV, part A of the ESEA. American Samoa need not*

> *submit to the Secretary a State plan that addresses the program's application requirement that the State educational agency describe how it will use funds for State-level activities. However, in carrying out the program, American Samoa must use the required amount of funds for State-level activities under the program.*

[47 FR 17421, Apr. 22, 1982, as amended at 89 FR 70335, Aug. 29, 2024]

§ 76.130 How are consolidated grants made?

(a) The Secretary annually makes a single consolidated grant to each Insular Area that meets the requirements of §§ 76.125 through 76.137 and each program under which the grant funds are to be used and administered.

(b) The Secretary may decide that one or more programs cannot be included in the consolidated grant if the Secretary determines that the Insular Area failed to meet the program objectives stated in its plan for the previous fiscal year in which it carried out the programs.

(c) Under a consolidated grant, an Insular Area may use a single advisory council for any or all of the programs that require an advisory council.

(d) Although Pub. L. 95-134 authorizies the Secretary to consolidate grant funds that the Department awards to an Insular Area, it does not confer eligibility for any grant funds. The eligibility of a particular Insular Area to receive grant funds under a Federal education program is determined under the statutes and regulations that apply to that program.

[47 FR 17421, Apr. 22, 1982, as amended at 89 FR 70336, Aug. 29, 2024]

§ 76.131 How does an insular area apply for a consolidated grant?

(a) An Insular Area that desires to apply for a grant consolidating two or more State-administered formula grant programs shall submit to the Secretary an application that:

(1) Contains the assurances in § 76.132; and

(2) Meets the application requirements in paragraph (c) of this section.

(b) The submission of an application that contains these requirements and assurances takes the place of a separate State plan or other similar document required by this part or by applicable statutes and regulations for programs included in the consolidated grant.

(c) An Insular Area shall include in its consolidated grant application a program plan that:

(1) Contains a list of the State-administered formula grant programs to be included in the consolidated grant;

(2) Describes the State-administered formula grant programs under which the consolidated grant funds will be used and administered;

(3) Describes the goals, objectives, activities, and the means of evaluating program outcomes for the programs for which the Insular Area will use the funds received under the consolidated grant during the fiscal year for which it submits the application, including needs of the population that will be met by the consolidation of funds; and

(4) Contains a budget that includes a description of the allocation of funds—including any anticipated carryover funds of the program in the consolidated grant from the preceding year—among the programs to be included in the consolidated grant.

(Approved by the Office of Management and Budget under control number 1880-0513)

[47 FR 17421, Apr. 22, 1982, as amended at 53 FR 49143, Dec. 6, 1988; 89 FR 70336, Aug. 29, 2024]

§ 76.132 What assurances must be in a consolidated grant application?

(a) An Insular Area shall include in its consolidated grant application assurances to the Secretary that it will:

(1) Follow policies and use administrative practices that will insure that non-Federal funds will not be supplanted by Federal funds made available under the authority of the programs in the consolidated grant;

(2) Comply with the requirements (except those relating to the submission of State plans or similar documents) in the applicable statutes and implementing regulations for the programs under which funds are to be used and administered, (except requirements for matching funds);

(3) Provide for proper and efficient administration of funds in accordance with the authorizing statutes and implementing regulations for those programs under which funds are to be used and administered;

(4) Provide for fiscal control and fund accounting procedures to ensure proper disbursement of, and accounting for, Federal funds received under the consolidated grant;

(5) Submit an annual report to the Secretary containing information covering the program or programs for which the grant is used and administered, including the financial and program performance information required under 2 CFR 200.328 and 200.329.

(6) Provide that funds received under the consolidated grant will be under control of, and that title to property acquired with these funds will be in, a public agency, institution, or organization. The public agency shall administer these funds and property;

(7) Keep records, including a copy of the State Plan or application document under which funds are to be spent, which show how the funds received under the consolidated grant have been spent.

(8) Adopt and use methods of monitoring and providing technical assistance to any agencies, organizations, or institutions that carry out the programs under the consolidated grant and enforce any obligations imposed on them under the applicable statutes and regulations.

(9) Evaluate the effectiveness of these programs in meeting the purposes and objectives in the applicable statutes under which program funds are used and administered;

(10) Conduct evaluations of these programs at intervals and in accordance with procedures the Secretary may prescribe; and

(11) Provide appropriate opportunities for participation by local agencies, representatives of the groups affected by the programs, and other interested institutions, organizations, and individuals in planning and operating the programs.

(b) These assurances remain in effect for the duration of the programs they cover.

[47 FR 17421, Apr. 22, 1982, as amended at 64 FR 50392, Sept. 16, 1999; 79 FR 76093, Dec. 19, 2014; 89 FR 70336, Aug. 29, 2024]

§ 76.133 What is the reallocation authority?

(a) After an Insular Area receives a consolidated grant, it may reallocate the funds in a manner different from the allocation described in its consolidated grant application. However, the funds cannot be used for purposes that are not authorized under the programs in the consolidated grant under which funds are to be used and administered.

(b) If an Insular Area decides to reallocate the funds it receives under a consolidated grant, it shall notify the Secretary by amending its original application to include an update of the information required under § 76.131.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.134 What is the relationship between consolidated and non-consolidated grants?

(a) An Insular Area may request that any State-administered formula grant programs be included in its consolidated grant and may apply separately for assistance under any other of those programs for which it is eligible.

(b) Those programs that an Insular Area decides to exclude from consolidation—for which it must submit separate plans or applications—are implemented in accordance with the applicable applicable statutes and regulations. The excluded programs are not subject to the provisions for allocation of funds among programs in a consolidated grant.

[47 FR 17421, Apr. 22, 1982, as amended at 89 FR 70336, Aug. 29, 2024]

§ 76.135 Are there any requirements for matching funds?

The Secretary waives all requirements for matching funds for those programs that are consolidated by an Insular Area in a consolidated grant application.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.136 Under what programs may consolidated grant funds be spent?

Insular Areas may only use and administer funds under State-administered formula grant programs during a fiscal year for which the Insular Area is entitled to receive funds under an appropriation for that program.

[47 FR 17421, Apr. 22, 1982, as amended at 57 FR 30341, July 8, 1992; 89 FR 70336, Aug. 29, 2024]

§ 76.137 How may carryover funds be used under the consolidated grant application?

Any funds under any applicable program which are available for obligation and expenditure in the year succeeding the fiscal year for which they are appropriated must be obligated and expended in accordance with the consolidated grant application submitted by the Insular Area for that program for the succeeding fiscal year.

(Authority: 20 U.S.C. 1225(b); 48 U.S.C. 1469a)

AMENDMENTS

§ 76.140 Amendments to a State plan.

(a) If the Secretary determines that an amendment to a State plan is essential during the effective period of the plan, the State must make the amendment.

(b) A State must also amend a State plan if there is a significant and relevant change in the information or the assurances in the plan.

(c) If a State amends a State plan, to the extent consistent with applicable law, the State must use the same procedures as those it must use to prepare and submit a State plan, unless the Secretary prescribes different procedures for submitting amendments based on the characteristics and requirements of a particular State-administered formula grant program.

[89 FR 70336, Aug. 29, 2024]

§§ 76.141-76.142 [Reserved]

Subpart C—How a Grant Is Made to a State

APPROVAL OR DISAPPROVAL BY THE SECRETARY

§ 76.201 A State plan must meet all statutory and regulatory requirements.

The Secretary approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.202 Opportunity for a hearing before a State plan is disapproved.

The Secretary may disapprove a State plan only after:

(a) Notifying the State;

(b) Offering the State a reasonable opportunity for a hearing; and

(c) Holding the hearing, if requested by the State.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.235 The notification of grant award.

(a) To make a grant to a State, the Secretary issues and sends to the State a notification of grant award.

(b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

ALLOTMENTS AND REALLOTMENTS OF GRANT FUNDS

§ 76.260 Allotments are made under applicable statutes or regulations.

(a) The Secretary allots program funds to a State in accordance with applicable statutes or implementing regulations for the program.

(b) Any reallotment to other States will be made by the Secretary in accordance with applicable statutes or implementing regulations for that program.

(Authority: 20 U.S.C. 3474(a))

[50 FR 29330, July 18, 1985, as amended at 89 FR 70336, Aug. 29, 2024]

§ 76.261 Reallotted funds are part of a State's grant.

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Secretary does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Subpart D—How To Apply to the State for a Subgrant

§ 76.300 Contact the State for procedures to follow.

An applicant for a subgrant can find out the procedures it must follow by contacting the State agency that administers the program.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross Reference:
See subparts E and G of this part for the general responsibilities of the State regarding applications for subgrants.

§ 76.301 Local educational agency application in general.

(a) A local educational agency (LEA) that applies for a subgrant under a program subject to this part must have on file with the State an application that meets the requirements of section 442 of GEPA (20 U.S.C. 1232e).

(b) The requirements of section 442 of GEPA do not apply to an LEA's application for a program under the ESEA.

[89 FR 70336, Aug. 29, 2024]

§ 76.302 The notice to the subgrantee.

A State shall notify a subgrantee in writing of:

(a) The amount of the subgrant;

(b) The period during which the subgrantee may obligate the funds; and

(c) The Federal requirements that apply to the subgrant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.303 Joint applications and projects.

(a) Two or more eligible parties may submit a joint application for a subgrant.

(b) If the State must use a formula to distribute subgrant funds (see § 76.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.

(c) If the State funds the application, each subgrantee shall:

(1) Carry out the activities that the subgrantee agreed to carry out; and

(2) Use the funds in accordance with Federal requirements.

(d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.304 Subgrantee shall make subgrant application available to the public.

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(Authority: 20 U.S.C. 1221e-3, 1232e, and 3474)

Subpart E—How a Subgrant Is Made to an Applicant

§ 76.400 State procedures for reviewing an application.

A State that receives an application for a subgrant shall take the following steps:

(a) ***Review.*** The State shall review the application.

(b) ***Approval—entitlement programs.*** The State shall approve an application if:

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the applicable statutes and regulations that apply to the program.

(c) ***Approval—discretionary programs.*** The State may approve an application if:

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the applicable statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) ***Disapproval—entitlement and discretionary programs.*** If an application does not meet the requirements of the applicable statutes and regulations that apply to a program, the State shall not approve the application.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70336, Aug. 29, 2024]

§ 76.401 Disapproval of an application—opportunity for a hearing.

(a) ***State educational agency hearing regarding disapproval of an application.*** When financial assistance is provided to (or through) a State educational agency (SEA) consistent with an approved State plan and the SEA takes final action by disapproving or failing to approve an application for a subgrant in whole or in part, the SEA must provide the aggrieved applicant with notice and an opportunity for a hearing regarding the SEA's disapproval or failure to approve the application.

(b) ***Applicant request for SEA hearing.***

(1) The aggrieved applicant must request a hearing within 30 days of the final action of the SEA.

(2) The aggrieved applicant's request for a hearing must include, at a minimum, a citation to the specific State or Federal statute, rule, regulation, or guideline that the SEA allegedly violated when disapproving or failing to approve the application in whole or in part and a brief description of the alleged violation.

(3) The SEA must make available, at reasonable times and places to each applicant, all records of the SEA pertaining to the SEA's failure to approve the application in whole or in part that is the subject of the applicant's request for a hearing under this paragraph (b).

(c) ***SEA hearing procedures.***

(1) Within 30 days after it receives a request that meets the requirements of paragraphs (b)(1) and (2) of this section, the SEA must hold a hearing on the record to review its action.

(2) No later than 10 days after the hearing, the SEA must issue its written ruling, including findings of fact and reasons for the ruling.

(3) If the SEA determines that its action was contrary to State or Federal statutes, rules, regulations, or guidelines that govern the applicable program, the SEA must rescind its action in whole or in part.

(d) ***Procedures for appeal of SEA action to the Secretary.***

(1) If an SEA does not rescind its final action disapproving or failing to approve an application in whole or in part after the SEA conducts a hearing consistent with paragraph (c) of this section, the applicant may appeal the SEA's final action to the Secretary.

(2) The applicant must file a notice of appeal with the Secretary within 20 days after the applicant has received the SEA's written ruling.

(3) The applicant's notice of appeal must include, at a minimum, a citation to the specific Federal statute, rule, regulation, or guideline that the SEA allegedly violated and a brief description of the alleged violation.

(4) The Secretary may issue interim orders at any time when considering the appeal, including requesting the hearing record and any additional documentation, such as additional documentation regarding the information provided pursuant to paragraph (d)(3) of this section.

(5) After considering the appeal, the Secretary issues an order either affirming the final action of the SEA or requiring the SEA to take appropriate action, if the Secretary determines that the final action of the SEA was contrary to a Federal statute, rule, regulation, or guideline that governs the applicable program.

(e) ***Programs administered by State agencies other than an SEA.*** Under programs with an approved State plan under which financial assistance is provided to (or through) a State agency that is not the SEA, that State agency is not required to comply with this section unless specifically required to do so by Federal statute or regulation.

[89 FR 70336, Aug. 29, 2024]

Subpart F—What Conditions Must Be Met by the State and Its Subgrantees?

NONDISCRIMINATION

§ 76.500 Constitutional rights, freedom of inquiry, and Federal statutes and regulations on nondiscrimination.

(a) A State and a subgrantee must comply with the following statutes and regulations:

TABLE 1 TO § 76.500(a)

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d-4)	34 CFR part 100.
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683)	34 CFR part 106.
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)	34 CFR part 104.
Discrimination on the basis of age	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*)	34 CFR part 110.

(b)

(1) Each State or subgrantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is public and that is legally required to abide by the First Amendment to the U.S. Constitution (hereinafter "public institution"), must also comply with the First Amendment to the U.S. Constitution, including protections for freedom of speech, association, press, religion, assembly, petition, and academic freedom, as a material condition of the Department's grant. The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment. A final judgment is a judgment that the public institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the public institution to be in compliance with the First Amendment.

(2) Each State or subgrantee that is a public institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(c)

(1) Each State or subgrantee that is an institution of higher education, as defined in 20 U.S.C. 1002(a), that is private (hereinafter "private institution") must comply with its stated institutional policies regarding freedom of speech, including academic freedom. The Department will determine that a private institution has not complied with these stated institutional policies only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom, as a material condition of the Department's grant. A final judgment is a judgment that the private institution chooses not to appeal or that is not subject to further appeal. Absent such a final, non-default judgment, the Department will deem the private institution to be in compliance with its stated institutional policies.

(2) Each State or subgrantee that is a private institution also must submit to the Secretary a copy of the final, non-default judgment by that State or Federal court to conclude the lawsuit no later than 45 calendar days after such final, non-default judgment is entered.

(d) As a material condition of the Department's grant, each State or subgrantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

(e) A State or subgrantee that is a covered entity as defined in 34 CFR 108.3 shall comply with the nondiscrimination requirements of the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 CFR part 108.

[85 FR 59979, Sept. 23, 2020, as amended at 89 FR 70337, Aug. 29, 2024]

Editorial Note: At 89 FR 70337, Aug. 29, 2024, § 76.500 was amended; however, the amendment could not be incorporated because the table to paragraph (a) was missing.

ALLOWABLE COSTS

§ 76.530 General cost principles.

The general principles to be used in determining costs applicable to grants, subgrants, and cost-type contracts under grants and subgrants are specified at 2 CFR part 200, subpart E—Cost Principles.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[79 FR 76093, Dec. 19, 2014]

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved]

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004; 89 FR 70337, Aug. 29, 2024]

§ 76.533 Acquisition of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by applicable statutes or implementing regulations for the program.

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70337, Aug. 29, 2024]

§ 76.534 Use of tuition and fees restricted.

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost sharing, or maintenance of effort requirements of a program.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

INDIRECT COST RATES

§ 76.560 General indirect cost rates and cost allocation plans; exceptions.

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for—

(1) All grantees, other than hospitals and commercial (for-profit) organizations, at 2 CFR part 200, subpart E;

(2) Hospitals, at 45 CFR part 75, appendix IX; and

(3) Commercial (for-profit) organizations, at 48 CFR part 31.

(b) Except as specified in paragraph (c) of this section, a grantee must have a current indirect cost rate agreement or approved cost allocation plan to charge indirect costs to a grant. To obtain a negotiated indirect cost rate agreement or approved cost allocation plan, a grantee must submit an indirect cost rate proposal or cost allocation plan to its cognizant agency.

(c) A grantee that meets the requirements in 2 CFR 200.414(f) may elect to charge the *de minimis* rate of modified total direct costs (MTDC) specified in that provision, which may be used indefinitely. The *de minimis* rate may not be used on programs that have statutory or regulatory restrictions on the indirect cost rate. No documentation is required to justify the *de minimis* rate.

(1) If the grantee has established a threshold for equipment that is lower than the amount specified in the Uniform Guidance, the grantee must use that threshold to exclude equipment from the MTDC base.

(2) For purposes of the MTDC base and application of the 10 percent rate, MTDC includes up to the amount specified in the definition of MTDC in the Uniform Guidance of each subaward, each year.

(d) If a grantee is required to, but does not, have a federally recognized indirect cost rate or approved cost allocation plan, the Secretary may permit the grantee to charge a temporary indirect cost rate of 10 percent of budgeted direct salaries and wages.

(e)

(1) If a grantee fails to submit an indirect cost rate proposal or cost allocation plan to its cognizant agency within the required 90 days, the grantee may not charge indirect costs to its grant from the end of the 90-day period until it obtains a federally recognized indirect cost rate agreement applicable to the grant.

(2) If the Secretary determines that exceptional circumstances warrant continuation of a temporary indirect cost rate, the Secretary may authorize the grantee to continue charging indirect costs to its grant at the temporary rate specified in paragraph (d) of this section even though the grantee has not submitted its indirect cost rate proposal within the 90-day period.

(3) Once a grantee obtains a federally recognized indirect cost rate that is applicable to the affected grant, the grantee may use that indirect cost rate to claim indirect cost reimbursement for expenditures made on or after the date on which the grantee submitted its indirect cost proposal to its cognizant agency or the start of the project period, whichever is later. However, this authority is subject to the following limitations:

(i) The total amount of funds recovered by the grantee under the federally recognized indirect cost rate is reduced by the amount of indirect costs previously recovered under the temporary indirect cost rate specified in paragraph (d) of this section.

(ii) The grantee must obtain prior approval from the Secretary to shift direct costs to indirect costs in order to recover indirect costs at a higher negotiated indirect cost rate.

(iii) The grantee may not request additional funds to recover indirect costs that it cannot recover by shifting direct costs to indirect costs.

(f) The Secretary accepts a negotiated indirect cost rate or approved cost allocation plan but may establish a restricted indirect cost rate or cost allocation plan compliant with §§ 76.564 through 76.569 for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

[89 FR 70337, Aug. 29, 2024]

§ 76.561 Approval of indirect cost rates and cost allocation plans.

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate or cost allocation plan for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term "local educational agency" does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, must approve an indirect cost rate for each local educational agency that requests it to do so.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

[89 FR 70338, Aug. 29, 2024]

§ 76.562 Reimbursement of indirect costs.

(a) Reimbursement of indirect costs is subject to the availability of funds and statutory or administrative restrictions.

(b) The application of the negotiated indirect cost rate (determination of the direct cost base) or cost allocation plan (charging methodology) must be in accordance with the agreement/plan approved by the grantee's cognizant agency.

(c) Indirect costs for joint applications and projects (see § 76.303) are limited to the amount derived by applying the rate of the applicant, or a restricted rate when applicable, to the direct cost base for the grant in keeping with the terms of the applicant's federally recognized indirect cost rate agreement and program requirements.

[89 FR 70338, Aug. 29, 2024]

§ 76.563 Restricted indirect cost rate—programs covered.

Sections 76.564 through 76.569 apply to programs with a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, and to subgrants under these programs.

[59 FR 59583, Nov. 17, 1994, as amended at 89 FR 70338, Aug. 29, 2024]

§ 76.564 Restricted indirect cost rate formula.

(a) An indirect cost rate for a grant covered by §§ 76.563 or 75.563 is determined by the following formula: Restricted indirect cost rate = (General management costs + Fixed costs) ÷ (Other expenditures).

(b) General management costs, fixed costs, and other expenditures must be determined under §§ 76.565 through 76.567.

(c) Under the programs covered by § 76.563, a grantee or subgrantee that is not a State or local government agency—

(1) Must use a negotiated restricted indirect cost rate computed under paragraph (a) of this section or cost allocation plan that complies with the formula in paragraph (a) of this section; or

(2) May elect to use an indirect cost rate of 8 percent of the modified total direct costs (MTDC) base if the grantee or subgrantee does not have a negotiated restricted indirect cost rate. MTDC is defined in 2 CFR 200.1. If the Secretary determines that the grantee or subgrantee would have a lower rate as calculated under paragraph (a) of this section, the lower rate must be used for the affected program.

(3) If the grantee has established a threshold for equipment that is lower than the amount specified in the Uniform Guidance, the grantee must use that threshold to exclude equipment from the MTDC base.

(4) For purposes of the MTDC base and application of the 8 percent rate, MTDC includes up to the amount specified in the definition of MTDC in the Uniform Guidance of each subaward, each year.

(d) Indirect costs that are unrecovered as a result of these restrictions may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

[89 FR 70338, Aug. 29, 2024]

§ 76.565 General management costs—restricted rate.

(a) As used in § 76.564, *general management costs* means the costs of activities that are for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) General management costs include the costs of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management. The term also includes certain occupancy and space maintenance costs as determined under § 76.568.

(c) The term does not include expenditures for—

(1) Divisional administration that is limited to one component of the grantee;

(2) The governing body of the grantee;

(3) Compensation of the chief executive officer of the grantee;

(4) Compensation of the chief executive officer of any component of the grantee; and

(5) Operation of the immediate offices of these officers.

(d) For purposes of this section—

(1) The chief executive officer of the grantee is the individual who is the head of the executive office of the grantee and exercises overall responsibility for the operation and management of the organization. The chief executive officer's immediate office includes any deputy chief executive officer or similar officer along with immediate support staff of these individuals. The term does not include the governing body of the grantee, such as a board or a similar elected or appointed governing body; and

(2) Components of the grantee are those organizational units supervised directly or indirectly by the chief executive officer. These organizational units generally exist one management level below the executive office of the grantee. The term does not include the office of the chief executive officer or a deputy chief executive officer or similar position.

[59 FR 59583, Nov. 17, 1994, as amended at 89 FR 70338, Aug. 29, 2024]

§ 76.566 Fixed costs—restricted rate.

As used in § 76.564, *fixed costs* means contributions of the grantee to fringe benefits and similar costs, but only those associated with salaries and wages that are charged as allowable indirect costs, including—

(a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;

(b) Unemployment compensation payments; and

(c) Property, employee, health, and liability insurance.

[59 FR 59583, Nov. 17, 1994, as amended at 89 FR 70338, Aug. 29, 2024]

§ 76.567 Other expenditures—restricted rate.

(a) As used in § 76.564, *other expenditures* means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available. The term also includes direct occupancy and space maintenance costs as determined under § 76.568 and costs related to the chief executive officers of the grantee and components of the grantee and their offices (see § 76.565(c) and (d)).

(b) The term does not include—

(1) General management costs determined under § 76.565;

(2) Fixed costs determined under § 76.566;

(3) Subawards exceeding the amount specified in the definition of Modified Total Direct Cost in the Uniform Guidance each, per year;

(4) Capital outlay;

(5) Debt service;

(6) Fines and penalties;

(7) Contingencies;

(8) Other distorting items; and

(9) Election expenses. However, the term does include election expenses that result from elections required by an applicable Federal statute.

[59 FR 59583, Nov. 17, 1994, as amended at 89 FR 70338, Aug. 29, 2024]

§ 76.568 Occupancy and space maintenance costs—restricted rate.

(a) As used in the calculation of a restricted indirect cost rate, *occupancy and space maintenance costs* means such costs as—

(1) Building costs whether owned or rented;

(2) Janitorial services and supplies;

(3) Building, grounds, and parking lot maintenance;

(4) Guard services;

(5) Light, heat, and power;

(6) Depreciation, use allowances, and amortization; and

(7) All other related space costs.

(b) Occupancy and space maintenance costs associated with organization-wide service functions (accounting, payroll, personnel) may be included as general management costs if a space allocation or use study supports the allocation.

(c) Occupancy and space maintenance costs associated with functions that are not organization-wide must be included with other expenditures (denominator) in the indirect cost formula. These costs may be charged directly to affected programs only to the extent that statutory supplanting prohibitions are not violated. This reimbursement must be approved in advance by the Secretary.

[59 FR 59584, Nov. 17, 1994, as amended at 89 FR 70338, Aug. 29, 2024]

§ 76.569 Using the restricted indirect cost rate.

(a) Under the programs referenced in §§ 75.563 and 76.563, the maximum amount of indirect costs recovery under a grant is determined by the following formula: Indirect costs = (Restricted indirect cost rate) × (Total direct costs of the grant minus capital outlays, subawards exceeding amount specified in the definition of Modified Total Direct Cost in the Uniform Guidance each, per year, and other distorting or unallowable items as specified in the grantee's indirect cost rate agreement)

(b) If a grantee uses a restricted indirect cost rate, the general management and fixed costs covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

[59 FR 59584, Nov. 17, 1994, as amended at 89 FR 70338, Aug. 29, 2024]

§ 76.580 Coordination with other activities.

A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30341, July 8, 1992; 89 FR 70338, Aug. 29, 2024]

EVALUATION

§ 76.591 Federal evaluation—cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1221e-3, 1226c, 1231a, 3474, and 6511(a))

[45 FR 86298, Dec. 30, 1980, as amended at 57 FR 30341, July 8, 1992]

§ 76.592 Federal evaluation—satisfying requirement for State or subgrantee evaluation.

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Secretary may determine that the State or subgrantee meets the evaluation requirements of the program.

(Authority: 20 U.S.C. 1226c; 1231a)

CONSTRUCTION

§ 76.600 Where to find the construction regulations.

(a) A State or a subgrantee that requests program funds for construction, or whose grant or subgrant includes funds for construction, must comply with the rules on construction that apply to applicants and grantees under 34 CFR 75.600 through 75.618.

(b) The State must perform the functions of the Secretary for subgrantee requests under 34 CFR 75.601 (Approval of the construction).

(c) The State must perform the functions that the Secretary performs under 34 CFR 75.614(b). The State may consult with the State Historic Preservation Officer and Tribal Historic Preservation Officer to identify and evaluate historic properties and assess effects. The Secretary will continue to participate in the consultation process when:

(1) The State determines that “Criteria of Adverse Effect” applies to a project;

(2) There is a disagreement between the State and the State Historic Preservation Officer or Tribal Historic Preservation Officer regarding identification and evaluation or assessment of effects;

(3) There is an objection from consulting parties or the public regarding findings, determinations, the implementation of agreed-upon provisions, or their involvement in a National Historic Preservation Act Section 106 review (see 36 CFR part 800); or

(4) There is the potential for a foreclosure situation or anticipatory demolition as specified in Section 110(k) of the National Historic Preservation Act (see 36 CFR part 800).

(d) The State must provide to the Secretary the information required under 34 CFR 75.614(a) (Preservation of historic sites).

(e) The State must submit periodic reports to the Secretary regarding the State's review and approval of construction or real property projects containing information specified by the Secretary consistent with 2 CFR 200.329(d).

[89 FR 70338, Aug. 29, 2024]

PARTICIPATION OF PRIVATE SCHOOL CHILDREN, TEACHERS OR OTHER EDUCATIONAL PERSONNEL, AND FAMILIES

§ 76.650 Participation of private school children, teachers or other educational personnel, and families.

If a program provides for participation by private school children, teachers or other educational personnel, and families, and the program is not otherwise governed by applicable regulations, the grantee or subgrantee must provide, as applicable, services in accordance with the requirements under §§ 76.651 through 76.662.

[89 FR 70339, Aug. 29, 2024]

§ 76.651 Responsibility of a State and a subgrantee.

(a)

(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)

(1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.652 Consultation with representatives of private school students.

A subgrantee must consult with appropriate private school officials in accordance with the requirements in § 299.7.

[89 FR 70339, Aug. 29, 2024]

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.654 Benefits for private school students.

(a) ***Comparable benefits.*** The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) ***Same benefits.*** If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) ***Different benefits.*** If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.655 [Reserved]

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3 and 3474)

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall ensure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70339, Aug. 29, 2024]

§ 76.662 Construction.

A subgrantee shall ensure that program funds are not used for the construction of private school facilities.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70339, Aug. 29, 2024]

§§ 76.663-76.6775 [Reserved]

Other Requirements for Certain Programs

§ 76.681 Protection of human subjects.

If a State or a subgrantee uses a human subject in a research project, the State or subgrantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30341, July 8, 1992]

§ 76.682 Treatment of animals.

If a State or a subgrantee uses an animal in a project, the State or subgrantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70339, Aug. 29, 2024]

§ 76.683 Health or safety standards for facilities.

A State and a subgrantee shall comply with any Federal health or safety requirements that apply to the facilities that the State or subgrantee uses for a project.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

Subpart G—What Are the Administrative Responsibilities of the State and Its Subgrantees?

General Administrative Responsibilities

§ 76.684 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e-3, 3474)

[85 FR 59980, Sept. 23, 2020]

§ 76.700 Compliance with the U.S. Constitution, statutes, regulations, stated institutional policies, and applications.

A State and a subgrantee shall comply with § 76.500, the State plan, applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(Authority: 20 U.S.C. 1221e-3, 3474)

[85 FR 59980, Sept. 23, 2020]

§ 76.701 The State or subgrantee administers or supervises each project.

A State or a subgrantee shall directly administer or supervise the administration of each project.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

§ 76.702 Fiscal control and fund accounting procedures.

A State and a subgrantee shall use fiscal control and fund accounting procedures that ensure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70339, Aug. 29, 2024]

§ 76.703 When a State may begin to obligate funds.

(a)

(1) The Secretary may establish, for a program subject to this part, a date by which a State must submit for review by the Department a State plan and any other documents required to be submitted under guidance provided by the Department under paragraph (b)(3) of this section.

(2) If the Secretary does not establish a date for the submission of State plans and any other documents required under guidance provided by the Department, the date for submission is three months before the date the Secretary may begin to obligate funds under the program.

(b)

(1) This paragraph (b) describes the circumstances under which the submission date for a State plan may be deferred.

(2) If a State asks the Secretary in writing to defer the submission date for a State plan because of a Presidentially declared disaster that has occurred in that State, the Secretary may defer the submission date for the State plan and any other document required under guidance provided by the Department if the Secretary determines that the disaster significantly impairs the ability of the State to submit a timely State plan or other document required under guidance provided by the Department.

(3)

(i) The Secretary establishes, for a program subject to this part, a date by which the program office must deliver guidance to the States regarding the contents of the State plan under that program.

(ii) The Secretary may only establish a date for the delivery of guidance to the States so that there are at least as many days between that date and the date that State plans must be submitted to the Department as there are days between the date that State plans must be submitted to the Department and the date that funds are available for obligation by the Secretary on July 1, or October 1, as appropriate.

(iii) If a State does not receive the guidance by the date established under paragraph (b)(3)(i) of this section, the submission date for the State plan under the program is deferred one day for each day that the guidance is late in being received by the State.

Note: The following examples describe how the regulations in § 76.703(b)(3) would act to defer the date that a State would have to submit its State plan.

Example 1. The Secretary decides that State plans under a forward-funded program must be submitted to the Department by May first. The Secretary must provide guidance to the States under this program by March first, so that the States have at least as many days between the guidance date and the submission date (60) as the Department has between the submission date and the date that funds are available for obligation (60). If the program transmits guidance to the States on February 15, specifying that State plans must be submitted by May first, States generally would have to submit State plans by that date. However, if, for example, a State did not receive the guidance until March third, that State would have until May third to submit its State plan because the submission date of its State plan would be deferred one day for each day that the guidance to the State was late.

Example 2. If a program publishes the guidance in the FEDERAL REGISTER on March third, the States would be considered to have received the guidance on that day. Thus, the guidance could not specify a date for the submission of State plans before May second, giving the States 59 days between the date the guidance is published and the submission date and giving the Department 58 days between the submission date and the date that funds are available for obligation.

(c)

(1) For the purposes of this section, the submission date of a State plan or other document is the date that the Secretary receives the plan or document.

(2) The Secretary does not determine whether a State plan is substantially approvable until the plan and any documents required under guidance provided by the Department have been submitted.

(3) The Secretary notifies a State when the Department has received the State plan and all documents required under guidance provided by the Department.

(d) If a State submits a State plan in substantially approvable form (or an amendment to the State plan that makes it substantially approvable), and submits any other document required under guidance provided by the Department, on or before the date the State plan must be submitted to the Department, the State may begin to obligate funds on the date that the funds are first available for obligation by the Secretary.

(e) If a State submits a State plan in substantially approvable form (or an amendment to the State plan that makes it substantially approvable) or any other documents required under guidance provided by the Department after the date the State plan must be submitted to the Department, and—

(1) The Department determines that the State plan is substantially approvable on or before the date that the funds are first available for obligation by the Secretary, the State may begin to obligate funds on the date that the funds are first available for obligation by the Secretary; or

(2) The Department determines that the State plan is substantially approvable after the date that the funds are first available for obligation by the Secretary, the State may begin to obligate funds on the earlier of the two following dates:

(i) The date that the Secretary determines that the State plan is substantially approvable.

(ii) The date that is determined by adding to the date that funds are first available for obligation by the Secretary—

(A) The number of days after the date the State plan must be submitted to the Department that the State plan or other document required under guidance provided by the Department is submitted; and

(B) If applicable, the number of days after the State receives notice that the State plan is not substantially approvable that the State submits additional information that makes the plan substantially approvable.

(f) Additional information submitted under paragraph (e)(2)(ii)(B) of this section must be signed by the person who submitted the original State plan (or an authorized delegate of that officer).

(g)

(1) If the Department does not complete its review of a State plan during the period established for that review, the Secretary will grant pre-award costs for the period after funds become available for obligation by the Secretary and before the State plan is found substantially approvable.

(2) The period established for the Department's review of a plan does not include any day after the State has received notice that its plan is not substantially approvable.

Note: The following examples describe how the regulations in § 76.703 would be applied in certain circumstances. For the purpose of these examples, assume that the grant program established an April 1 due date for the submission of the State plan and that funds are first available for obligation by the Secretary on July 1.

Example 1. Paragraph (d): A State submits a plan in substantially approvable form by April 1. The State may begin to obligate funds on July 1.

Example 2. Paragraph (e)(1): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on June 20. The State may begin to obligate funds on July 1.

Example 3. Paragraph (e)(2)(i): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on July 15. The State may begin to obligate funds on July 15.

Example 4. Paragraph (e)(2)(ii)(A): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on August 21. The State may begin to obligate funds on August 14. (In this example, the plan is 45 days late. By adding 45 days to July 1, we reach August 14, which is earlier than the date, August 21, that the Department notifies the State that the plan is substantially approvable. Therefore, if the State chose to begin drawing funds from the Department on August 14, obligations made on or after that date would generally be allowable.)

Example 5. Paragraph (e)(2)(i): A State submits a plan on May 15, and the Department notifies the State that the plan is not substantially approvable on July 10. The State submits changes that make the plan substantially approvable on July 20 and the Department notifies the State that the plan is substantially approvable on July 25. The State may begin to obligate funds on July 25. (In this example, the original submission is 45 days late. In addition, the Department notifies the State that the plan is not substantially approvable and the time from that notification until the State submits changes that make the plan substantially approvable is an additional 10 days. By adding 55 days to July 1, we reach August 24. However, since the Department notified the State that the plan was substantially approvable on July 25, that is the date that the State may begin to obligate funds.)

Example 6. Paragraph (e)(2)(ii)(B): A State submits a plan on May 15, and the Department notifies the State that the plan is not substantially approvable on August 1. The State submits changes that make the plan substantially approvable on August 20, and the Department notifies the State that the plan is substantially approvable on September 5. The State may choose to begin drawing funds from the Department on September 2, and obligations made on or after that date would generally be allowable. (In this example, the original submission is 45 days late. In addition, the Department notifies the State that the plan is not substantially approvable and the time from that notification until the State submits changes that make the plan substantially approvable is an additional 19 days. By adding 64 days to July 1, we reach September 2, which is earlier than September 5, the date that the Department notifies the State that the plan is substantially approvable.)

Example 7. Paragraph (g): A State submits a plan on April 15 and the Department notifies the State that

> the plan is not substantially approvable on July 16. The State makes changes to the plan and submits a substantially approvable plan on July 30. The Department had until July 15 to decide whether the plan was substantially approvable because the State was 15 days late in submitting the plan. The date the State may begin to obligate funds under the regulatory deferral is July 29 (based on the 15 day deferral for late submission plus a 14 day deferral for the time it took to submit a substantially approvable plan after having received notice). However, because the Department was one day late in completing its review of the plan, the State would get pre-award costs to cover the period of July 1 through July 29.

(h) After determining that a State plan is in substantially approvable form, the Secretary informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(Authority: 20 U.S.C. 1221e-3, 3474, 6511(a) and 31 U.S.C. 6503)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 60 FR 41294, Aug. 11, 1995; 61 FR 14484, Apr. 2, 1996]

§ 76.704 New State plan requirements that must be addressed in a State plan.

(a) This section specifies the State plan requirements that must be addressed in a State plan if the State plan requirements established in statutes or regulations change on a date close to the date that State plans are due for submission to the Department.

(b)

(1) A State plan must meet the following requirements:

(i) Every State plan requirement in effect three months before the date the State plan is due to be submitted to the Department under 34 CFR 76.703; and

(ii) Every State plan requirement included in statutes or regulations that will be effective on or before the date that funds become available for obligation by the Secretary and that have been signed into law or published in the FEDERAL REGISTER as final regulations three months before the date the State plan is due to be submitted to the Department under 34 CFR 76.703.

(2) If a State plan does not have to meet a new State plan requirement under paragraph (b)(1) of this section, the Secretary takes one of the following actions:

(i) Require the State to submit assurances and appropriate documentation to show that the new requirements are being followed under the program.

(ii) Extend the date for submission of State plans and approve pre-award costs as necessary to hold the State harmless.

(3) If the Secretary requires a State to submit assurances under paragraph (b)(2) of this section, the State shall incorporate changes to the State plan as soon as possible to comply with the new requirements. The State shall submit the necessary changes before the start of the next obligation period.

(Authority: 20 U.S.C. 1221e-3, 3474, 6511(a) and 31 U.S.C. 6503)

[60 FR 41296, Aug. 11, 1995]

§ 76.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary under the cost principles in 2 CFR part 200, subpart E	On the first day of the grant or subgrant period of performance.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 55 FR 14817, Apr. 18, 1990; 57 FR 30342, July 8, 1992; 79 FR 76094, Dec. 19, 2014; 89 FR 70339, Aug. 29, 2024]

§ 76.708 When certain subgrantees may begin to obligate funds.

(a) If applicable statutes and regulations for a program require a State to make subgrants on the basis of a formula (see § 76.51(a)), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

(1) The date that the State may begin to obligate funds under § 76.703; or

(2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If applicable statutes and regulations for a program give the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles in 2 CFR part 200, subpart E-Cost Principles.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980. Further redesignated at 60 FR 41295, Aug. 11, 1995; 79 FR 76094, Dec. 19, 2014; 89 FR 70339, Aug. 29, 2024]

§ 76.709 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.

(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980. Redesignated at 60 FR 41295, Aug. 11, 1995; 89 FR 70339, Aug. 29, 2024]

§ 76.710 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

A State and a subgrantee shall use carryover funds in accordance with:

(a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and

(b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980. Redesignated at 60 FR 41295, Aug. 11, 1995; 89 FR 70339, Aug. 29, 2024]

§ 76.711 Requesting funds by ALN number.

If a program is listed in the Assistance Listings and assigned an Assistance Listing Number (ALN), a State, when requesting funds under the program, shall identify that program by the ALN.

(Authority: 20 U.S.C. 1221e-3, 6511(a), 3474, 31 U.S.C. 6503)

[60 FR 41296, Aug. 11, 1995, as amended at 89 FR 70339, Aug. 29, 2024]

§ 76.712 Beneficiary protections: Written notice.

(a) An organization providing social services to beneficiaries under a Department program supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—

(1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;

(2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;

(3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and

(4) A beneficiary or prospective beneficiary may report an organization's violation of these protections, including any denials of services or benefits by an organization, by contacting or filing a written complaint with the Department.

(b) The written notice described in paragraph (a) of this section must be given to a prospective beneficiary prior to the time they enroll in the program or receive services from the program. When the nature of the service provided or exigent circumstances make it impracticable to provide such written notice in advance of the actual service, an organization must provide the notice at the earliest available opportunity.

(c) The Department may determine that the notice described in paragraph (a) of this section must inform each beneficiary or prospective beneficiary of the option to seek information from the Department, or a State agency or other entity administering the applicable program, as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.

(d) The notice that an organization uses to notify beneficiaries or prospective beneficiaries of the rights under paragraphs (a) through (c) of this section must include language substantially similar to that in appendix C to 34 CFR part 75.

[89 FR 15704, Mar. 4, 2024]

§ 6.713 [Reserved]

§ 76.714 Subgrants, contracts, and other agreements with faith-based organizations.

If a grantee under a State-Administered Formula Grant program of the Department has the authority under the grant or subgrant to select a private organization to provide services supported by direct Federal financial assistance, as defined in § 76.52(c)(3), under the program by subgrant, contract, or other agreement, the grantee must ensure compliance with applicable Federal requirements governing contracts, grants, and other agreements with faith-based organizations, including, as applicable, §§ 76.52 and 76.532 and 2 CFR 3474.15. If the pass-through entity is a nongovernmental organization, it retains all other rights of a nongovernmental organization under the program's statutory and regulatory provisions.

[85 FR 82130, Dec. 17, 2020, as amended at 89 FR 70339, Aug. 29, 2024]

REPORTS

§ 76.720 State reporting requirements.

(a) This section applies to a State's reports required for monitoring and continuous improvement, including 2 CFR 200.328 (Financial reporting) and 2 CFR 200.329 (Monitoring and reporting program performance), and other reports required by the Secretary and approved by the Office of Management and Budget (OMB) under the Subpart 1 of Chapter 35 (sections 3501-3521) of Title 44, U.S. Code, commonly known as the "Paperwork Reduction Act."

(b) A State must submit these reports annually unless—

(1) The Secretary allows less frequent reporting; or

(2) The Secretary requires a State to report more frequently than annually, including reporting under 2 CFR 3474.10 and 2 CFR 200.207 (Specific conditions) and 2 CFR 3474.10 (Clarification regarding 2 CFR 200.207) or 2 CFR 200.302 Financial management and 200.303 Internal controls.

(c)

(1) A State must submit these reports in the manner prescribed by the Secretary, including submitting any of these reports electronically and at the quality level specified in the data collection instrument.

(2) Failure by a State to submit reports in accordance with paragraph (c)(1) of this section constitutes a failure, under section 454 of GEPA , 20 U.S.C. 1234c, to comply substantially with a requirement of law applicable to the funds made available under that program.

(3) For reports that the Secretary requires to be submitted in an electronic manner, the Secretary may establish a transition period of up to two years following the date the State otherwise would be required to report the data in the electronic manner, during which time a State will not be required to comply with that specific electronic submission requirement, if the State submits to the Secretary—

(i) Evidence satisfactory to the Secretary that the State will not be able to comply with the electronic submission requirement specified by the Secretary in the data collection instrument on the first date the State otherwise would be required to report the data electronically;

(ii) Information requested in the report through an alternative means that is acceptable to the Secretary, such as through an alternative electronic means; and

(iii) A plan for submitting the reports in the required electronic manner and at the level of quality specified in the data collection instrument no later than the date two years after the first date the State otherwise would be required to report the data in the electronic manner prescribed by the Secretary.

[72 FR 3702, Jan. 25, 2007, as amended at 79 FR 76094, Dec. 19, 2014; 89 FR 70339, Aug. 29, 2024]

§ 76.722 Subgrantee reporting requirements.

A State may require a subgrantee to submit reports in a manner and format that assists the State in complying with the requirements under 34 CFR 76.720, in carrying out other responsibilities under the program, engaging in periodic review and continuous improvement of the State's plan, and supporting the subgrantee in engaging in periodic review and continuous improvement of the subgrantee's plan.

[89 FR 70340, Aug. 29, 2024]

RECORDS

§ 76.730 Records related to grant funds.

A State and a subgrantee shall keep records that fully show:

(a) The amount of funds under the grant or subgrant;

(b) How the State or subgrantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.731 Records related to compliance.

A State and a subgrantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

PRIVACY

§ 76.732 Records related to performance.

(a) A grantee must keep records of significant project experiences and results.

(b) The grantee must use the records under paragraph (a) to—

(1) Determine progress in accomplishing project objectives;

(2) Inform periodic review and continuous improvement of the project plans; and

(3) Revise those project objectives, if necessary.

[89 FR 70340, Aug. 29, 2024]

§ 76.740 Protection of and access to student records; student rights in research, experimental programs, and testing.

(a) Most records on present or past students are subject to the requirements of section 444 of GEPA and its implementing regulations under 34 CFR part 99.(Section 444 of GEPA (20 U.S.C. 1232g) is commonly referred to as the “Family Educational Rights and Privacy Act of 1974” or “FERPA”.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 445 of GEPA (20 U.S.C. 1232h; commonly known as the "Protection of Pupil Rights Amendment" or "PPRA")and its implementing regulations at 34 CFR part 98.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30342, July 8, 1992; 89 FR 70340, Aug. 29, 2024]

USE OF FUNDS BY STATES AND SUBGRANTEES

§ 76.760 More than one program may assist a single activity.

A State or a subgrantee may use funds under more than one program to support different parts of the same project if the State or subgrantee meets the following conditions:

(a) The State or subgrantee complies with the requirements of each program with respect to the part of the project assisted with funds under that program.

(b) The State or subgrantee has an accounting system that permits identification of the costs paid for under each program.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

§ 76.761 Federal funds may pay 100 percent of cost.

A State or a subgrantee may use program funds to pay up to 100 percent of the cost of a project if:

(a) The State or subgrantee is not required to match the funds; and

(b) The project can be assisted under applicable statutes and regulations.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70340, Aug. 29, 2024]

STATE ADMINISTRATIVE RESPONSIBILITIES

§ 76.770 A State shall have procedures to ensure compliance.

Each State shall have procedures for reviewing and approving applications for subgrants and amendments to those applications, for providing technical assistance, for evaluating projects, and for performing other administrative responsibilities the State has determined are necessary to ensure compliance with applicable statutes and regulations.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[57 FR 30342, July 8, 1992]

§ 76.783 State educational agency action—subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

(1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds;

(2) Terminating further assistance for an approved project; or

(3) Failing to provide funds in amounts in accordance with the requirements of applicable statutes and regulations.

(b) The procedures in 76.401(a) through (d) apply to any request for a hearing under this section.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980; 57 FR 30342, July 8, 1992; 89 FR 70340, Aug. 29, 2024]

§ 76.784 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[85 FR 59980, Sept. 23, 2020]

Subpart H—How Does a State or Local Educational Agency Allocate Funds to Charter Schools?

Source: 64 FR 71965, Dec. 22, 1999, unless otherwise noted.

GENERAL

§ 76.785 What is the purpose of this subpart?

The regulations in this subpart implement section 4306 of the Elementary and Secondary Education Act of 1965 (ESEA), which requires States to take measures to ensure that each charter school in the State receives the funds for which it is eligible under a covered program during its first year of operation and during subsequent years in which the charter school expands its enrollment.

[64 FR 71965, Dec. 22, 1999, as amended at 89 FR 70340, Aug. 29, 2024]

§ 76.786 What entities are governed by this subpart?

The regulations in this subpart apply to—

(a) State educational agencies (SEAs) and local educational agencies (LEAs) that fund charter schools under a covered program, including SEAs and LEAs located in States that do not participate in the Department's Charter School State Entity Grant Program;

(b) State agencies that are not SEAs, if they are responsible for administering a covered program. State agencies that are not SEAs must comply with the provisions in this subpart that are applicable to SEAs; and

(c) Charter schools that are scheduled to open or significantly expand their enrollment during the academic year and wish to participate in a covered program.

[64 FR 71965, Dec. 22, 1999, as amended at 89 FR 70340, Aug. 29, 2024]

§ 76.787 What definitions apply to this subpart?

For purposes of this subpart—

Academic year means the regular school year (as defined by State law, policy, or practice) and for which the State allocates funds under a covered program.

Charter school has the same meaning as provided in section 4310(2) of the ESEA (20 U.S.C. 7221i(2))

Charter school LEA means a charter school that is treated as a local educational agency for purposes of the applicable covered program.

Covered program means a State-administered formula grant program, except that the term does not include a program or portion of a program under which an SEA awards subgrants on a discretionary, noncompetitive basis.

Local educational agency has the same meaning for each covered program as provided in applicable statutes and regulations for the program.

Significant expansion of enrollment means a substantial increase in the number of students attending a charter school due to a significant event that is unlikely to occur on a regular basis, such as the addition of one or more grades or educational programs in major curriculum areas. The term also includes any other expansion of enrollment that the SEA determines to be significant.

[64 FR 71965, Dec. 22, 1999, as amended at 89 FR 70340, Aug. 29, 2024]

"Responsibilities for Notice and Information"

§ 76.788

§ 76.788 What are a charter school LEA's responsibilities under this subpart?

(a) ***Notice.*** At least 120 days before the date a charter school LEA is scheduled to open or significantly expand its enrollment, the charter school LEA or its authorized public chartering agency must provide its SEA with written notification of that date.

(b) ***Information.***

(1) In order to receive funds, a charter school LEA must provide to the SEA any available data or information that the SEA may reasonably require to assist the SEA in estimating the amount of funds the charter school LEA may be eligible to receive under a covered program.

(2)

(i) Once a charter school LEA has opened or significantly expanded its enrollment, the charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require.

(ii) An SEA is not required to provide funds to a charter school LEA until the charter school LEA provides the SEA with the required actual enrollment and eligibility data.

(c) ***Compliance.*** Except as provided in § 76.791(a), or applicable statutes or regulations, a charter school LEA must establish its eligibility and comply with all applicable program requirements on the same basis as other LEAs.

[64 FR 71965, Dec. 22, 1999, as amended at 89 FR 70340, Aug. 29, 2024]

§ 76.789 What are an SEA's responsibilities under this subpart?

(a) ***Information.*** Upon receiving notice under § 76.788(a) of the date a charter school LEA is scheduled to open or significantly expand its enrollment, an SEA must provide the charter school LEA with timely and meaningful information about each covered program in which the charter school LEA may be eligible to participate, including notice of any upcoming competitions under the program.

(b) ***Allocation of Funds.***

(1) An SEA must allocate funds under a covered program in accordance with this subpart to any charter school LEA that—

(i) Opens for the first time or significantly expands its enrollment during an academic year for which the State awards funds by formula or through a competition under the program;

(ii) In accordance with § 76.791(a), establishes its eligibility and complies with all applicable program requirements; and

(iii) Meets the requirements of § 76.788(a).

(2) In order to meet the requirements of this subpart, an SEA may allocate funds to, or reserve funds for, an eligible charter school LEA based on reasonable estimates of projected enrollment at the charter school LEA.

(3)

(i) The failure of an eligible charter school LEA or its authorized public chartering agency to provide notice to its SEA in accordance with § 76.788(a) relieves the SEA of any obligation to allocate funds to the charter school within five months.

(ii) Except as provided in § 76.792(c), an SEA that receives less than 120 days' actual notice of the date an eligible charter school LEA is scheduled to open or significantly expand its enrollment must allocate funds to the charter school LEA on or before the date the SEA allocates funds to LEAs under the applicable covered program for the succeeding academic year.

(iii) The SEA may provide funds to the charter school LEA from the SEA's allocation under the applicable covered program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Approved by the Office of Management and Budget under control number 1810-0623)

(Authority: 20 U.S.C. 8065a)

ALLOCATION OF FUNDS BY STATE EDUCATIONAL AGENCIES

§ 76.791 On what basis does an SEA determine whether a charter school LEA that opens or significantly expands its enrollment is eligible to receive funds under a covered program?

(a) For purposes of this subpart, an SEA must determine whether a charter school LEA is eligible to receive funds under a covered program based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA opens or significantly expands its enrollment.

(b) For the year the charter school LEA opens or significantly expands its enrollment, the eligibility determination may not be based on enrollment or eligibility data from a prior year, even if the SEA makes eligibility determinations for other LEAs under the program based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

§ 76.792 How does an SEA allocate funds to eligible charter school LEAs under a covered program in which the SEA awards subgrants on a formula basis?

(a) For each eligible charter school LEA that opens or significantly expands its enrollment on or before November 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives the proportionate amount of funds for which the charter school LEA is eligible under each covered program.

(b) For each eligible charter school LEA that opens or significantly expands its enrollment after November 1 but before February 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives at least a *pro rata* portion of the proportionate amount of funds for which the charter school LEA is eligible under each covered program. The *pro rata* amount must be based on the number of months or days during the academic year the charter school LEA will participate in the program as compared to the total number of months or days in the academic year.

(c) For each eligible charter school LEA that opens or significantly expands its enrollment on or after February 1 of an academic year, the SEA may implement procedures to provide the charter school LEA with a *pro rata* portion of the proportionate amount of funds for which the charter school LEA is eligible under each covered program.

(Authority: 20 U.S.C. 8065a)

§ 76.793 When is an SEA required to allocate funds to a charter school LEA under this subpart?

Except as provided in §§ 76.788(b) and 76.789(b)(3):

(a) For each eligible charter school LEA that opens or significantly expands its enrollment on or before November 1 of an academic year, the SEA must allocate funds to the charter school LEA within five months of the date the charter school LEA opens or significantly expands its enrollment; and

(b)

(1) For each eligible charter school LEA that opens or significantly expands its enrollment after November 1, but before February 1 of an academic year, the SEA must allocate funds to the charter school LEA on or before the date the SEA allocates funds to LEAs under the applicable covered program for the succeeding academic year.

(2) The SEA may provide funds to the charter school LEA from the SEA's allocation under the program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

§ 76.794 How does an SEA allocate funds to charter school LEAs under a covered program in which the SEA awards subgrants on a discretionary basis?

(a) ***Competitive programs.***

(1) For covered programs in which the SEA awards subgrants on a competitive basis, the SEA must provide each eligible charter school LEA in the State that is scheduled to open on or before the closing date of any competition under the program a full and fair opportunity to apply to participate in the program.

(2) An SEA is not required to delay the competitive process in order to allow a charter school LEA that has not yet opened or significantly expanded its enrollment to compete for funds under a covered program.

(b) ***Noncompetitive discretionary programs.*** The requirements in this subpart do not apply to discretionary programs or portions of programs under which the SEA does not award subgrants through a competition.

(Authority: 20 U.S.C. 8065a)

ADJUSTMENTS

§ 76.796 What are the consequences of an SEA allocating more or fewer funds to a charter school LEA under a covered program than the amount for which the charter school LEA is eligible when the charter school LEA actually opens or significantly expands its enrollment?

(a) An SEA that allocates more or fewer funds to a charter school LEA than the amount for which the charter school LEA is eligible, based on actual enrollment or eligibility data when the charter school LEA opens or significantly expands its enrollment, must make appropriate adjustments to the amount of funds allocated to the charter school LEA as well as to other LEAs under the applicable program.

(b) Any adjustments to allocations to charter school LEAs under this subpart must be based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA first opens or significantly expands its enrollment, even if allocations or adjustments to allocations to other LEAs in the State are based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

§ 76.797 When is an SEA required to make adjustments to allocations under this subpart?

(a) The SEA must make any necessary adjustments to allocations under a covered program on or before the date the SEA allocates funds to LEAs under the program for the succeeding academic year.

(b) In allocating funds to a charter school LEA based on adjustments made in accordance with paragraph (a) of this section, the SEA may use funds from the SEA's allocation under the applicable covered program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

APPLICABILITY OF THIS SUBPART TO LOCAL EDUCATIONAL AGENCIES

§ 76.799 Do the requirements in this subpart apply to LEAs?

(a) Each LEA that is responsible for funding a charter school under a covered program must comply with the requirements in this subpart on the same basis as SEAs are required to comply with the requirements in this subpart.

(b) In applying the requirements in this subpart (except for §§ 76.785, 76.786, and 76.787) to LEAs, references to SEA (or State), charter school LEA, and LEA must be read as references to LEA, charter school, and public school, respectively.

(Authority: 20 U.S.C. 8065a)

Subpart I—What Procedures Does the Secretary Use To Get Compliance?

Source: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980, and further redesignated at 64 FR 71965, Dec. 22, 1999.

§ 76.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of the Department may waive any regulation that applies to a Department program unless the regulation specifically provide that it may be waived.

(b) No act or failure to act by an official, agent, or employee of the Department can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31(1963))

[45 FR 22517, Apr. 3, 1980, as amended at 89 FR 70340, Aug. 29, 2024]

§ 76.901 Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges, established under Part D (20 U.S.C. 1234-1234h) of GEPA, has the following functions:

(1) Recovery of funds hearings under section 452 of GEPA.

(2) Withholding hearings under section 455 of GEPA.

(3) Cease and desist hearings under section 456 of GEPA.

(4) Any other proceeding designated by the Secretary under section 451 of GEPA.

(b) The regulations of the Office of Administrative Law Judges are at 34 CFR part 81.

[57 FR 30342, July 8, 1992, as amended at 89 FR 70340, Aug. 29, 2024]

§ 76.902 Judicial review.

After a hearing by the Secretary, a State is usually entitled—generally by the statute that required the hearing—to judicial review of the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

§ 76.910 Cooperation with audits.

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. appendix 3, sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e-3(a)(1), 1232f)

[54 FR 21776, May 19, 1989]

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 77—DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

Authority: 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

§ 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in 2 CFR part 200 apply to the regulations in subtitles A and B of this title. The following terms have the definitions given those terms in 2 CFR 200.1. Phrasing given in parentheses references the term or terms used in title 34 that are consistent with the term defined in title 2.

Contract. (See definition in 2 CFR 200.1.)

Equipment. (See definition in 2 CFR 200.1.)

Federal award. (See definition in 2 CFR 200.1.) (The terms "award," "grant," and "subgrant", as defined in paragraph (c) of this section, have the same meaning, depending on the context, as "Federal award" in 2 CFR 200.1.).

Period of performance. (See definition in 2 CFR 200.1.) (For discretionary grants, the Department uses the term "project period," as defined in paragraph (c) of this section, instead of "period of performance," to describe the period during which funds can be obligated by the grantee.).

Personal property. (See definition in 2 CFR 200.1.)

Real property. (See definition in 2 CFR 200.1.)

Recipient. (See definition in 2 CFR 200.1.)

Subaward. (See definition in 2 CFR 200.1.) (The term "subgrant," as defined in paragraph (c) of this section, has the same meaning as "subaward" in 2 CFR 200.1).

Supplies. (See definition in 2 CFR 200.1.)

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in subtitles A and B of this title:

Acquisition means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

Ambitious means promoting continued, meaningful improvement for program participants or for other individuals or entities affected by the grant, or representing a significant advancement in the field of education research, practices, or methodologies. When used to describe a performance target, whether a performance target is ambitious depends upon the context of the relevant performance measure and the baseline for that measure.

Applicant means a party applying for a grant or subgrant under a program of the Department.

Application means a request for a grant or subgrant under a program of the Department.

Award has the same meaning as "Grant" in this paragraph (c).

Baseline means the starting point from which performance is measured and targets are set.

Budget means a recipient's financial plan for carrying out the project or program.

Budget period means an interval of time into which a project period is divided for budgetary purposes.

Construction means the preparation of drawings and specifications for a facilities project; erecting, building, demolishing, acquiring, renovating, major remodeling of, or extending a facilities project; or inspecting and supervising the construction of a facilities project. Construction does not include minor remodeling.

Continuous improvement means using plans for collecting and analyzing data about a project component's implementation and outcomes (including the pace and extent to which project outcomes are being met) to inform necessary changes throughout the project. These plans may include strategies to gather ongoing feedback from participants and stakeholders on the implementation of the project component.

Demonstrates a rationale means that there is a key project component included in the project's logic model that is supported by citations of high-quality research or evaluation findings that suggest that the project component is likely to significantly improve relevant outcomes.

Department means the U.S. Department of Education.

Director of the Institute of Education Sciences means the Director of the Institute of Education Sciences or an officer or employee of the Institute of Education Sciences acting for the Director under a delegation of authority.

ED means the U.S. Department of Education.

EDGAR means the Education Department General Administrative Regulations (34 CFR parts 75, 76, 77, 79, 81, 82, 84, 86, 97, 98, and 99).

Elementary school means a day or residential school that provides elementary education, as determined under State law.

Evaluation means an assessment using systematic data collection and analysis of one or more programs, policies, practices, and organizations intended to assess their implementation, outcomes, effectiveness, or efficiency.

Evidence-based, for the purposes of 34 CFR part 75 means the proposed project component is supported by one or more of strong evidence, moderate evidence, promising evidence, or evidence that demonstrates a rationale.

Evidence-building means a systematic plan for identifying and answering questions relevant to programs and policies through performance measurement, exploratory studies, or program evaluation.

Experimental study means a study that is designed to compare outcomes between two groups of individuals (such as students) that are otherwise equivalent except for their assignment to either a treatment group receiving a project component or a control group that does not. Randomized controlled trials, regression discontinuity design studies, and single-case design studies are the specific types of experimental studies that, depending on their design and implementation (*e.g.,* sample attrition in randomized controlled trials and regression discontinuity design studies), can meet What Works Clearinghouse (WWC) standards without reservations as described in the WWC Handbooks:

(i) A randomized controlled trial employs random assignment of, for example, students, teachers, classrooms, or schools to receive the project component being evaluated (the treatment group) or not to receive the project component (the control group).

(ii) A regression discontinuity design study assigns the project component being evaluated using a measured variable (*e.g.,* assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes.

(iii) A single-case design study uses observations of a single case (*e.g.,* a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment.

Facilities means one or more structures in one or more locations.

Fiscal year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30.

GEPA means the General Education Provisions Act.

Grant means financial assistance, including cooperative agreements, that provides support or stimulation to accomplish a public purpose. 2 CFR part 200, as adopted in 2 CFR part 3474, uses the broader, undefined term "Award" to cover grants, subgrants, and other agreements in the form of money or property, in lieu of money, by the Federal Government to an eligible recipient. The term does not include—

(i) Technical assistance, which provides services instead of money;

(ii) Other assistance in the form of loans, loan guarantees, interest subsidies, or insurance;

(iii) Direct payments of any kind to individuals; and

(iv) Contracts that are required to be entered into and administered under procurement laws and regulations.

Grantee means the legal entity to which a grant is awarded and that is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award notice (GAN). For example, a

GAN may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually intends, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations that may be only components of a legal entity.) The term "grantee" does not include any secondary recipients, such as subgrantees and contractors, that may receive funds from a grantee pursuant to a subgrant or contract.

Grant period means the period for which funds have been awarded.

Independent evaluation means an evaluation of a project component that is designed and carried out independently of, but in coordination with, the entities that develop or implement the project component.

Local educational agency means:

(i) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(A) A city, county, township, school district, or other political subdivision of a State; or

(B) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(ii) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(iii) As used in 34 CFR parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active "ingredients" that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

Minor remodeling means minor alterations in a previously completed facilities project. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed facility. The term may also include related designs and drawings for these projects. The term does not include construction or renovation, structural alterations to buildings, facilities maintenance, or repairs.

Moderate evidence means evidence of effectiveness of a key project component in improving a relevant outcome for a sample that overlaps with the populations or settings proposed to receive that component, based on a relevant finding from one of the following:

(i) A practice guide prepared by the WWC using version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks reporting "strong evidence" or "moderate evidence" for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC using version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks reporting "Tier 1 strong evidence" of effectiveness or "Tier 2 moderate evidence" of effectiveness or a "positive effect" on a relevant outcome based on a sample including at least 20 students or other individuals from more than one site (such as a State, county, city, local educational agency (LEA), school, or postsecondary campus), or a "potentially positive effect" on a relevant outcome based on a sample including at least 350 students or other individuals from more than one site (such as a State, county, city, LEA, school, or postsecondary campus), with no reporting of a "negative effect" or "potentially negative effect" on a relevant outcome; or

(iii) A single experimental study or quasi-experimental design study reviewed and reported by the WWC most recently using version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks, or otherwise assessed by the Department using version 5.0 of the WWC Handbook, as appropriate, and that—

(A) Meets WWC standards with or without reservations;

(B) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome;

(C) Includes no overriding statistically significant and negative effects on relevant outcomes reported in the study or in a corresponding WWC intervention report prepared under version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks; and

(D) Is based on a sample from more than one site (such as a State, county, city, LEA, school, or postsecondary campus) and includes at least 350 students or other individuals across sites. Multiple studies of the same project component that each meet the requirements in paragraphs (iii)(A) through (C) of this definition may together satisfy the requirement in this paragraph (iii)(D).

National level means the level of scope or effectiveness of a project component that is able to be effective in a wide variety of communities, including rural and urban areas, as well as groups with different characteristics (such as socioeconomic status, race, ethnicity, gender, disability, language, and migrant status), populations, and settings.

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Nonpublic, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

Peer-reviewed scholarly publication means a final peer-reviewed manuscript accepted for publication, that arises from research funded, either fully or partially, by Federal funds awarded through a Department-managed grant, contract, or other agreement. A final peer-reviewed manuscript is defined as an author's final manuscript of a peer-reviewed scholarly paper accepted for publication, including all modifications resulting from the peer review process. The final peer-reviewed manuscript is not the same as the final published article, which is defined as a publisher's authoritative copy of the paper including all modifications from the publishing peer review process, copyediting, stylistic edits, and formatting changes. However, the content included in both the final peer-reviewed manuscript and the final published article, including all findings, tables, and figures should be identical.

Performance measure means any quantitative indicator, statistic, or metric used to gauge program or project performance.

Performance target means a level of performance that an applicant would seek to meet during the course of a project or as a result of a project.

Preschool means the educational level from a child's birth to the time at which the State provides elementary education.

Private, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

Project means the activity described in an application.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Project period means the period established in the award document during which Federal sponsorship begins and ends (See, 2 CFR 200.1 Period of performance).

Promising evidence means evidence of the effectiveness of a key project component in improving a relevant outcome, based on a relevant finding from one of the following:

(i) A practice guide prepared by the WWC reporting "strong evidence", "moderate evidence", or "promising evidence" for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC reporting "Tier 1 strong evidence" of effectiveness, or "Tier 2 moderate evidence" of effectiveness, or "Tier 3 promising evidence" of effectiveness, or a "positive effect," or "potentially positive effect" on a relevant outcome, with no reporting of a "negative effect" or "potentially negative effect" on a relevant outcome; or

(iii) A single study assessed by the Department, as appropriate, that—

(A) Is an experimental study, a quasi-experimental design study, or a well-designed and well-implemented correlational study with statistical controls for selection bias (such as a study using regression methods to account for differences between a treatment group and a comparison group);

(B) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome; and

(C) Includes no overriding statistically significant and negative effects on relevant outcomes reported in the study or in a corresponding WWC intervention report.

Public, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government.

Quality data encompasses utility, objectivity, and integrity of the information. "Utility" refers to how the data will be used, either for its intended use or other uses. "Objectivity" refers to data being accurate, complete, reliable, and unbiased. "Integrity" refers to the protection of data from being manipulated.

Quasi-experimental design study means a study using a design that attempts to approximate an experimental study by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation (*e.g.,* establishment of baseline equivalence of the groups being compared), can meet WWC standards with reservations, but cannot meet WWC standards without reservations, as described in the WWC Handbooks.

Regional level means the level of scope or effectiveness of a project component that is able to serve a variety of communities within a State or multiple States, including rural and urban areas, as well as groups with different characteristics (such as socioeconomic status, race, ethnicity, gender, disability, language, and migrant status). For an LEA-based project, to be considered a regional-level project, a project component must serve students in more than one LEA, unless the project component is implemented in a State in which the State educational agency is the sole educational agency for all schools.

Relevant outcome means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

Scientific data include the recorded factual material commonly accepted in the scientific community as of sufficient quality to validate and replicate research findings. Such scientific data do not include laboratory notebooks, preliminary analyses, case report forms, drafts of scientific papers, plans for future research, peer reviews, communications with colleagues, or physical objects and materials, such as laboratory specimens, artifacts, or field notes.

Secondary school means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Service function, with respect to a local educational agency:

(i) Means an educational service that is performed by a legal entity—such as an intermediate agency:

(A)

(*1*) Whose jurisdiction does not extend to the whole State; and

(*2*) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(B) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(ii) The term does not include a service that is performed by a cultural or educational resource.

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Strong evidence means evidence of the effectiveness of a key project component in improving a relevant outcome for a sample that overlaps with the populations and settings proposed to receive that component, based on a relevant finding from one of the following:

(i) A practice guide prepared by the WWC using version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks reporting "strong evidence" for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC using version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks reporting "Tier 1 strong evidence" of effectiveness or a "positive effect" on a relevant outcome based on a sample including at least 350 students or other individuals across more than one site (such as a State, county, city, local educational agency (LEA), school, or postsecondary campus), with no reporting of a "negative effect" or "potentially negative effect" on a relevant outcome; or

(iii) A single experimental study reviewed and reported by the WWC most recently using version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks, or otherwise assessed by the Department using version 5.0 of the WWC Handbook, as appropriate, and that—

(A) Meets WWC standards without reservations;

(B) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome;

(C) Includes no overriding statistically significant and negative effects on relevant outcomes reported in the study or in a corresponding WWC intervention report prepared under version 2.1, 3.0, 4.0, 4.1, or 5.0 of the WWC Handbooks; and

(D) Is based on a sample from more than one site (such as a State, county, city, LEA, school, or postsecondary campus) and includes at least 350 students or other individuals across sites. Multiple studies of the same project component that each meet the requirements in paragraphs (iii)(A) through (C) of this definition may together satisfy the requirement in this paragraph (iii)(D).

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual or any other form of legal agreement, but does not include procurement purchases, nor does it include any form of assistance that is excluded from the definitions of "Grant or Award" in this part (See 2 CFR 200.92, "Subaward").

Subgrantee means the government or other legal entity to which a subgrant is awarded and that is accountable to the grantee for the use of the funds provided.

What Works Clearinghouse (WWC) Handbooks (WWC Handbooks) means the standards and procedures set forth in the WWC Procedures and Standards Handbook, Version 5.0, or in the WWC Standards Handbook, Version 4.0 or 4.1, or in the WWC Procedures Handbook, Version 4.0 or 4.1, the WWC Procedures and Standards Handbook, Version 3.0 or Version 2.1 (all incorporated by reference; see § 77.2). Study findings eligible for review under WWC standards can meet WWC standards without reservations, meet WWC standards with reservations, or not meet WWC standards. WWC practice guides and intervention reports include findings from systematic reviews of evidence as described in the WWC Handbooks documentation.

Work of art means an item that is incorporated into a facility primarily because of its aesthetic value.

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989; 57 FR 30342, July 8, 1992; 59 FR 34739, July 6, 1994; 64 FR 50392, Sept. 16, 1999; 77 FR 18679, Mar. 28, 2012; 78 FR 49355, Aug. 13, 2013; 79 FR 76094, Dec. 19, 2014; 80 FR 2608, Jan. 20, 2015; 82 FR 35449, July 31, 2017; 83 FR 18421, Apr. 27, 2018; 85 FR 62611, Oct. 5, 2020; 89 FR 70340, Aug. 29, 2024]

§ 77.2 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the Department of Education (the Department) and the National Archives and Records Administration (NARA). Contact the Department at: Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, 550 12th Street SW, PCP-4158, Washington, DC, 20202-5900; phone: (202) 245-6940; email: *Contact.WWC@ed.gov*. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov*. The following material may be obtained from Institute of Education Sciences, 550 12th Street SW, Washington, DC, 20202; phone: (202) 245-6940; website: *http://ies.ed.gov/ncee/wwc/Handbooks*.

(a) What Works Clearinghouse Procedures and Standards Handbook, WWC 2022008REV, Version 5.0, August 2022; Revised December 2022; IBR approved for § 77.1.

(b) What Works Clearinghouse Standards Handbook, Version 4.1, January 2020, IBR approved for § 77.1.

(c) What Works Clearinghouse Procedures Handbook, Version 4.1, January 2020, IBR approved for § 77.1.

(d) What Works Clearinghouse Standards Handbook, Version 4.0, October 2017, IBR approved for § 77.1.

(e) What Works Clearinghouse Procedures Handbook, Version 4.0, October 2017, IBR approved for § 77.1.

(f) What Works Clearinghouse Procedures and Standards Handbook, Version 3.0, March 2014, IBR approved for § 77.1.

(g) What Works Clearinghouse Procedures and Standards Handbook, Version 2.1, September 2011, IBR approved for § 77.1.

[89 FR 70343, Aug. 29, 2024]

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 79—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF EDUCATION PROGRAMS AND ACTIVITIES

Authority: 31 U.S.C. 6506; 42 U.S.C. 3334; and E.O. 12372, unless otherwise noted.
Section 79.2 also issued under E.O. 12372.

Source: 48 FR 29166, June 24, 1983, unless otherwise noted.

Editorial Note: Nomenclature changes to part appear at 89 FR 70343, Aug. 29, 2024.

§ 79.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on State processes and on State, areawide, regional, and local coordination for review of proposed federal financial assistance.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 89 FR 70343, Aug. 29, 2024]

§ 79.2 What definitions apply to these regulations?

Order means Executive Order 12372, issued July 14, 1982, amended April 8, 1983, and titled "Intergovernmental Review of Federal Programs."

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

[48 FR 29166, June 24, 1983, as amended at 89 FR 70343, Aug. 29, 2024]

§ 79.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the FEDERAL REGISTER a list of the Department's programs and activities that are subject to these regulations

(b) If a program or activity of the Department that provides Federal financial assistance does not have implementing regulations, the regulations in this part apply to that program or activity.

(c) The following programs and activities are excluded from coverage under this part:

(1) Proposed legislation.

(2) Regulation and budget formulation.

(3) National security matters.

(4) Procurement.

(5) Direct payments to individuals.

(6) Financial transfers for which the Department has no funding discretion or direct authority to approve specific sites or projects.

(7) Research and development that is national in scope.

(8) Assistance to federally recognized Indian tribes.

(d) In addition to the programs and activities excluded in paragraph (c) of this section, the Secretary may only exclude a Federal financial assistance program or activity from coverage under this part if the program or activity does not directly affect State or local governments.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20824, June 9, 1986; 89 FR 70343, Aug. 29, 2024]

§ 79.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those State and local governments that would provide the nonfederal funds for, or that would be directly affected by, proposed federal financial assistance from the Department.

(b) If a State adopts a process under the Order to review and coordinate proposed federal financial assistance, the Secretary, to the extent permitted by law:

(1) Uses the State process to determine official views of State and local elected officials;

(2) Communicates with State and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate State and local elected officials' concerns with proposed federal financial assistance that are communicated through the State process;

(4) Allows the States to simplify and consolidate existing federally required State plan submissions;

(5) Where State planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of State plans for federally required State plans;

(6) Seeks the coordination of views of affected State and local elected officials in one State with those of another State when proposed federal financial assistance has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports State and local governments by discouraging the reauthorization or creation of any planning organization which is federally funded, which has a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 89 FR 70343, Aug. 29, 2024]

§ 79.5 What is the Secretary's obligation with respect to Federal interagency coordination?

The Secretary, to the maximum extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to ensure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 89 FR 70343, Aug. 29, 2024]

§ 79.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A State may select any program or activity published in the FEDERAL REGISTER in accordance with § 79.3 for intergovernmental review under these regulations. Each State, before selecting programs and activities, shall consult with local elected officials.

(b) Each State that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A State may notify the Secretary of changes in its selections at any time. For each change, the State shall submit to the Secretary an assurance that the State has consulted with local elected officials regarding the change. The Department may establish deadlines by which States are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a State's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

(Authority: E.O. 12372, sec. 2)

[48 FR 29166, June 24, 1983, as amended at 89 FR 70343, Aug. 29, 2024]

§ 79.7 How does the Secretary communicate with State and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b)

(1) The Secretary provides notice to directly affected State, areawide, regional, and local entities in a State of proposed federal financial assistance if:

(i) The State has not adopted a process under the Order; or

(ii) The assistance involves a program or activity not selected for the State process.

(2) This notice may be made by publication in the FEDERAL REGISTER or other means which the Secretary determine appropriate.

(Authority: E.O. 12372, Sec. 2)

§ 79.8 How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?

(a) Except in unusual circumstances, the Secretary gives State processes or directly affected State, areawide, regional, and local officials and entities—

(1) At least 30 days to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days to comment on proposed Federal financial assistance other than noncompeting continuation awards.

(b) The Secretary establishes a date for mailing or hand-delivering comments under paragraph (a) of this section using one of the following two procedures:

(1) If the comments relate to continuation award applications, the Secretary notifies each applicant and each State Single Point of Contact (SPOC) of the date by which SPOC comments should be submitted.

(2) If the comments relate to applications for new grants, the Secretary establishes the date in a notice published in the FEDERAL REGISTER.

(c) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986; 89 FR 70343, Aug. .29, 2024]

§ 79.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedure in § 79.10 if:

(1) A State office or official is designated to act as a single point of contact between a State process and all federal agencies, and

(2) That office or official transmits a State process recommendation, and identifies it as such, for a program selected under § 79.6.

(b)

(1) The single point of contact is not obligated to transmit comments from State, areawide, regional, or local officials and entities if there is no State process recommendation.

(2) If a State process recommendation is transmitted by a single point of contact, all comments from State, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a State has not established a process, or is unable to submit a State process recommendation, State, areawide, regional, and local officials and entities may submit comments to the Department.

(d) If a program or activity is not selected for a State process, State, areawide, regional, and local officials and entities may submit comments to the Department. In addition, if a State process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of § 79.10.

(e) The Secretary considers comments which do not constitute a State process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of § 79.10, if those comments are provided by a single point of contact, or directly to the Department by a commenting party.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986; 89 FR 70343, Aug. 29, 2024]

§ 79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a State process provides a State process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches an agreement with the State; or

(3) Provides the single point of contact with a written explanation of the decision in such form as the Secretary deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of the notification.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 89 FR 70343, Aug. 29, 2024]

§ 79.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance that has an impact on interstate areas;

(2) Notifying appropriate officials and entities in States which have adopted a process and which select the Department's program or activity.

(3) Making efforts to identify and notify the affected State, areawide, regional, and local officials and entities in those States that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding under § 79.10 if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) In an interstate situation subject to this section, the Secretary uses the procedures in § 79.10 if a State process provides a State process recommendation to the Department through a single point of contact.

(Authority: E.O. 12372, Sec. 2(e))

§ 79.12 How may a State simplify, consolidate, or substitute federally required State plans?

(a) As used in this section:

(1) ***Simplify*** means that a State may develop its own format, choose its own submission date, and select the planning period for a State plan.

(2) ***Consolidate*** means that a State may meet statutory and regulatory requirements by combining two or more plans into one document and that the State can select the format, submission date, and planning period for the consolidated plan.

(3) ***Substitute*** means that a State may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a State may decide to try to simplify, consolidate, or substitute federally required State plans without prior approval by the Secretary.

(c) The Secretary reviews each State plan that a State has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

(Authority: E.O. 12372, sec. 2)

§ 79.13 [Reserved]

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 81—GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

Authority: 20 U.S.C. 1221e-3, 1234-1234i, and 3474(a), unless otherwise noted.

Source: 54 FR 19512, May 5, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 81.1 Purpose.

The regulations in this part govern the enforcement of legal requirements under applicable programs administered by the Department of Education and implement Part E of the General Education Provisions Act (GEPA).

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.2 Definitions.

The following definitions apply to the terms used in this part:

Administrative Law Judge (ALJ) means a judge appointed by the Secretary in accordance with section 451 (b) and (c) of GEPA.

Applicable program means any program for which the Secretary of Education has administrative responsibility, except a program authorized by—

(a) The Higher Education Act of 1965, as amended;

(b) The Act of September 30, 1950 (Pub. L. 874, 81st Congress), as amended; or

(c) The Act of September 23, 1950 (Pub. L. 815, 81st Congress), as amended.

Department means the United States Department of Education.

Disallowance decision means the decision of an authorized Departmental official that a recipient must return funds because it made an expenditure of funds that was not allowable or otherwise failed to discharge its obligation to account properly for funds. Such a decision, referred to as a "preliminary departmental decision" in section 452 of GEPA, is subject to review by the Office of Administrative Law Judges.

OES means the OHA Electronic System or any successor system designated by the Department.

Party means either of the following:

(a) A recipient that appeals a decision.

(b) An authorized Departmental official who issues a decision that is appealed.

Recipient means the recipient of a grant or cooperative agreement under an applicable program.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1221e-3, 1234 (b), (c), and (f)(1), 1234a(a)(1), 1234i, and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993; 86 FR 52832, Sept. 23, 2021]

§ 81.3 Jurisdiction of the Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program:

(1) Hearings for recovery of funds.

(2) Withholding hearings.

(3) Cease and desist hearings.

(b) The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the FEDERAL REGISTER.

(Authority: 5 U.S.C. 554, 20 U.S.C. 1234(a))

§ 81.4 Membership and assignment to cases.

(a) The Secretary appoints Administrative Law Judges as members of the OALJ.

(b) The Secretary appoints one of the members of the OALJ to be the chief judge. The chief judge is responsible for the efficient and effective administration of the OALJ.

(c) The chief judge assigns an ALJ to each case or class of cases within the jurisdiction of the OALJ.

(Authority: 20 U.S.C. 1221e-3, 1234 (b) and (c), and 3474(a))

§ 81.5 Authority and responsibility of an Administrative Law Judge.

(a) An ALJ assigned to a case conducts a hearing on the record. The ALJ regulates the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case in accordance with applicable law.

(b) An ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(c) An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case.

(d)

(1) An ALJ may disqualify himself or herself at any time on the basis of the standards in paragraph (c) of this section.

(2) A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the disqualification matter before proceeding further with the case.

(Authority: 5 U.S.C. 556(b); 20 U.S.C. 1221e-3, 1234 (d), (f)(1) and (g)(1), and 3474(a))

§ 81.6 Hearing on the record.

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.

(b) Except as otherwise provided in this part or in a notice of designation under § 81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) At a party's request, the ALJ shall confer with the parties in person or by conference telephone call before determining whether an evidentiary hearing or an oral argument is needed.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3, 1234(f)(1), and 3474)

§ 81.7 Non-party participation.

(a) A person or organization, other than a party, that wishes to participate in a case shall file an application to participate with the ALJ assigned to the case. The application must—

(1) Identify the case in which participation is sought;

(2) State how the applicant's interest relates to the case;

(3) State how the applicant's participation would aid in the disposition of the case; and

(4) State how the applicant seeks to participate.

(b) The ALJ may permit an applicant to participate if the ALJ determines that the applicant's participation—

(1) Will aid in the disposition of the case;

(2) Will not unduly delay the proceedings; and

(3) Will not prejudice the adjudication of the parties' rights.

(c) If the ALJ permits an applicant to participate, the ALJ permits the applicant to file briefs.

(d)

(1) In addition to the participation described in paragraph (c) of this section, the ALJ may permit the applicant to participate in any or all of the following ways:

(i) Submit documentary evidence.

(ii) Participate in an evidentiary hearing afforded the parties.

(iii) Participate in an oral argument afforded the parties.

(2) The ALJ may place appropriate limits on an applicant's participation to ensure the efficient conduct of the proceedings.

(e) A non-party participant shall comply with the requirements for parties in § 81.11 and § 81.12.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.8 Representation.

A party to, or other participant in, a case may be represented by counsel.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.9 Location of proceedings.

(a) An ALJ may hold conferences of the parties in person or by conference telephone call.

(b) Any conference, hearing, argument, or other proceeding at which the parties are required to appear in person is held in the Washington, DC metropolitan area unless the ALJ determines that the convenience and necessity of the parties or their representatives requires that it be held elsewhere.

(Authority: 5 U.S.C. 554(b); 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.10 Ex parte communications.

A party to, or other participant in, a case may not communicate with an ALJ on any fact in issue in the case or on any matter relevant to the merits of the case unless the parties are given notice and an opportunity to participate.

(Authority: 5 U.S.C. 554(d)(1), 557(d)(1)(A); 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.11 Motions.

(a) To obtain an order or a ruling from an ALJ, a party shall make a motion to the ALJ.

(b) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(c) Parties must file motions with the ALJ, and serve them upon the other party, as provided under § 81.12.

(d) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(e) The date of service of a motion is determined by the standards for determining a filing date in § 81.12(d).

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 57 FR 56795, Nov. 30, 1992; 86 FR 52832, Sept. 23, 2021]

§ 81.12 Filing requirements.

(a) ***Method of filing.***

(1) Any written submission to an ALJ or the OALJ under this part, including pleadings, petitions, and motions, must be filed by submission to OES unless a party shows the ALJ good cause why its written submission cannot be filed electronically. A party filing electronically is responsible for ensuring that a complete and legible document was successfully submitted in a format for electronic filing permitted under OHA procedures.

(2) If the ALJ permits a party to file a written submission in paper format, the filing party must file the written submission with the ALJ or the OALJ by hand-delivery or regular mail.

(b) ***Filing date.***

(1) The filing date for a written submission to an ALJ or the OALJ is the date the document is—

(i) Submitted to OES; or

(ii) Hand-delivered or mailed, if the ALJ has permitted the written submission to be filed in paper format.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day.

(c) ***Service to other parties.***

(1) The filing of a written submission to OES constitutes service on other parties.

(2) If a party is permitted by the ALJ to file a written submission in paper format, the party must serve a copy of the written submission on the other party on the filing date by hand-delivery or regular mail. Any such written submission to the ALJ or OALJ must be accompanied by a statement certifying that the material was served on the other party on the filing date.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

[86 FR 52832, Sept. 23, 2021]

§ 81.13 Mediation.

(a) Voluntary mediation is available for proceedings that are pending before the OALJ.

(b) A mediator must be independent of, and agreed to by, the parties to the case.

(c) A party may request mediation by filing a motion with the ALJ assigned to the case. The OALJ arranges for a mediator if the parties to the case agree to mediation.

(d) A party may terminate mediation at any time. Mediation is limited to 120 days unless the mediator informs the ALJ that—

(1) The parties are likely to resolve some or all of the dispute; and

(2) An extension of time will facilitate an agreement.

(e) The ALJ stays the proceedings during mediation.

(f)

(1) Evidence of conduct or statements made during mediation is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during mediation.

(2) A mediator may not disclose, in any proceeding under this part, information acquired as a part of his or her official mediation duties that relates to any fact in issue in the case or any matter relevant to the merits of the case.

(Authority: 20 U.S.C. 1221e-3, 1234 (f)(1) and (h), and 3474(a))

§ 81.14 Settlement negotiations.

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations, or for approval of a settlement agreement, the ALJ may grant a stay of the proceedings upon a finding of good cause.

(b) Evidence of conduct or statements made during settlement negotiations is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during settlement negotiations.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 554(c)(1), 1221e-3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

§ 81.15 Evidence.

(a) The Federal Rules of Evidence do not apply to proceedings under this part. However, the ALJ accepts only evidence that is—

(1) Relevant;

(2) Material;

(3) Not unduly repetitious; and

(4) Not inadmissible under § 81.13 or § 81.14.

(b) The ALJ may take official notice of facts that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Authority: 5 U.S.C. 556 (d) and (e); 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.16 Discovery.

(a) The parties to a case are encouraged to exchange relevant documents and information voluntarily.

(b) The ALJ, at a party's request, may order compulsory discovery described in paragraph (c) of this section if the ALJ determines that—

(1) The order is necessary to secure a fair, expeditious, and economical resolution of the case;

(2) The discovery requested is likely to elicit relevant information with respect to an issue in the case;

(3) The discovery request was not made primarily for the purposes of delay or harassment; and

(4) The order would serve the ends of justice.

(c) If a compulsory discovery is permissible under paragraph (b) of this section, the ALJ may order a party to do one or more of the following:

(1) Make relevant documents available for inspection and copying by the party making the request.

(2) Answer written interrogatories that inquire into relevant matters.

(3) Have depositions taken.

(d) The ALJ may issue a subpoena to enforce an order described in this section and may apply to the appropriate court of the United States to enforce the subpoena.

(e) The ALJ may not compel the discovery of information that is legally privileged.

(f)

(1) The ALJ limits the period for discovery to not more than 90 days but may grant an extension for good cause.

(2) At a party's request, the ALJ may set a specific schedule for discovery.

(Authority: 20 U.S.C. 1234(f)(1) and (g))

§ 81.17 Privileges.

The privilege of a person or governmental organization not to produce documents or provide information in a proceeding under this part is governed by the principles of common law as interpreted by the courts of the United States.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.18 The record.

(a) The ALJ arranges for any evidentiary hearing or oral argument to be recorded and transcribed and makes the transcript available to the parties. Transcripts are made available to non-Departmental parties at a cost not to exceed the actual cost of duplication.

(b) The record of a hearing on the record consists of—

(1) All papers filed in the proceeding;

(2) Documentary evidence admitted by the ALJ;

(3) The transcript of any evidentiary hearing or oral argument; and

(4) Rulings, orders, and subpoenas issued by the ALJ.

(Authority: 5 U.S.C. 556(e), 557(c); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

§ 81.19 Costs and fees of parties.

The Equal Access to Justice Act, 5 U.S.C. 504, applies by its terms to proceedings under this part. Regulations under that statute are in 34 CFR part 21.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), and 3474(a))

§ 81.20 Interlocutory appeals to the Secretary from rulings of an ALJ.

(a) A ruling by an ALJ may not be appealed to the Secretary until the issuance of an initial decision, except that the Secretary may, at any time prior to the issuance of an initial decision, grant review of a ruling upon either an ALJ's certification of the ruling to the Secretary for review, or the filing of a petition seeking review of an interim ruling by one or both of the parties, if—

(1) That ruling involves a controlling question of substantive or procedural law; and

(2) The immediate resolution of the question will materially advance the final disposition of the proceeding or subsequent review will be an inadequate remedy.

(b)

(1) A petition for interlocutory review of an interim ruling must include the following:

(i) A brief statement of the facts necessary to an understanding of the issue on which review is sought.

(ii) A statement of the issue.

(iii) A statement of the reasons showing that the ruling complained of involves a controlling question of substantive or procedural law and why immediate review of the ruling will materially advance the disposition of the case, or why subsequent review will be an inadequate remedy.

(2) A petition may not exceed 10 pages, double-spaced, and must be accompanied by a copy of the ruling and any findings and opinions relating to the ruling.

(3)

(i) The petition must be filed electronically, and served upon the ALJ and other parties, by submission to OES on behalf of the Office of the Secretary unless a party shows the Secretary good cause why the petition cannot be filed electronically.

(ii) If the Secretary permits a party to file a petition in paper format, the filing party must file the petition with the Office of Hearings and Appeals (OHA) on behalf of the Secretary by hand-delivery or regular mail. The filing party must provide a copy of the petition to the ALJ at the time the petition is filed, and a copy of the petition must be served upon the other parties by hand-delivery or regular mail.

(c) If a party files a petition under this section, the ALJ may state to the Secretary a view as to whether review is appropriate by submitting a brief statement addressing the party's petition within 10 days of the ALJ's receipt of the petition for interlocutory review. The ALJ must serve a copy of the statement on all parties by submission to OES and, if the Secretary has permitted paper filing, by hand-delivery or regular mail.

(d)

(1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed 10 pages, double-spaced, in length.

(2) A copy of the response must be filed to OES unless the party shows the Secretary good cause why the response cannot be filed electronically. If the ALJ permits a party to file a petition in paper format, the filing party must file the petition with OHA on behalf of the Secretary by hand-delivery or regular mail.

(3) If the Secretary has permitted a party to file the response in paper format, the party must file a copy of the response with the ALJ, and serve a copy of the response on all parties, on the filing date by hand delivery or regular mail.

(e)

(1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed ten pages, double-spaced, in length. A copy of the response must be filed with the ALJ by hand delivery, by regular mail, or by facsimile transmission.

(2) A party shall serve a copy of its response on all parties on the filing date by hand-delivery or regular mail. If agreed upon by the parties, service of a copy of the response may be made upon the other parties by facsimile transmission.

(f) The filing of a request for interlocutory review does not automatically stay the proceedings. Rather, a stay during consideration of a petition for review may be granted by the ALJ if the ALJ has certified or stated to the Secretary that review of the ruling is appropriate. The Secretary may order a stay of proceedings at any time after the filing of a request for interlocutory review.

(g) The Secretary notifies the parties if a petition or certification for interlocutory review is accepted, and may provide the parties a reasonable time within which to submit written argument or other existing material in the administrative record with regard to the merit of the petition or certification.

(h) If the Secretary takes no action on a request for interlocutory review within 15 days of receipt of it, the request is deemed to be denied.

(i) The Secretary may affirm, modify, set aside, or remand the ALJ's ruling.

[58 FR 43473, Aug. 16, 1993, as amended at 86 FR 52832, Sept. 23, 2021; 87 FR 11310, Mar. 1, 2022]

Subpart B—Hearings for Recovery of Funds

§ 81.30 Basis for recovery of funds.

(a) Subject to the provisions of § 81.31, an authorized Departmental official requires a recipient to return funds to the Department if—

(1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or

(2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental offcial may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.31 Measure of recovery.

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that—

(a) Meets the standards for proportionality in § 81.32;

(b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in § 81.23; and

(c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under § 81.34.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(k), 1234b (a) and (b), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.32 Proportionality.

(a)

(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

(2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:

(i) Serving only eligible beneficiaries.

(ii) Providing only authorized services or benefits.

(iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.

(iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.

(v) Maintaining accountability for the use of funds.

(b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§ 81.33 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;

(3) The recipient actually relied on the guidance as the basis for the conduct that constituted the violation; and

(4) The recipient's reliance on the guidance was reasonable.

(c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;

(2) The request was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(3) The request—

(i) Accurately described the proposed expenditure or practice; and

(ii) Included the facts necessary for the Department's determination of its legality;

(4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer—

(i) Examined the proposed expenditure or practice; and

(ii) Believed it was permissible under State and Federal law applicable at the time of the certification;

(5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;

(6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and

(7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90-day period.

(d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient was legally bound by the decree;

(2) The recipient actually relied on the decree when it engaged in the conduct that constituted the violation; and

(3) The recipient's reliance on the decree was reasonable.

(e) If a Departmental official authorized to provide the requested guidance responds to a request described in paragraph (c) of this section more than 90 days after its receipt, the recipient that made the request shall comply with the guidance at the earliest practicable time.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234b(b), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§ 81.34 Notice of a disallowance decision.

(a) If an authorized Departmental official decides that a recipient must return funds under § 81.30, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.

(b)

(1) The notice must establish a prima facie case for the recovery of funds, including an analysis reflecting the value of the program services actually obtained in a determination of harm to the Federal interest.

(2) For the purpose of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

(c) The notice must inform the recipient that it may—

(1) Obtain a review of the disallowance decision by the OALJ; and

(2) Request mediation under § 81.13.

(d) The notice must describe—

(1) The time available to apply for a review of the disallowance decision; and

(2) The procedure for filing an application for review.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993; 60 FR 46494, Sept. 6, 1995; 61 FR 14484, Apr. 2, 1996]

§ 81.35 Reduction of claims.

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by—

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under § 81.31, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR part 103; or

(c) Compromising the claim under § 81.36, if applicable.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(j), and 3474(a); 31 U.S.C. 3711)

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.36 Compromise of claims under General Education Provisions Act.

(a) The Secretary or an authorized Departmental official as appropriate may compromise a claim established under this subpart without following the procedures in 4 CFR part 103 if—

(1)

(i) The amount of the claim does not exceed $200,000; or

(ii) The difference between the amount of the claim and the amount agreed to be returned does not exceed $200,000; and

(2) The Secretary or the official determines that—

(i) The collection of the amount by which the claim is reduced under the compromise would not be practical or in the public interest; and

(ii) The practice that resulted in the disallowance decision has been corrected and will not recur.

(b) Not less than 45 days before compromising a claim under this section, the Department publishes a notice in the FEDERAL REGISTER stating—

(1) The intention to compromise the claim; and

(2) That interested persons may comment on the proposed compromise.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a (j), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§ 81.37 Application for review of a disallowance decision.

(a) If a recipient wishes to obtain review of a disallowance decision, the recipient shall file a written application for review with the Office of Administrative Law Judges, c/o Docket Clerk, Office of Hearings and Appeals, and, as required by § 81.12(b), shall serve a copy on the applicable Departmental official who made the disallowance decision.

(b) A recipient shall file an application for review not later than 60 days after the date it receives the notice of a disallowance decision.

(c) Within 10 days after receipt of a copy of the application for review, the authorized Departmental official who made the disallowance decision shall provide the ALJ with a copy of any document identified in the notice pursuant to § 81.34(b)(2).

(d) An application for review must contain—

(1) A copy of the disallowance decision of which review is sought;

(2) A statement certifying the date the recipient received the notice of that decision;

(3) A short and plain statement of the disputed issues of law and fact, the recipient's position with respect to these issues, and the disallowed funds the recipient contends need not be returned; and

(4) A statement of the facts and the reasons that support the recipient's position.

(e) The ALJ who considers a timely application for review that substantially complies with the requirements of paragraph (c) of this section may permit the recipient to supplement or amend the application with respect to issues that were timely raised. Any requirement to return funds that is not timely appealed becomes the final decision of the Department.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(b)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 58 FR 51013, Sept. 30, 1993; 60 FR 46494, Sept. 6, 1995]

§ 81.38 Consideration of an application for review.

(a) The ALJ assigned to the case under § 81.4 considers an application for review of a disallowance decision.

(b) The ALJ decides whether the notice of a disallowance decision meets the requirements of § 81.34, as provided by section 451(e) of GEPA.

(1) If the notice does not meet those requirements, the ALJ—

(i) Returns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision;

(ii) Gives the official the reasons why the notice does not meet the requirements of § 81.34; and

(iii) Informs the recipient of the ALJ's decision by certified mail, return receipt requested.

(2) An authorized Departmental official may modify and reissue a notice that an ALJ returns.

(c) If the notice of a disallowance decision meets the requirements of § 81.34, the ALJ decides whether the application for review meets the requirements of § 81.37.

(1) If the application, including any supplements or amendments under § 81.37(d), does not meet those requirements, the disallowance decision becomes the final decision of the Department.

(2) If the application meets those requirements, the ALJ—

(i) Informs the recipient and the authorized Departmental official that the OALJ has accepted jurisdiction of the case; and

(ii) Schedules a hearing on the record.

(3) The ALJ informs the recipient of the disposition of its application for review by certified mail, return receipt requested. If the ALJ decides that the application does not meet the requirements of § 81.37, the ALJ informs the recipient of the reasons for the decision.

(Authority: 20 U.S.C. 1221e-3, 1234 (e) and (f)(1), 1234a(b), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.39 Submission of evidence.

(a) The ALJ schedules the submission of the evidence, whether oral or documentary, to occur within 90 days of the OALJ's receipt of an acceptable application for review under § 81.37.

(b) The ALJ may waive the 90-day requirement for good cause.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(c), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.40 Burden of proof.

If the OALJ accepts jurisdiction of a case under § 81.38, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because—

(a) An expenditure identified in the disallowance decision as unallowable was allowable;

(b) The recipient discharged its obligation to account properly for the funds;

(c) The amount required to be returned does not meet the standards for proportionality in § 81.32;

(d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in § 81.33; or

(e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(b)(3), 1234b(b)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.41 Initial decision.

(a) The ALJ makes an initial decision based on the record.

(b) The initial decision includes the ALJ's findings of fact, conclusions of law, and reasoning on all material issues.

(c) The OALJ transmits the initial decision to the Secretary and to the parties by submission to OES and, if filing in paper format was permitted by the ALJ, by certified mail, return receipt requested, or by another parcel service with delivery confirmation.

(d) For the purpose of this part, "initial decision" includes an ALJ's modified decision after the Secretary's remand of a case.

(Authority: 5 U.S.C. 557(c); 20 U.S.C 1221e-3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 86 FR 52832, Sept. 23, 2021]

§ 81.42 Petition for review of initial decision.

(a)

(1) If a party seeks to obtain the Secretary's review of the initial decision of an ALJ, the party must file a petition for review by submission to OES on behalf of the Office of the Secretary unless the party shows the ALJ good cause why the petition cannot be filed electronically.

(2) If the ALJ permits a party to file a petition for review in paper format, the filing party must file the petition with the ALJ by hand-delivery or regular mail.

(b) A party must file a petition for review not later than 30 days after the date it receives the initial decision. The party is deemed to have received the initial decision on the date the initial decision is uploaded to OES or, if filing in paper format was permitted by the ALJ, the party is deemed to have received the initial decision on the delivery date indicated by the certified mail or parcel delivery records.

(c) Electronically filing a petition to OES for review constitutes service on the other party.

(d) If the ALJ has permitted the petition to be filed in paper format, then—

(1) The party must serve a copy of the petition on the other party on the filing date by hand delivery or by "overnight" or "express" mail. If agreed upon by the parties, service of a copy of the petition may be made upon the other party by a method approved by the ALJ.

(2) Any petition submitted under this section in paper format must be accompanied by a statement certifying the date that the petition was served on the other party.

(e) A petition for review of an initial decision must—

(1) Identify the initial decision for which review is sought; and

(2) Include a statement of the reasons asserted by the party for affirming, modifying, setting aside, or remanding the initial decision in whole or in part.

(f)

(1) A party may respond to a petition for review of an initial decision by filing a statement of its views on the issues raised in the petition, as provided for in this section, not later than 15 days after the date it receives the petition.

(2) If the ALJ has permitted the written submission to be filed in paper format, a party must serve a copy of its statement of views on the other party by hand delivery or mail and certify that it has done so pursuant to the provisions of paragraph (d) of this section.

(g)

(1) The filing date for petitions under this section is the date the document is—

(i) Electronically filed; or

(ii) Hand-delivered or mailed, if permitted to file in paper format.

(2) If a scheduled filing date falls on a Saturday, Sunday, or a Federal holiday, the filing deadline is the next business day.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(e), and 3474(a))

[86 FR 52832, Sept. 23, 2021]

§ 81.43 Review by the Secretary.

(a)

(1) The Secretary's review of an initial decision is based on the record of the case, the initial decision, and any proper submissions of the parties or other participants in the case.

(2) During the Secretary's review of the initial decision there shall not be any *ex parte* contact between the Secretary and individuals representing the Department or the recipient.

(b) The ALJ's findings of fact, if supported by substantial evidence, are conclusive.

(c) The Secretary may affirm, modify, set aside, or remand the ALJ's initial decision.

(1) If the Secretary modifies, sets aside, or remands an initial decision, in whole or in part, the Secretary's decision includes a statement of reasons that supports the Secretary's decision.

(2)

(i) The Secretary may remand the case to the ALJ with instructions to make additional findings of fact or conclusions of law, or both, based on the evidence of record. The Secretary may also remand the case to the ALJ for further briefing or for clarification or revision of the initial decision.

(ii) If a case is remanded, the ALJ shall make new or modified findings of fact or conclusions of law or otherwise modify the initial decision in accordance with the Secretary's remand order.

(iii) A party may appeal a modified decision of the ALJ under the provisions of §§ 81.42 through 81.45. However, upon that review, the ALJ's new or modified findings, if supported by substantial evidence, are conclusive.

(3) The Secretary, for good cause shown, may remand the case to the ALJ to take further evidence, and the ALJ may make new or modified findings of fact and may modify the initial decision based on that new evidence. These new or modified findings of fact are likewise conclusive if supported by substantial evidence.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(d), and 3474(a))

[58 FR 43474, Aug. 16, 1993, as amended at 60 FR 46494, Sept. 6, 1995]

§ 81.44 Final decision of the Department.

(a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.

(b) If the Secretary modifies or sets aside the ALJ's initial decision, a copy of the Secretary's decision is provided to the parties by submission to OES. If the ALJ has permitted written submissions to be filed in paper format, the decision will be sent by certified mail, return receipt requested, or by another parcel service with delivery confirmation. The Secretary's decision becomes the final decision of the Department on the date it is electronically filed or, if sent via parcel delivery service, on the delivery date indicated by the certified mail or parcel delivery records.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(g), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 86 FR 52833, Sept. 23, 2021]

§ 81.45 Collection of claims.

(a) An authorized Departmental official collects a claim established under this subpart by using the standards and procedures in 34 CFR part 30.

(b) A claim established under this subpart may be collected—

(1) 30 days after a recipient receives notice of a disallowance decision if the recipient fails to file an acceptable application for review under § 81.37; or

(2) On the date of the final decision of the Department under § 81.44 if the recipient obtains review of a disallowance decision.

(c) The Department takes no collection action pending judicial review of a final decision of the Department under section 458 of GEPA.

(d) If a recipient obtains review of a disallowance decision under § 81.38, the Department does not collect interest on the claim for the period between the date of the disallowance decision and the date of the final decision of the Department under § 81.44.

(Authority: 20 U.S.C. 1234(f)(1); 1234a(f)(1) and (2), (i), and (1))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

Appendix to Part 81—Illustrations of Proportionality

(1) ***Ineligible beneficiaries.*** A State uses 15 percent of its grant to meet the special educational needs of children who were migratory, but who have not migrated for more than five years as a Federal program statute requires for eligibility to participate in the program. Result: Recovery of 15 percent of the grant—all program funds spent for the benefit of those children. Although the services were authorized, the children were not eligible to receive them.

(2) ***Ineligible beneficiaries.*** A Federal program designed to meet the special educational needs of gifted and talented children requires that at least 80 percent of the children served in any project must be identified as gifted or talented. A local educational agency (LEA) conducts a project in which 76 students are identified as gifted or talented and 24 are not. The project was designed and implemented to meet the special educational needs of gifted and talented students. Result: The LEA must return five percent of the project costs. The LEA provided authorized services for a project in which the 76 target students had to constitute at least 80 percent of the total. Thus, the maximum number of non-target students permitted was 19. Project costs relating to the remaining five students must be returned.

(3) ***Ineligible beneficiaries.*** Same as the example in paragraph (2), except that only 15 percent of the children were identified as gifted or talented. On the basis of the low percentage of these children and other evidence, the authorized Departmental official finds that the project as a whole did not address their special educational needs and was outside the purpose of the statute. Result: The LEA must return its entire award. The difference between the required percentage of gifted and talented children and the percentage actually enrolled is so substantial that, if consistent with other evidence, the official may reasonably conclude the entire grant was misused.

(4) ***Ineligible beneficiaries.*** Same as the example in paragraph (2), except that 60 percent of the children were identified as gifted or talented, and it is not clear whether the project was designed or implemented to meet the special educational needs of these children. Result: If it is determined that the project was designed and implemented to serve their special educational needs, the LEA must return 25 percent of the project costs. A project that included 60 target children would meet the requirement that 80 percent of the children served be gifted and talented if it included no more than 15 other children. Thus, while the LEA provided authorized services, only 75 percent of the beneficiaries were authorized to participate in the project (60 target children and 15 others). If the authorized Departmental official, after examining all the relevant facts, determines that the project was not designed and implemented to serve the special educational needs of gifted or talented students, the LEA must return its entire award because it did not provide services authorized by the statute.

(5) ***Unauthorized activities.*** An LEA uses ten percent of its grant under a Federal program that authorizes activities only to meet the special educational needs of educationally deprived children to pay for health services that are available to all children in the LEA. All the children who use the Federally funded health services happen to be educationally deprived, and thus eligible to receive program services. Result: Recovery of ten percent of the grant—all program funds spent for the health services. Although the children were eligible to receive program services, the health services were unrelated to a special educational need and, therefore, not authorized by law.

(6) ***Set-aside requirement.*** A State uses 22 percent of its grant for one fiscal year under a Federal adult education program to provide programs of equivalency to a certificate of graduation from a secondary school. The adult education program statute restricts those programs to no more than 20 percent of the State's grant. Result: Two percent of the State's grant must be returned. Although all 22 percent of the funds supported adult education, the State had no authority to spend more than 20 percent on secondary school equivalency programs.

(7) ***Set-aside requirement.*** A State uses eight percent of its basic State grant under a Federal vocational education program to pay for the excess cost of vocational education services and activities for handicapped individuals. The program statute requires a State to use ten percent of its basic State grant for this purpose. Result: The State must return two percent of its basic State grant, regardless of how it

was used. Because the State was required to spend that two percent on services and activities for handicapped individuals and did not do so, it diverted those funds from their intended purposes, and the Federal interest was harmed to that extent.

(8) ***Excess cost requirement.*** An LEA uses funds reserved for the disadvantaged under a Federal vocational education program to pay for the cost of the same vocational education services it provides to non-disadvantaged individuals. The program statute requires that funds reserved for the disadvantaged must be used to pay only for the supplemental or additional costs of vocational education services that are not provided to other individuals and that are required for disadvantaged individuals to participate in vocational education. Result: All the funds spent on the disadvantaged must be returned. Although the funds were spent to serve the disadvantaged, the funds were available to pay for only the supplemental or additional costs of providing services to the disadvantaged.

(9) ***Maintenance-of-effort requirement.*** An LEA participates in a Federal program in fiscal year 1988 that requires it to maintain its expenditures from non-Federal sources for program purposes to receive its full allotment. The program statute requires that non-Federal funds expended in the first preceding fiscal year must be at least 90 percent of non-Federal funds expended in the second preceding fiscal year and provides for a reduction in grant amount proportional to the shortfall in expenditures. No waiver of the requirement is authorized. In fiscal year 1986 the LEA spent $100,000 from non-Federal sources for program purposes; in fiscal year 1987, only $87,000. Result: The LEA must return $^{1}/_{30}$ of its fiscal year 1988 grant—the amount of its grant that equals the proportion of its shortfall ($3,000) to the required level of expenditures ($90,000). If, instead, the statute made maintenance of expenditures a clear condition of the LEA's eligibility to receive funds and did not provide for a proportional reduction in the grant award, the LEA would be required to return its entire grant.

(10) ***Supplanting prohibition.*** An LEA uses funds under a Federal drug education program to provide drug abuse prevention counseling to students in the eighth grade. The LEA is required to provide that same counseling under State law. Funds under the Federal program statute are subject to a supplement-not-supplant requirement. Result: All the funds used to provide the required counseling to the eighth-grade students must be returned. The Federal funds did not increase the total amount of spending for program purposes because the counseling would have been provided with non-Federal funds if the Federal funds were not available.

(11) ***Matching requirement.*** A State receives an allotment of $90,000 for fiscal year 1988 under a Federal adult education program. It expends its full allotment and $8,000 from its own resources for adult education. Under the Federal statute, the Federal share of expenditures for the State's program is 90 percent. Result: The State must return the unmatched Federal funds, or $18,000. Expenditure of a $90,000 Federal allotment required $10,000 in matching State expenditures, $2,000 more than the State's actual expenditures. At a ratio of one State dollar for every nine Federal dollars, $18,000 in Federal funds were unmatched.

(12) ***Application requirements.*** In order to receive funds under a Federal program that supports a wide range of activities designed to improve the quality of elementary and secondary education, an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students—an

authorized activity under the Federal statute. However, the LEA does not consult with interested parties and does not amend its application. Result: 20 percent of the LEA's subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of the application process, but caused significant harm to other Federal interests associated with the program as follows: the required planning process was circumvented because the LEA did not consult with the specified local interests; program accountability was impaired because neither the SEA nor the various local interests that were to be consulted had an opportunity to review and comment on the merits of the gifted and talented program activities, and the LEA never had to justify those activities to them; and fiscal accountability was impaired because the SEA and those various local interests were, in effect, misled by the LEA's unamended application regarding the expenditure of Federal funds.

(13) ***Harmless violation.*** Under a Federal program, a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring, and evaluation. Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified. Result: No financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 82—NEW RESTRICTIONS ON LOBBYING

Authority: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 20 U.S.C. 3474.

Source: 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted.

Cross Reference:

See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 82.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 82.105 Definitions.

For purposes of this part:

(a) ***Agency,*** as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) ***Covered Federal action*** means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) ***Federal contract*** means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) ***Federal cooperative agreement*** means a cooperative agreement entered into by an agency.

(e) ***Federal grant*** means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) ***Federal loan*** means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) ***Indian tribe*** and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) ***Influencing or attempting to influence*** means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) ***Loan guarantee*** and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) ***Local government*** means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) ***Officer or employee of an agency*** includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) ***Person*** means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) ***Reasonable compensation*** means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) ***Reasonable payment*** means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) ***Recipient*** includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) ***Regularly employed*** means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) ***State*** means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 82.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 82.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 82.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 82.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 82.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 82.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 82.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 82.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 82.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 82.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 82.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 82.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

Appendix A to Part 82—Certification Regarding Lobbying

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Appendix B to Part 82—Disclosure Form To Report Lobbying

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. **Type of Federal Action:**	2. **Status of Federal Action:**	3. **Report Type:**
☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	☐ a. bid/offer/application b. initial award c. post-award	☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter _____ date of last report _____

4. **Name and Address of Reporting Entity:**	5. **If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:**
☐ Prime ☐ Subawardee Tier _____, *if known*: **Congressional District,** *if known*:	 **Congressional District,** *if known*:
6. **Federal Department/Agency:**	7. **Federal Program Name/Description:** CFDA Number, *if applicable*: _____
8. **Federal Action Number,** *if known*:	9. **Award Amount,** *if known*: $
10. a. **Name and Address of Lobbying Entity** *(if individual, last name, first name, MI)*:	b. **Individuals Performing Services** *(including address if different from No. 10a)* *(last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. **Amount of Payment** *(check all that apply)*:	13. **Type of Payment** *(check all that apply)*:
$ _____ ☐ actual ☐ planned	☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. **Form of Payment** *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	

14. **Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:**

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. **Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 84—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327, unless otherwise noted.

Source: 68 FR 66557, 66610, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 84.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.,* as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the Department of Education; or

(2) A(n) ED awarding official. (See definitions of award and recipient in §§ 84.605 and 84.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.

If you are . . .	see subparts . . .
(3) A(n) ED awarding official	A, D and E.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the ED Deciding Official determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 84.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

Subpart B—Requirements for Recipients Other Than Individuals

§ 84.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 84.205 through 84.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 84.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 84.230).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 84.205 be given to each employee who will be engaged in the performance of any Federal award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 84.205 and an ongoing awareness program as described in § 84.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program	may ask the ED awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 84.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must—

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each ED award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

(1) To the ED official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by ED officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.,* all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the ED awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the ED awarding official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

Subpart C—Requirements for Recipients Who Are Individuals

§ 84.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) ED award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the ED awarding official or other designee for each award that you currently have, unless § 84.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.301 [Reserved]

Subpart D—Responsibilities of ED Awarding Officials

§ 84.400 What are my responsibilities as a(n) ED awarding official?

As a(n) ED awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

Subpart E—Violations of this Part and Consequences

§ 84.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the ED Deciding Official determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the ED Deciding Official determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 84.500 or § 84.505, the Department of Education may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 34 CFR Part 85, for a period not to exceed five years.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.515 Are there any exceptions to those actions?

The ED Deciding Official may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the ED Deciding Official determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

Subpart F—Definitions

§ 84.605 Award.

Award means an award of financial assistance by the Department of Education or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 34 CFR Part 85 that implements OMB Circular A-102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.,* any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in § 84.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.640 Employee.

(a) ***Employee*** means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.,* volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.655 Individual.

Individual means a natural person.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

§ 84.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327)

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 86—DRUG AND ALCOHOL ABUSE PREVENTION

Authority: 20 U.S.C. 1145g, unless otherwise noted.

Source: 55 FR 33581, Aug. 16, 1990, unless otherwise noted.

Subpart A—General

§ 86.1 What is the purpose of the Drug and Alcohol Abuse Prevention regulations?

The purpose of the Drug and Alcohol Abuse Prevention regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which added section 1213 to the Higher Education Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g)

[61 FR 66225, Dec. 17, 1996]

§ 86.2 What Federal programs are covered by this part?

The Federal programs covered by this part include—

(a) All programs administered by the Department of Education under which an IHE may receive funds or any other form of Federal financial assistance; and

(b) All programs administered by any other Federal agency under which an IHE may receive funds or any other form of Federal financial assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.3 What actions shall an IHE take to comply with the requirements of this part?

(a) An IHE shall adopt and implement a drug prevention program as described in § 86.100 to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.

(b) An IHE shall provide a written certification that it has adopted and implemented the drug prevention program described in § 86.100.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, 66226, Dec. 17, 1996]

§ 86.4 What are the procedures for submitting a drug prevention program certification?

An IHE shall submit to the Secretary the drug prevention program certification required by § 86.3(b).

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

§ 86.5 What are the consequences if an IHE fails to submit a drug prevention program certification?

(a) An IHE that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.6 When must an IHE submit a drug prevention program certification?

(a) After October 1, 1990, except as provided in paragraph (b) of this section, an IHE is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE has submitted a drug prevention program certification.

(b)

(1) The Secretary may allow an IHE until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that—

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3) An IHE shall submit a request for an extension to the Secretary.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

§ 86.7 What definitions apply to this part?

(a) ***Definitions in EDGAR.*** The following terms used in this part are defined in 34 CFR part 77:

Department

EDGAR

Secretary

(b) ***Other definitions.*** The following terms used in this part are defined as follows:

Compliance agreement means an agreement between the Secretary and an IHE that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part.

Institution of higher education means—

(1) An institution of higher education, as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education, as defined in 34 CFR 600.5;

(3) A postsecondary vocational institution, as defined in 34 CFR 600.6; and

(4) A vocational school, as defined in 34 CFR 600.7.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

Subpart B—Institutions of Higher Education

§ 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

(a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of—

(1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;

(2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;

(3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;

(4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and

(5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(b) A biennial review by the IHE of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?

The Secretary annually reviews a representative sample of IHE drug prevention programs.

(Authority: 20 U.S.C. 1145g)

§ 86.102 What is required of an IHE that the Secretary selects for annual review?

If the Secretary selects an IHE for review under § 86.101, the IHE shall provide the Secretary access to personnel, records, documents and any other necessary information requested by the Secretary to review the IHE's adoption and implementation of its drug prevention program.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

§ 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

(a) Each IHE that provides the drug prevention program certification required by § 86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by § 86.100(a) as well as the results of the biennial review required by § 86.100(b).

(b)

(1) An IHE shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraph (a) of this section.

(ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

Subpart C [Reserved]

Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE

§ 86.300 What constitutes a violation of this part by an IHE?

An IHE violates this part by—

(a) Receiving any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification in accordance with § 86.3(b); or

(b) Violating its certification. Violation of a certification includes failure of an IHE to—

(1) Adopt or implement its drug prevention program; or

(2) Consistently enforce its disciplinary sanctions for violations by students and employees of the standards of conduct adopted by an IHE under § 86.100(a)(1).

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

§ 86.301 What actions may the Secretary take if an IHE violates this part?

(a) If an IHE violates its certification, the Secretary may issue a response to the IHE. A response may include, but is not limited to—

(1) Provision of information and technical assistance; and

(2) Formulation of a compliance agreement designed to bring the IHE into full compliance with this part as soon as feasible.

(b) If an IHE receives any form of Federal financial assistance without having submitted a certification or violates its certification, the Secretary may impose one or more sanctions on the IHE, including—

(1) Repayment of any or all forms of Federal financial assistance received by the IHE when it was in violation of this part; and

(2) The termination of any or all forms of Federal financial assistance that—

(i)

(A) Except as specified in paragraph (b)(2)(ii) of this section, ends an IHE's eligibility to receive any or all forms of Federal financial assistance. The Secretary specifies which forms of Federal financial assistance would be affected; and

(B) Prohibits an IHE from making any new obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.302 What are the procedures used by the Secretary for providing information or technical assistance?

(a) The Secretary provides information or technical assistance to an IHE in writing, through site visits, or by other means.

(b) The IHE shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE in writing of—

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance; and

(2) The response the Secretary intends to issue.

(b) An IHE may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph (a)(2) of this section within 30 days after the date the IHE receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE in accordance with the procedures in § 86.304.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's eligibility for any or all forms of Federal financial assistance?

(a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's eligibility for any or all forms of Federal financial assistance by sending the IHE a notice by certified mail with return receipt requested. This notice—

(1) Informs the IHE of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(2) Specifies, as appropriate—

(i) The amount of Federal financial assistance that must be repaid and the date by which the IHE must repay the funds; and

(ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and

(3) Informs the IHE that the repayment of Federal financial assistance will not be required or that the termination will not be effective on the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE receives the notice of intent described in this paragraph—

(i) Written material indicating why the repayment of Federal financial assistance or termination should not take place; or

(ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE contends need not be repaid.

(b) If the IHE does not request a hearing but submits written material—

(1) The IHE receives no additional opportunity to request or receive a hearing; and

(2) The designated Department official, after considering the written material, notifies the IHE in writing whether—

(i) Any or all of the Federal financial assistance must be repaid; or

(ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

Subpart E—Appeal Procedures

§ 86.400 What is the scope of this subpart?

(a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE to receive some or all forms of Federal financial assistance for violations of this part.

(b) An Administrative Law Judge (ALJ) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.401 What are the authority and responsibility of the ALJ?

(a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to—

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether—

(1) The IHE received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE violated its certification.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.402 Who may be a party in a hearing under this subpart?

(a) Only the designated Department official and the IHE that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.403 May a party be represented by counsel?

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g)

§ 86.404 How may a party communicate with an ALJ?

(a) A party may not communicate with an ALJ on any fact at issue in the case or on any matter relevant to the merits of the case unless the other party is given notice and an opportunity to participate.

(b)

(1) To obtain an order or ruling from an ALJ, a party shall make a motion to the ALJ.

(2) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with § 86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in § 86.405(d).

(Authority: 20 U.S.C. 1145g)

§ 86.405 What are the requirements for filing written submissions?

(a) Any written submission under this subpart must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d)

(1) The filing date for a written submission is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.

(e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(f) If a document is filed by facsimile transmission, the Secretary or the designated Department official, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 1145g)

[57 FR 56795, Nov. 30, 1992]

§ 86.406 What must the ALJ do if the parties enter settlement negotiations?

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.

(b) The following are not admissible in any proceeding under this part:

(1) Evidence of conduct during settlement negotiations.

(2) Statements made during settlement negotiations.

(3) Terms of settlement offers.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g)

§ 86.407 What are the procedures for scheduling a hearing?

(a) If the IHE requests a hearing by the time specified in § 86.304(a)(3), the designated Department official sets the date and the place.

(b)

(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.

(2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.

(c) No termination takes effect until after a hearing is held and a decision is issued by the Department.

(d) With the approval of the ALJ and the consent of the designated Department official and the IHE, any time schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.408 What are the procedures for conducting a pre-hearing conference?

(a)

(1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by—

(i) The designated Department official; or

(ii) The IHE.

(2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.

(b) A pre-hearing conference may consist of—

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.409 What are the procedures for conducting a hearing on the record?

(a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.

(b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE. Procedures to expedite may include, but are not limited to, the following:

(1) A restriction on the number or length of submissions.

(2) The conduct of the hearing by telephone conference call.

(3) A review limited to the written record.

(4) A certification by the parties to facts and legal authorities not in dispute.

(d)

(1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.

(2) The designated Department official has the burden of persuasion in any proceeding under this subpart.

(3)

(i) The parties may agree to exchange relevant documents and information.

(ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any other exchange between the parties of documents or information.

(4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to—

(1) The designated Department official; and

(2) The IHE on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.410 What are the procedures for issuance of a decision?

(a)

(1) The ALJ issues a written decision to the IHE, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after—

(i) The last brief is filed;

(ii) The last day of the hearing if one is held; or

(iii) The date on which the ALJ terminates the hearing in accordance with § 86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)

(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

(c)

(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE does not take effect pending the Secretary's review.

(e)

(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

§ 86.411 What are the procedures for requesting reinstatement of eligibility?

(a)

(1) An IHE whose eligibility to receive any or all forms of Federal financial assistance has been terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment obligation imposed upon it under § 86.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 97—PROTECTION OF HUMAN SUBJECTS

Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; 42 U.S.C. 300v-1(b).

Source: 56 FR 28012, 28021, June 18, 1991, unless otherwise noted.

Subpart A—Federal Policy for the Protection of Human Subjects (Basic ED Policy for Protection of Human Research Subjects)

Source: 82 FR 7272, Jan. 19, 2017, unless otherwise noted.

§ 97.101 To what does this policy apply?

(a) Except as detailed in § 97.104, this policy applies to all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency that takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by Federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the Federal Government outside the United States. Institutions that are engaged in research described in this paragraph and institutional review boards (IRBs) reviewing research that is subject to this policy must comply with this policy.

(b) [Reserved]

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy and this judgment shall be exercised consistent with the ethical principles of the Belmont Report.[62]

[62] The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.-Belmont Report. Washington, DC: U.S. Department of Health and Human Services. 1979.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the Federal department or agency but not otherwise covered by this policy comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations that provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe) that may otherwise be applicable and that provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations that may otherwise be applicable and that provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy, provided the alternative procedures to be followed are consistent with the principles of the Belmont Report.[63] Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Human Research Protections, Department of Health and Human Services (HHS), or any successor office, or to the equivalent office within the appropriate Federal department or agency, and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures. The waiver notice must include a statement that identifies the conditions under which the waiver will be applied and a justification as to why the waiver is appropriate for the research, including how the decision is consistent with the principles of the Belmont Report.

(j) Federal guidance on the requirements of this policy shall be issued only after consultation, for the purpose of harmonization (to the extent appropriate), with other Federal departments and agencies that have adopted this policy, unless such consultation is not feasible.

(k) [Reserved]

(l) ***Pre-2018 Requirements.*** Compliance dates and transition provisions:

(1) For purposes of this section, the *pre-2018 Requirements* means this subpart as published in the 2016 edition of the Code of Federal Regulations.

[63] *Id.*

(2) ***2018 Requirements.*** For purposes of this section, the *2018 Requirements* means the Federal Policy for the Protection of Human Subjects requirements contained in this subpart. The general compliance date for the 2018 Requirements is January 21, 2019. The compliance date for § 97.114(b) (cooperative research) of the 2018 Requirements is January 20, 2020.

(3) ***Research subject to pre-2018 requirements.*** The pre-2018 Requirements shall apply to the following research, unless the research is transitioning to comply with the 2018 Requirements in accordance with paragraph (l)(4) of this section:

(i) Research initially approved by an IRB under the pre-2018 Requirements before January 21, 2019;

(ii) Research for which IRB review was waived pursuant to § 97.101(i) of the pre-2018 Requirements before January 21, 2019; and

(iii) Research for which a determination was made that the research was exempt under § 97.101(b) of the pre-2018 Requirements before January 21, 2019.

(4) ***Transitioning research.*** If, on or after July 19, 2018, an institution planning or engaged in research otherwise covered by paragraph (l)(3) of this section determines that such research instead will transition to comply with the 2018 Requirements, the institution or an IRB must document and date such determination.

(i) If the determination to transition is documented between July 19, 2018, and January 20, 2019, the research shall:

(A) Beginning on the date of such documentation through January 20, 2019, comply with the pre-2018 Requirements, except that the research shall comply with the following:

(*1*) Section 97.102(l) of the 2018 Requirements (definition of research) (instead of § 97.102(d) of the pre-2018 Requirements);

(*2*) Section 97.103(d) of the 2018 Requirements (revised certification requirement that eliminates IRB review of application or proposal) (instead of § 97.103(f) of the pre-2018 Requirements); and

(*3*) Section 97.109(f)(1)(i) and (iii) of the 2018 Requirements (exceptions to mandated continuing review) (instead of § 97.103(b), as related to the requirement for continuing review, and in addition to § 97.109, of the pre-2018 Requirements); and

(B) Beginning on January 21, 2019, comply with the 2018 Requirements.

(ii) If the determination to transition is documented on or after January 21, 2019, the research shall, beginning on the date of such documentation, comply with the 2018 Requirements.

(5) ***Research subject to 2018 Requirements.*** The 2018 Requirements shall apply to the following research:

(i) Research initially approved by an IRB on or after January 21, 2019;

(ii) Research for which IRB review is waived pursuant to paragraph (i) of this section on or after January 21, 2019; and

(iii) Research for which a determination is made that the research is exempt on or after January 21, 2019.

(m) Severability: Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

[82 FR 7272, Jan. 19, 2017, as amended at 83 FR 28516, June 19, 2018]

§ 97.102 Definitions for purposes of this policy.

(a) ***Certification*** means the official notification by the institution to the supporting Federal department or agency component, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

(b) ***Clinical trial*** means a research study in which one or more human subjects are prospectively assigned to one or more interventions (which may include placebo or other control) to evaluate the effects of the interventions on biomedical or behavioral health-related outcomes.

(c) ***Department or agency head*** means the head of any Federal department or agency, for example, the Secretary of HHS, and any other officer or employee of any Federal department or agency to whom the authority provided by these regulations to the department or agency head has been delegated.

(d) ***Federal department or agency*** refers to a federal department or agency (the department or agency itself rather than its bureaus, offices or divisions) that takes appropriate administrative action to make this policy applicable to the research involving human subjects it conducts, supports, or otherwise regulates (*e.g.,* the U.S. Department of Health and Human Services, the U.S. Department of Defense, or the Central Intelligence Agency).

(e)

(1) ***Human subject*** means a living individual about whom an investigator (whether professional or student) conducting research:

(i) Obtains information or biospecimens through intervention or interaction with the individual, and uses, studies, or analyzes the information or biospecimens; or

(ii) Obtains, uses, studies, analyzes, or generates identifiable private information or identifiable biospecimens.

(2) ***Intervention*** includes both physical procedures by which information or biospecimens are gathered (*e.g.,* venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes.

(3) ***Interaction*** includes communication or interpersonal contact between investigator and subject.

(4) ***Private information*** includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information that has been provided for specific purposes by an individual and that the individual can reasonably expect will not be made public (*e.g.,* a medical record).

(5) ***Identifiable private information*** is private information for which the identity of the subject is or may readily be ascertained by the investigator or associated with the information.

(6) ***An identifiable biospecimen*** is a biospecimen for which the identity of the subject is or may readily be ascertained by the investigator or associated with the biospecimen.

(7) Federal departments or agencies implementing this policy shall:

(i) Upon consultation with appropriate experts (including experts in data matching and re-identification), reexamine the meaning of "identifiable private information," as defined in paragraph (e)(5) of this section, and "identifiable biospecimen," as defined in paragraph (e)(6) of this section. This reexamination shall take place within 1 year and regularly thereafter (at least every 4 years). This process will be conducted by collaboration among the Federal departments and agencies implementing this policy. If appropriate and permitted by law, such Federal departments and agencies may alter the interpretation of these terms, including through the use of guidance.

(ii) Upon consultation with appropriate experts, assess whether there are analytic technologies or techniques that should be considered by investigators to generate "identifiable private information," as defined in paragraph (e)(5) of this section, or an "identifiable biospecimen," as defined in paragraph (e)(6) of this section. This assessment shall take place within 1 year and regularly thereafter (at least every 4 years). This process will be conducted by collaboration among the Federal departments and agencies implementing this policy. Any such technologies or techniques will be included on a list of technologies or techniques that produce identifiable private information or identifiable biospecimens. This list will be published in the FEDERAL REGISTER after notice and an opportunity for public comment. The Secretary, HHS, shall maintain the list on a publicly accessible Web site.

(f) ***Institution*** means any public or private entity, or department or agency (including federal, state, and other agencies).

(g) ***IRB*** means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) ***IRB approval*** means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) ***Legally authorized representative*** means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research. If there is no applicable law addressing this issue, *legally authorized representative* means an individual recognized by institutional policy as acceptable for providing consent in the nonresearch context on behalf of the prospective subject to the subject's participation in the procedure(s) involved in the research.

(j) ***Minimal risk*** means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(k) ***Public health authority*** means an agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, an Indian tribe, or a foreign government, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.

(l) ***Research*** means a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge. Activities that meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program that is considered research for other purposes. For example, some demonstration and service programs may include research activities. For purposes of this part, the following activities are deemed not to be research:

(1) Scholarly and journalistic activities (*e.g.,* oral history, journalism, biography, literary criticism, legal research, and historical scholarship), including the collection and use of information, that focus directly on the specific individuals about whom the information is collected.

(2) Public health surveillance activities, including the collection and testing of information or biospecimens, conducted, supported, requested, ordered, required, or authorized by a public health authority. Such activities are limited to those necessary to allow a public health authority to identify, monitor, assess, or investigate potential public health signals, onsets of disease outbreaks, or conditions of public health importance (including trends, signals, risk factors, patterns in diseases, or increases in injuries from using consumer products). Such activities include those associated with providing timely situational awareness and priority setting during the course of an event or crisis that threatens public health (including natural or man-made disasters).

(3) Collection and analysis of information, biospecimens, or records by or for a criminal justice agency for activities authorized by law or court order solely for criminal justice or criminal investigative purposes.

(4) Authorized operational activities (as determined by each agency) in support of intelligence, homeland security, defense, or other national security missions.

(m) ***Written,* or *in writing,*** for purposes of this part, refers to writing on a tangible medium (*e.g.,* paper) or in an electronic format.

§ 97.103 Assuring compliance with this policy—research conducted or supported by any Federal department or agency.

(a) Each institution engaged in research that is covered by this policy, with the exception of research eligible for exemption under § 97.104, and that is conducted or supported by a Federal department or agency, shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements of this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Human Research Protections, HHS, or any successor office, and approved for Federal-wide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Human Research Protections, HHS, or any successor office. Federal departments and agencies will conduct or support research covered by this policy only if the institution has provided an assurance that it will comply with the requirements of this policy, as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB (if such certification is required by § 97.103(d)).

(b) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(c) The department or agency head may limit the period during which any assurance shall remain effective or otherwise condition or restrict the assurance.

(d) Certification is required when the research is supported by a Federal department or agency and not otherwise waived under § 97.101(i) or exempted under § 97.104. For such research, institutions shall certify that each proposed research study covered by the assurance and this section has been reviewed and approved by the IRB. Such certification must be submitted as prescribed by the Federal department or agency component supporting the research. Under no condition shall research covered by this section be initiated prior to receipt of the certification that the research has been reviewed and approved by the IRB.

(e) For nonexempt research involving human subjects covered by this policy (or exempt research for which limited IRB review takes place pursuant to § 97.104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8)) that takes place at an institution in which IRB oversight is conducted by an IRB that is not operated by the institution, the institution and the organization operating the IRB shall document the institution's reliance on the IRB for oversight of the research and the responsibilities that each entity will undertake to ensure compliance with the requirements of this policy (*e.g.,* in a written agreement between the institution and the IRB, by implementation of an institution-wide policy directive providing the allocation of responsibilities between the institution and an IRB that is not affiliated with the institution, or as set forth in a research protocol).

(Approved by the Office of Management and Budget under Control Number 0990-0260)

§ 97.104 Exempt research.

(a) Unless otherwise required by law or by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the categories in paragraph (d) of this section are exempt from the requirements of this policy, except that such activities must comply with the requirements of this section and as specified in each category.

(b) Use of the exemption categories for research subject to the requirements of subparts B, C, and D: Application of the exemption categories to research subject to the requirements of 45 CFR part 46, subparts B, C, and D, is as follows:

(1) ***Subpart B.*** Each of the exemptions at this section may be applied to research subject to subpart B if the conditions of the exemption are met.

(2) ***Subpart C.*** The exemptions at this section do not apply to research subject to subpart C, except for research aimed at involving a broader subject population that only incidentally includes prisoners.

(3) ***Subpart D.*** The exemptions at paragraphs (d)(1), (4), (5), (6), (7), and (8) of this section may be applied to research subject to subpart D if the conditions of the exemption are met. Paragraphs (d)(2)(i) and (ii) of this section only may apply to research subject to subpart D involving educational tests or the observation of public behavior when the investigator(s) do not participate in the activities being observed. Paragraph (d)(2)(iii) of this section may not be applied to research subject to subpart D.

(c) [Reserved]

(d) Except as described in paragraph (a) of this section, the following categories of human subjects research are exempt from this policy:

(1) Research, conducted in established or commonly accepted educational settings, that specifically involves normal educational practices that are not likely to adversely impact students' opportunity to learn required educational content or the assessment of educators who provide instruction. This includes most research on regular and special education instructional strategies, and research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior (including visual or auditory recording) if at least one of the following criteria is met:

(i) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(ii) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(iii) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by § 97.111(a)(7).

(3)

(i) Research involving benign behavioral interventions in conjunction with the collection of information from an adult subject through verbal or written responses (including data entry) or audiovisual recording if the subject prospectively agrees to the intervention and information collection and at least one of the following criteria is met:

(A) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(B) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(C) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by § 97.111(a)(7).

(ii) For the purpose of this provision, benign behavioral interventions are brief in duration, harmless, painless, not physically invasive, not likely to have a significant adverse lasting impact on the subjects, and the investigator has no reason to think the subjects will find the interventions offensive or embarrassing. Provided all such criteria are met, examples of such benign behavioral interventions would include having the subjects play an online game, having them solve puzzles under various noise conditions, or having them decide how to allocate a nominal amount of received cash between themselves and someone else.

(iii) If the research involves deceiving the subjects regarding the nature or purposes of the research, this exemption is not applicable unless the subject authorizes the deception through a prospective agreement to participate in research in circumstances in which the subject is informed that he or she will be unaware of or misled regarding the nature or purposes of the research.

(4) Secondary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met:

(i) The identifiable private information or identifiable biospecimens are publicly available;

(ii) Information, which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects;

(iii) The research involves only information collection and analysis involving the investigator's use of identifiable health information when that use is regulated under 45 CFR parts 160 and 164, subparts A and E, for the purposes of “health care operations” or “research” as those terms are defined at 45 CFR 164.501 or for “public health activities and purposes” as described under 45 CFR 164.512(b); or

(iv) The research is conducted by, or on behalf of, a Federal department or agency using government-generated or government-collected information obtained for nonresearch activities, if the research generates identifiable private information that is or will be maintained on information technology that is subject to and in compliance with section 208(b) of the E-Government Act of 2002, 44 U.S.C. 3501 note, if all of the identifiable private information collected, used, or generated as part of the activity will be maintained in systems of records subject to the Privacy Act of 1974, 5 U.S.C. 552a, and, if applicable, the information used in the research was collected subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

(5) Research and demonstration projects that are conducted or supported by a Federal department or agency, or otherwise subject to the approval of department or agency heads (or the approval of the heads of bureaus or other subordinate agencies that have been delegated authority to conduct the research and demonstration projects), and that are designed to study, evaluate, improve, or otherwise examine public benefit or service programs, including procedures for obtaining benefits or services under those programs, possible changes in or alternatives to those programs or procedures, or possible changes in methods or levels of payment for benefits or services under those programs. Such projects include, but are not limited to, internal studies by Federal employees, and studies under contracts or consulting arrangements, cooperative agreements, or grants. Exempt projects also include waivers of otherwise mandatory requirements using authorities such as sections 1115 and 1115A of the Social Security Act, as amended.

(i) Each Federal department or agency conducting or supporting the research and demonstration projects must establish, on a publicly accessible Federal Web site or in such other manner as the department or agency head may determine, a list of the research and demonstration projects that the Federal department or agency conducts or supports under this provision. The research or demonstration project must be published on this list prior to commencing the research involving human subjects.

(ii) [Reserved]

(6) Taste and food quality evaluation and consumer acceptance studies:

(i) If wholesome foods without additives are consumed, or

(ii) If a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(7) Storage or maintenance for secondary research for which broad consent is required: Storage or maintenance of identifiable private information or identifiable biospecimens for potential secondary research use if an IRB conducts a limited IRB review and makes the determinations required by § 97.111(a)(8).

(8) Secondary research for which broad consent is required: Research involving the use of identifiable private information or identifiable biospecimens for secondary research use, if the following criteria are met:

(i) Broad consent for the storage, maintenance, and secondary research use of the identifiable private information or identifiable biospecimens was obtained in accordance with § 97.116(a)(1) through (4), (a)(6), and (d);

(ii) Documentation of informed consent or waiver of documentation of consent was obtained in accordance with § 97.117;

(iii) An IRB conducts a limited IRB review and makes the determination required by § 97.111(a)(7) and makes the determination that the research to be conducted is within the scope of the broad consent referenced in paragraph (d)(8)(i) of this section; and

(iv) The investigator does not include returning individual research results to subjects as part of the study plan. This provision does not prevent an investigator from abiding by any legal requirements to return individual research results.

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§§ 97-97.106 [Reserved]

§ 97.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members (professional competence), and the diversity of its members, including race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. The IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments (including policies and resources) and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a category of subjects that is vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these categories of subjects.

(b) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(c) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(d) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(e) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues that require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 97.108 IRB functions and operations.

(a) In order to fulfill the requirements of this policy each IRB shall:

(1) Have access to meeting space and sufficient staff to support the IRB's review and recordkeeping duties;

(2) Prepare and maintain a current list of the IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications or licenses sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution, for example, full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant;

(3) Establish and follow written procedures for:

(i) Conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution;

(ii) Determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and

(iii) Ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that investigators will conduct the research activity in accordance with the terms of the IRB approval until any proposed changes have been reviewed and approved by the IRB, except when necessary to eliminate apparent immediate hazards to the subject.

(4) Establish and follow written procedures for ensuring prompt reporting to the IRB; appropriate institutional officials; the department or agency head; and the Office for Human Research Protections, HHS, or any successor office, or the equivalent office within the appropriate Federal department or agency of

(i) Any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB; and

(ii) Any suspension or termination of IRB approval.

(b) Except when an expedited review procedure is used (as described in § 97.110), an IRB must review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

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§ 97.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy, including exempt research activities under § 97.104 for which limited IRB review is a condition of exemption (under § 97.104(d)(2)(iii), (d)(3)(i)(C), and (d)(7), and (8)).

(b) An IRB shall require that information given to subjects (or legally authorized representatives, when appropriate) as part of informed consent is in accordance with § 97.116. The IRB may require that information, in addition to that specifically mentioned in § 97.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with § 97.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research requiring review by the convened IRB at intervals appropriate to the degree of risk, not less than once per year, except as described in § 97.109(f).

(f)

(1) Unless an IRB determines otherwise, continuing review of research is not required in the following circumstances:

(i) Research eligible for expedited review in accordance with § 97.110;

(ii) Research reviewed by the IRB in accordance with the limited IRB review described in § 97.104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8);

(iii) Research that has progressed to the point that it involves only one or both of the following, which are part of the IRB-approved study:

(A) Data analysis, including analysis of identifiable private information or identifiable biospecimens, or

(B) Accessing follow-up clinical data from procedures that subjects would undergo as part of clinical care.

(2) [Reserved]

(g) An IRB shall have authority to observe or have a third party observe the consent process and the research.

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§ 97.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary of HHS has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The Secretary will evaluate the list at least every 8 years and amend it, as appropriate, after consultation with other federal departments and agencies and after publication in the FEDERAL REGISTER for public comment. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.

(b)

(1) An IRB may use the expedited review procedure to review the following:

(i) Some or all of the research appearing on the list described in paragraph (a) of this section, unless the reviewer determines that the study involves more than minimal risk;

(ii) Minor changes in previously approved research during the period for which approval is authorized; or

(iii) Research for which limited IRB review is a condition of exemption under § 97.104(d)(2)(iii), (d)(3)(i)(C), and (d)(7) and (8).

(2) Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the nonexpedited procedure set forth in § 97.108(b).

(c) Each IRB that uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals that have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

§ 97.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized:

(i) By using procedures that are consistent with sound research design and that do not unnecessarily expose subjects to risk, and

(ii) Whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in

the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (*e.g.,* the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted. The IRB should be particularly cognizant of the special problems of research that involves a category of subjects who are vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by, § 97.116.

(5) Informed consent will be appropriately documented or appropriately waived in accordance with § 97.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(i) The Secretary of HHS will, after consultation with the Office of Management and Budget's privacy office and other Federal departments and agencies that have adopted this policy, issue guidance to assist IRBs in assessing what provisions are adequate to protect the privacy of subjects and to maintain the confidentiality of data.

(ii) [Reserved]

(8) For purposes of conducting the limited IRB review required by § 97.104(d)(7)), the IRB need not make the determinations at paragraphs (a)(1) through (7) of this section, and shall make the following determinations:

(i) Broad consent for storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens is obtained in accordance with the requirements of § 97.116(a)(1)-(4), (a)(6), and (d);

(ii) Broad consent is appropriately documented or waiver of documentation is appropriate, in accordance with § 97.117; and

(iii) If there is a change made for research purposes in the way the identifiable private information or identifiable biospecimens are stored or maintained, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§ 97.112 Review by Institution

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 97.113 Suspension or Termination of IRB Approval of Research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

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§ 97.114 Cooperative Research.

(a) Cooperative research projects are those projects covered by this policy that involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy.

(b)

(1) Any institution located in the United States that is engaged in cooperative research must rely upon approval by a single IRB for that portion of the research that is conducted in the United States. The reviewing IRB will be identified by the Federal department or agency supporting or conducting the research or proposed by the lead institution subject to the acceptance of the Federal department or agency supporting the research.

(2) The following research is not subject to this provision:

(i) Cooperative research for which more than single IRB review is required by law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe); or

(ii) Research for which any Federal department or agency supporting or conducting the research determines and documents that the use of a single IRB is not appropriate for the particular context.

(c) For research not subject to paragraph (b) of this section, an institution participating in a cooperative project may enter into a joint review arrangement, rely on the review of another IRB, or make similar arrangements for avoiding duplication of effort.

§ 97.115 IRB Records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent forms, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings, which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities, including the rationale for conducting continuing review of research that otherwise would not require continuing review as described in § 97.109(f)(1).

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described in § 97.108(a)(2).

(6) Written procedures for the IRB in the same detail as described in § 97.108(a)(3) and (4).

(7) Statements of significant new findings provided to subjects, as required by § 97.116(c)(5).

(8) The rationale for an expedited reviewer's determination under § 97.110(b)(1)(i) that research appearing on the expedited review list described in § 97.110(a) is more than minimal risk.

(9) Documentation specifying the responsibilities that an institution and an organization operating an IRB each will undertake to ensure compliance with the requirements of this policy, as described in § 97.103(e).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research that is conducted shall be retained for at least 3 years after completion of the research. The institution or IRB may maintain the records in printed form, or electronically. All records shall be accessible for inspection and copying by authorized representatives of the Federal department or agency at reasonable times and in a reasonable manner.

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§ 97.116 General Requirements for Informed Consent.

(a) ***General.*** General requirements for informed consent, whether written or oral, are set forth in this paragraph and apply to consent obtained in accordance with the requirements set forth in paragraphs (b) through (d) of this section. Broad consent may be obtained in lieu of informed consent obtained in accordance with paragraphs (b) and (c) of this section only with respect to the storage, maintenance, and secondary research uses of identifiable private information and identifiable biospecimens. Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials is described in paragraph (e) of this section. General waiver or alteration of informed consent is described in paragraph (f) of this section. Except as provided elsewhere in this policy:

(1) Before involving a human subject in research covered by this policy, an investigator shall obtain the legally effective informed consent of the subject or the subject's legally authorized representative.

(2) An investigator shall seek informed consent only under circumstances that provide the prospective subject or the legally authorized representative sufficient opportunity to discuss and consider whether or not to participate and that minimize the possibility of coercion or undue influence.

(3) The information that is given to the subject or the legally authorized representative shall be in language understandable to the subject or the legally authorized representative.

(4) The prospective subject or the legally authorized representative must be provided with the information that a reasonable person would want to have in order to make an informed decision about whether to participate, and an opportunity to discuss that information.

(5) Except for broad consent obtained in accordance with paragraph (d) of this section:

(i) Informed consent must begin with a concise and focused presentation of the key information that is most likely to assist a prospective subject or legally authorized representative in understanding the reasons why one might or might not want to participate in the research. This part of the informed consent must be organized and presented in a way that facilitates comprehension.

(ii) Informed consent as a whole must present information in sufficient detail relating to the research, and must be organized and presented in a way that does not merely provide lists of isolated facts, but rather facilitates the prospective subject's or legally authorized representative's understanding of the reasons why one might or might not want to participate.

(6) No informed consent may include any exculpatory language through which the subject or the legally authorized representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution, or its agents from liability for negligence.

(b) ***Basic elements of informed consent.*** Except as provided in paragraph (d), (e), or (f) of this section, in seeking informed consent the following information shall be provided to each subject or the legally authorized representative:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures that are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others that may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject;

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled; and

(9) One of the following statements about any research that involves the collection of identifiable private information or identifiable biospecimens:

(i) A statement that identifiers might be removed from the identifiable private information or identifiable biospecimens and that, after such removal, the information or biospecimens could be used for future research studies or distributed to another investigator for future research studies without additional informed consent from the subject or the legally authorized representative, if this might be a possibility; or

(ii) A statement that the subject's information or biospecimens collected as part of the research, even if identifiers are removed, will not be used or distributed for future research studies.

(c) ***Additional elements of informed consent.*** Except as provided in paragraph (d), (e), or (f) of this section, one or more of the following elements of information, when appropriate, shall also be provided to each subject or the legally authorized representative:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) that are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's or the legally authorized representative's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research that may relate to the subject's willingness to continue participation will be provided to the subject;

(6) The approximate number of subjects involved in the study;

(7) A statement that the subject's biospecimens (even if identifiers are removed) may be used for commercial profit and whether the subject will or will not share in this commercial profit;

(8) A statement regarding whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions; and

(9) For research involving biospecimens, whether the research will (if known) or might include whole genome sequencing (*i.e.,* sequencing of a human germline or somatic specimen with the intent to generate the genome or exome sequence of that specimen).

(d) ***Elements of broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens.*** Broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens (collected for either research studies other than the proposed research or nonresearch purposes) is permitted as an alternative to the informed consent requirements in paragraphs (b) and (c) of this section. If the subject or the legally authorized representative is asked to provide broad consent, the following shall be provided to each subject or the subject's legally authorized representative:

(1) The information required in paragraphs (b)(2), (b)(3), (b)(5), and (b)(8) and, when appropriate, (c)(7) and (9) of this section;

(2) A general description of the types of research that may be conducted with the identifiable private information or identifiable biospecimens. This description must include sufficient information such that a reasonable person would expect that the broad consent would permit the types of research conducted;

(3) A description of the identifiable private information or identifiable biospecimens that might be used in research, whether sharing of identifiable private information or identifiable biospecimens might occur, and the types of institutions or researchers that might conduct research with the identifiable private information or identifiable biospecimens;

(4) A description of the period of time that the identifiable private information or identifiable biospecimens may be stored and maintained (which period of time could be indefinite), and a description of the period of time that the identifiable private information or identifiable biospecimens may be used for research purposes (which period of time could be indefinite);

(5) Unless the subject or legally authorized representative will be provided details about specific research studies, a statement that they will not be informed of the details of any specific research studies that might be conducted using the subject's identifiable private information or identifiable biospecimens, including the purposes of the research, and that they might have chosen not to consent to some of those specific research studies;

(6) Unless it is known that clinically relevant research results, including individual research results, will be disclosed to the subject in all circumstances, a statement that such results may not be disclosed to the subject; and

(7) An explanation of whom to contact for answers to questions about the subject's rights and about storage and use of the subject's identifiable private information or identifiable biospecimens, and whom to contact in the event of a research-related harm.

(e) ***Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials*** —

(1) ***Waiver.*** An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (e)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) ***Alteration.*** An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (e)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) ***Requirements for waiver and alteration.*** In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine:

(A) Public benefit or service programs;

(B) Procedures for obtaining benefits or services under those programs;

(C) Possible changes in or alternatives to those programs or procedures; or

(D) Possible changes in methods or levels of payment for benefits or services under those programs; and

(ii) The research could not practicably be carried out without the waiver or alteration.

(f) ***General waiver or alteration of consent*** —

(1) ***Waiver.*** An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (f)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) ***Alteration.*** An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (f)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) ***Requirements for waiver and alteration.*** In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research involves no more than minimal risk to the subjects;

(ii) The research could not practicably be carried out without the requested waiver or alteration;

(iii) If the research involves using identifiable private information or identifiable biospecimens, the research could not practicably be carried out without using such information or biospecimens in an identifiable format;

(iv) The waiver or alteration will not adversely affect the rights and welfare of the subjects; and

(v) Whenever appropriate, the subjects or legally authorized representatives will be provided with additional pertinent information after participation.

(g) ***Screening, recruiting, or determining eligibility.*** An IRB may approve a research proposal in which an investigator will obtain information or biospecimens for the purpose of screening, recruiting, or determining the eligibility of prospective subjects without the informed consent of the prospective subject or the subject's legally authorized representative, if either of the following conditions are met:

(1) The investigator will obtain information through oral or written communication with the prospective subject or legally authorized representative, or

(2) The investigator will obtain identifiable private information or identifiable biospecimens by accessing records or stored identifiable biospecimens.

(h) ***Posting of clinical trial consent form.***

(1) For each clinical trial conducted or supported by a Federal department or agency, one IRB-approved informed consent form used to enroll subjects must be posted by the awardee or the Federal department or agency component conducting the trial on a publicly available Federal Web site that will be established as a repository for such informed consent forms.

(2) If the Federal department or agency supporting or conducting the clinical trial determines that certain information should not be made publicly available on a Federal Web site (*e.g.* confidential commercial information), such Federal department or agency may permit or require redactions to the information posted.

(3) The informed consent form must be posted on the Federal Web site after the clinical trial is closed to recruitment, and no later than 60 days after the last study visit by any subject, as required by the protocol.

(i) ***Preemption.*** The informed consent requirements in this policy are not intended to preempt any applicable Federal, state, or local laws (including tribal laws passed by the official governing body of an American Indian or Alaska Native tribe) that require additional information to be disclosed in order for informed consent to be legally effective.

(j) ***Emergency medical care.*** Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable Federal, state, or local law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe).

(Approved by the Office of Management and Budget under Control Number 0990-0260)

§ 97.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written informed consent form approved by the IRB and signed (including in an electronic format) by the subject or the subject's legally authorized representative. A written copy shall be given to the person signing the informed consent form.

(b) Except as provided in paragraph (c) of this section, the informed consent form may be either of the following:

(1) A written informed consent form that meets the requirements of § 97.116. The investigator shall give either the subject or the subject's legally authorized representative adequate opportunity to read the informed consent form before it is signed; alternatively, this form may be read to the subject or the subject's legally authorized representative.

(2) A short form written informed consent form stating that the elements of informed consent required by § 97.116 have been presented orally to the subject or the subject's legally authorized representative, and that the key information required by § 97.116(a)(5)(i) was presented first to the subject, before other information, if any, was provided. The IRB shall approve a written summary of what is to be said to the subject or the legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Only the short form itself is to be signed by the subject or the subject's legally authorized representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the subject's legally authorized representative, in addition to a copy of the short form.

(c)

(1) An IRB may waive the requirement for the investigator to obtain a signed informed consent form for some or all subjects if it finds any of the following:

(i) That the only record linking the subject and the research would be the informed consent form and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject (or legally authorized representative) will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern;

(ii) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context; or

(iii) If the subjects or legally authorized representatives are members of a distinct cultural group or community in which signing forms is not the norm, that the research presents no more than minimal risk of harm to subjects and provided there is an appropriate alternative mechanism for documenting that informed consent was obtained.

(2) In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects or legally authorized representatives with a written statement regarding the research.

(Approved by the Office of Management and Budget under Control Number 0990-0260)

§ 97.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to Federal departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. Except for research waived under § 97.101(i) or exempted under § 97.104, no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the Federal department or agency component supporting the research.

§ 97.119 Research undertaken without the intention of involving human subjects.

Except for research waived under § 97.101(i) or exempted under § 97.104, in the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted by the institution to the Federal department or agency component supporting the research, and final approval given to the proposed change by the Federal department or agency component.

§ 97.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal department or agency.

(a) The department or agency head will evaluate all applications and proposals involving human subjects submitted to the Federal department or agency through such officers and employees of the Federal department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

§ 97.121 [Reserved]

§ 97.122 Use of Federal funds.

Federal funds administered by a Federal department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

§ 97.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that Federal department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has/have directed the scientific and technical aspects of an activity has/have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

§ 97.124 Conditions.

With respect to any research project or any class of research projects the department or agency head of either the conducting or the supporting Federal department or agency may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

Subparts B-C [Reserved]

Subpart D—Additional ED Protections for Children Who Are Subjects in Research

Source: 62 FR 63221, Nov. 26, 1997, unless otherwise noted.

§ 97.401 To what do these regulations apply?

(a) This subpart applies to all research involving children as subjects conducted or supported by the Department of Education.

(1) This subpart applies to research conducted by Department employees.

(2) This subpart applies to research conducted or supported by the Department of Education outside the United States, but in appropriate circumstances the Secretary may, under § 97.101(i), waive the applicability of some or all of the requirements of the regulations in this subpart for that research.

(b) Exemptions in § 97.101(b)(1) and (b)(3) through (b)(6) are applicable to this subpart. The exemption in § 97.101(b)(2) regarding educational tests is also applicable to this subpart. The exemption in § 97.101(b)(2) for research involving survey or interview procedures or observations of public behavior does not apply to research covered by this subpart, except for research involving observation of public behavior when the investigator or investigators do not participate in the activities being observed.

(c) The exceptions, additions, and provisions for waiver as they appear in § 97.101(c) through (i) are applicable to this subpart.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b)).

§ 97.402 Definitions.

The definitions in § 97.102 apply to this subpart. In addition, the following definitions also apply to this subpart:

(a) ***Children*** are persons who have not attained the legal age for consent to treatments or procedures involved in the research, under the applicable law of the jurisdiction in which the research will be conducted.

(b) ***Assent*** means a child's affirmative agreement to participate in research. Mere failure to object should not, absent affirmative agreement, be construed as assent.

(c) ***Permission*** means the agreement of parent(s) or guardian to the participation of their child or ward in research.

(d) ***Parent*** means a child's biological or adoptive parent.

(e) ***Guardian*** means an individual who is authorized under applicable State or local law to consent on behalf of a child to general medical care.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b)).

§ 97.403 IRB duties.

In addition to other responsibilities assigned to IRBs under this part, each IRB shall review research covered by this subpart and approve only research that satisfies the conditions of all applicable sections of this subpart.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b)).

§ 97.404 Research not involving greater than minimal risk.

ED conducts or funds research in which the IRB finds that no greater than minimal risk to children is presented, only if the IRB finds that adequate provisions are made for soliciting the assent of the children and the permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b))

§ 97.405 Research involving greater than minimal risk but presenting the prospect of direct benefit to the individual subjects.

ED conducts or funds research in which the IRB finds that more than minimal risk to children is presented by an intervention or procedure that holds out the prospect of direct benefit for the individual subject, or by a monitoring procedure that is likely to contribute to the subject's well-being, only if the IRB finds that—

(a) The risk is justified by the anticipated benefit to the subjects;

(b) The relation of the anticipated benefit to the risk is at least as favorable to the subjects as that presented by available alternative approaches; and

(c) Adequate provisions are made for soliciting the assent of the children and permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b))

§ 97.406 Research involving greater than minimal risk and no prospect of direct benefit to individual subjects, but likely to yield generalizable knowledge about the subject's disorder or condition.

ED conducts or funds research in which the IRB finds that more than minimal risk to children is presented by an intervention or procedure that does not hold out the prospect of direct benefit for the individual subject, or by a monitoring procedure which is not likely to contribute to the well-being of the subject, only if the IRB finds that—

(a) The risk represents a minor increase over minimal risk;

(b) The intervention or procedure presents experiences to subjects that are reasonably commensurate with those inherent in their actual or expected medical, dental, psychological, social, or educational situations;

(c) The intervention or procedure is likely to yield generalizable knowledge about the subjects' disorder or condition that is of vital importance for the understanding or amelioration of the subjects' disorder or condition; and

(d) Adequate provisions are made for soliciting assent of the children and permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b))

§ 97.407 Research not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of children.

ED conducts or funds research that the IRB does not believe meets the requirements of § 97.404, § 97.405, or § 97.406 only if—

(a) The IRB finds that the research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; and

(b) The Secretary, after consultation with a panel of experts in pertinent disciplines (for example: science, medicine, education, ethics, law) and following opportunity for public review and comment, has determined either that—

(1) The research in fact satisfies the conditions of § 97.404, § 97.405, or § 97.406, as applicable; or

(2)

(i) The research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children;

(ii) The research will be conducted in accordance with sound ethical principles; and

(iii) Adequate provisions are made for soliciting the assent of children and the permission of their parents or guardians, as set forth in § 97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b))

§ 97.408 Requirements for permission by parents or guardians and for assent by children.

(a) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine that adequate provisions are made for soliciting the assent of the children, if in the judgment of the IRB the children are capable of providing assent. In determining whether children are capable of assenting, the IRB shall take into account the ages, maturity, and psychological state of the children involved. This judgment may be made for all children to be involved in research under a particular protocol, or for each child, as the IRB deems appropriate. If the IRB determines that the capability of some or all of the children is so limited that they cannot reasonably be consulted or that the intervention or procedure involved in the research holds out a prospect of direct benefit that is important to the health or well-being of the children and is available only in the context of the research, the assent of the children is not a necessary condition for proceeding with the research. Even if the IRB determines that the subjects are capable of assenting, the IRB may still waive the assent requirement under circumstances in which consent may be waived in accord with § 97.116.

(b) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine, in accordance with and to the extent that consent is required by § 97.116, that adequate provisions are made for soliciting the permission of each child's parent(s) or guardian(s). If parental permission is to be obtained, the IRB may find that the permission of one parent is sufficient for research to be conducted under § 97.404 or § 97.405. If research is covered by §§ 97.406 and 97.407 and permission is to be obtained from parents, both parents must give their permission unless one parent is deceased, unknown, incompetent, or not reasonably available, or if only one parent has legal responsibility for the care and custody of the child.

(c) In addition to the provisions for waiver contained in § 97.116, if the IRB determines that a research protocol is designed for conditions or for a subject population for which parental or guardian permission is not a reasonable requirement to protect the subjects (for example, neglected or abused children), it may waive the consent requirements in subpart A of this part and paragraph (b) of this section, provided an appropriate mechanism for protecting the children who will participate as subjects in the research is substituted, and provided further that the waiver is not inconsistent with Federal, State, or local law. The choice of an appropriate mechanism depends upon the nature and purpose of the activities described in the protocol, the risk and anticipated benefit to the research subjects, and their age, maturity, status, and condition.

(d) Permission by parents or guardians must be documented in accordance with and to the extent required by § 97.117.

(e) If the IRB determines that assent is required, it shall also determine whether and how assent must be documented.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b))

§ 97.409 Wards.

(a) Children who are wards of the State or any other agency, institution, or entity may be included in research approved under § 97.406 or § 97.407 only if that research is—

(1) Related to their status as wards; or

(2) Conducted in schools, camps, hospitals, institutions, or similar settings in which the majority of children involved as subjects are not wards.

(b) If research is approved under paragraph (a) of this section, the IRB shall require appointment of an advocate for each child who is a ward, in addition to any other individual acting on behalf of the child as guardian or *in loco parentis*. One individual may serve as advocate for more than one child. The advocate must be an individual who has the background and experience to act in, and agrees to act in, the best interest of the child for the duration of the child's participation in the research and who is not associated in any way (except in the role as advocate or member of the IRB) with the research, the investigator or investigators, or the guardian organization.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e-3, 3474; and 42 U.S.C. 300v-1(b))

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 98—STUDENT RIGHTS IN RESEARCH, EXPERIMENTAL PROGRAMS, AND TESTING

Authority: Sec. 514(a) of Pub. L. 93-380, 88 Stat. 574 (20 U.S.C. 1232h(a)); sec. 1250 of Pub. L. 95-561, 92 Stat. 2355-2356 (20 U.S.C. 1232h(b)); and sec. 408(a)(1) of Pub. L. 90-247, 88 Stat. 559-560, as amended (20 U.S.C. 1221e-3(a)(1)); sec. 414(a) of Pub. L. 96-88, 93 Stat. 685 (20 U.S.C. 3474(a)), unless otherwise noted.

Source: 49 FR 35321, Sept. 6, 1984, unless otherwise noted.

§ 98.1 Applicability of part.

This part applies to any program administered by the Secretary of Education that:

(a)

(1) Was transferred to the Department by the Department of Education Organization Act (DEOA); and

(2) Was administered by the Education Division of the Department of Health, Education, and Welfare on the day before the effective date of the DEOA; or

(b) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.

(c) The following chart lists the funded programs to which part 98 does not apply as of February 16, 1984.

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96-374) 20 U.S.C. 1070d-2)	part 206.
2. Programs administered by the Commissioner of the Rehabilitative Services Administration	The Rehabilitation Act of 1973 as amended by Pub. L. 95-602 (29 U.S.C. 700, *et seq.*)	parts 351-356, 361, 362, 365, 366, 369-375, 378, 379, 385-390, and 395.
3. College housing	Title IV of the Housing Act of 1950 as amended (12 U.S.C. 1749, *et seq.*)	part 614.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1230, 1232h, 3487, 3507)

§ 98.2 Definitions.

(a) The following terms used in this part are defined in 34 CFR part 77; "Department," "Recipient," "Secretary."

(b) The following definitions apply to this part:

Act means the General Education Provisions Act.

Office means the information and investigation office specified in § 98.5.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 98.3 Access to instructional material used in a research or experimentation program.

(a) All instructional material—including teachers' manuals, films, tapes, or other supplementary instructional material—which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.

(b) For the purpose of this part *research or experimentation program or project* means any program or project in any program under § 98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.

(c) For the purpose of the section *children* means persons not above age 21 who are enrolled in a program under § 98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h(a))

§ 98.4 Protection of students' privacy in examination, testing, or treatment.

(a) No student shall be required, as part of any program specified in § 98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following:

(1) Political affiliations;

(2) Mental and psychological problems potentially embarrassing to the student or his or her family;

(3) Sex behavior and attitudes;

(4) Illegal, anti-social, self-incriminating and demeaning behavior;

(5) Critical appraisals of other individuals with whom the student has close family relationships;

(6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

(b) As used in paragraph (a) of this section, *prior consent* means:

(1) Prior consent of the student, if the student is an adult or emancipated minor; or

(2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section:

(1) ***Psychiatric or psychological examination or test*** means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and

(2) ***Psychiatric or psychological treatment*** means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

(Authority: 20 U.S.C. 1232h(b))

§ 98.5 Information and investigation office.

(a) The Secretary has designated an office to provide information about the requirements of section 439 of the Act, and to investigate, process, and review complaints that may be filed concerning alleged violations of the provisions of the section.

(b) The following is the name and address of the office designated under paragraph (a) of this section: Family Educational Rights and Privacy Act Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1231e-3(a)(1), 1232h)

§ 98.6 Reports.

The Secretary may require the recipient to submit reports containing information necessary to resolve complaints under section 439 of the Act and the regulations in this part.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.7 Filing a complaint.

(a) Only a student or a parent or guardian of a student directly affected by a violation under Section 439 of the Act may file a complaint under this part. The complaint must be submitted in writing to the Office.

(b) The complaint filed under paragraph (a) of this section must—

(1) Contain specific allegations of fact giving reasonable cause to believe that a violation of either § 98.3 or § 98.4 exists; and

(2) Include evidence of attempted resolution of the complaint at the local level (and at the State level if a State complaint resolution process exists), including the names of local and State officials contacted and significant dates in the attempted resolution process.

(c) The Office investigates each complaint which the Office receives that meets the requirements of this section to determine whether the recipient or contractor failed to comply with the provisions of section 439 of the Act.

(Approved by the Office of Management and Budget under control number 1880-0507)

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.8 Notice of the complaint.

(a) If the Office receives a complaint that meets the requirements of § 98.7, it provides written notification to the complainant and the recipient or contractor against which the violation has been alleged that the complaint has been received.

(b) The notice to the recipient or contractor under paragraph (a) of this section must:

(1) Include the substance of the alleged violation; and

(2) Inform the recipient or contractor that the Office will investigate the complaint and that the recipient or contractor may submit a written response to the complaint.

(Authority: 20 U.S.C. 1221e-3(A)(1), 1232h)

§ 98.9 Investigation and findings.

(a) The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigations, the Office provides to the complainant and recipient or contractor written notice of its findings and the basis for its findings.

(c) If the Office finds that the recipient or contractor has not complied with section 439 of the Act, the Office includes in its notice under paragraph (b) of this section:

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.10 Enforcement of the findings.

(a) If the recipient or contractor does not comply during the period of time set under § 98.9(c), the Secretary may either:

(1) For a recipient, take an action authorized under 34 CFR part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under § 98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

Title 34 —Education
Subtitle A —Office of the Secretary, Department of Education

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

Authority: 20 U.S.C. 1232g, unless otherwise noted.

Source: 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000]

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

Note to § 99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 73 FR 74851, Dec. 9, 2008]

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Authorized representative means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct—with respect to Federal- or State-supported education programs—any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

Biometric record, as used in the definition of *personally identifiable information,* means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

Dates of attendance.

(a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.,* undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

Early childhood education program means—

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 *et seq.*), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or

(c) A program that—

(1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(2) Is—

(i) A State prekindergarten program;

(ii) A program authorized under section 619 or part C of the Individuals with Disabilities Education Act; or

(iii) A program operated by a local educational agency.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education program means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

Education records.

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)

(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally Identifiable Information

The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Authority: 20 U.S.C. 1232g)

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

[53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000; 73 FR 74851, Dec. 9, 2008; 76 FR 75641, Dec. 2, 2011]

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of students?

(a)

(1) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C. 1232g(d))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008]

§ 99.6 [Reserved]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)

(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g (e) and (f))

[61 FR 59295, Nov. 21, 1996]

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)

(1) ***Law enforcement unit*** means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)

(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)

(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[60 FR 3469, Jan. 17, 1995]

Subpart B—What Are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)

(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)

(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

Subpart C—What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)

(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) "Signed and dated written consent" under this part may include a record and signature in electronic form that—

(1) Identifies and authenticates a particular person as the source of the electronic consent; and

(2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 69 FR 21671, Apr. 21, 2004]

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)

(i)

(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(*1*) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(*2*) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(*3*) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Note: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)

(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)

(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)

(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of § 99.33(b).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) of this section, only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that—

(*1*) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(*2*) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(*3*) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests;

and

(*4*) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(v) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)

(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii)

(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)

(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)

(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)

(1) ***De-identified records and information.*** An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)).

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008; 74 FR 401, Jan. 6, 2009; 76 FR 75641, Dec. 2, 2011]

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)

(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)

(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(ii) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(2)

(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74853, Dec. 9, 2008]

§ 99.33 What limitations apply to the redisclosure of information?

(a)

(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)

(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of § 99.31; and

(ii)

(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74853, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)

(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) is responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative—

(i) Uses personally identifiable information only to carry out an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;

(ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and

(iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

(3) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) must use a written agreement to designate any authorized representative, other than an employee. The written agreement must—

(i) Designate the individual or entity as an authorized representative;

(ii) Specify—

(A) The personally identifiable information from education records to be disclosed;

(B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;

(iv) Specify the time period in which the information must be destroyed; and

(v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and their authorized representatives, except that the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information

from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to—

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional email address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

[61 FR 59297, Nov. 21, 1996]

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

> Arson
>
> Assault offenses
>
> Burglary
>
> Criminal homicide—manslaughter by negligence
>
> Criminal homicide—murder and nonnegligent manslaughter
>
> Destruction/damage/vandalism of property
>
> Kidnapping/abduction
>
> Robbery

> Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

[65 FR 41853, July 6, 2000]

Subpart E—What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, *Office* means the Office of the Chief Privacy Officer, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 82 FR 6253, Jan. 19, 2017]

§ 99.61 What responsibility does an educational agency or institution, a recipient of Department funds, or a third party outside of an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law. If another recipient of Department funds under any program administered by the Secretary or a third party to which personally identifiable information from education records has been non-consensually disclosed determines that it cannot comply with the Act or this part due to a conflict with State or local law, it also must notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

[76 FR 75642, Dec. 2, 2011]

§ 99.62 What information must an educational agency or institution or other recipient of Department funds submit to the Office?

The Office may require an educational agency or institution, other recipient of Department funds under any program administered by the Secretary to which personally identifiable information from education records is non-consensually disclosed, or any third party outside of an educational agency or institution to which personally identifiable information from education records is non-consensually disclosed to submit reports, information on policies and procedures, annual notifications, training materials, or other information necessary to carry out the Office's enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

[76 FR 75643, Dec. 2, 2011]

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

[65 FR 41854, July 6, 2000, as amended at 73 FR 74854, Dec. 9, 2008]

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or any third party outside of an educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution or other recipient. The Office also investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether a third party outside of the educational agency or institution has failed to comply with the provisions of § 99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 65 FR 41854, July 6, 2000; 73 FR 74854, Dec. 9, 2008; 76 FR 75643, Dec. 2, 2011]

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies in writing the complainant, if any, and the educational agency or institution, the recipient of Department funds under any program administered by the Secretary, or the third party outside of an educational agency or institution if it initiates an investigation under § 99.64(b). The written notice—

(1) Includes the substance of the allegations against the educational agency or institution, other recipient, or third party; and

(2) Directs the agency or institution, other recipient, or third party to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

[73 FR 74855, Dec. 9, 2008, as amended at 76 FR 75643, Dec. 2, 2011]

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or third party outside of an educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution, other recipient, or third party a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution or other recipient has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution or other recipient. A notice of findings issued under paragraph (b) of this section to an educational agency or institution, or other recipient that has not complied with a provision of the Act or this part—

(1) Includes a statement of the specific steps that the agency or institution or other recipient must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution or other recipient may comply voluntarily.

(d) If the Office finds that a third party outside of an educational agency or institution has not complied with the provisions of § 99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33, the Office's notice of findings issued under paragraph (b) of this section—

(1) Includes a statement of the specific steps that the third party outside of the educational agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the third party may comply voluntarily.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

[76 FR 75643, Dec. 2, 2011]

§ 99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution or other recipient of Department funds under any program administered by the Secretary does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part D of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a complaint to compel compliance through a cease and desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution, other recipient, or third party has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution, other recipient, or third party with written notice of the decision and the basis for the decision.

(c) If the Office finds that a third party, outside the educational agency or institution, violates § 99.31(a)(6)(iii)(B), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation of § 99.31(a)(6)(iii)(B) access to personally identifiable information from education records for at least five years.

(d) If the Office finds that a State or local educational authority, a Federal agency headed by an official listed in § 99.31(a)(3), or an authorized representative of a State or local educational authority or a Federal agency headed by an official listed in § 99.31(a)(3), improperly rediscloses personally identifiable information from education records, then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the improper redisclosure access to personally identifiable information from education records for at least five years.

(e) If the Office finds that a third party, outside the educational agency or institution, improperly rediscloses personally identifiable information from education records in violation of § 99.33 or fails to provide the notification required under § 99.33(b)(2), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B) and (f); 20 U.S.C. 1234c)

[76 FR 75643, Dec. 2, 2011]

Appendix A to Part 99—Crimes of Violence Definitions

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Assault Offenses

An unlawful attack by one person upon another.

> Note: By definition there can be no "attempted" assaults, only "completed" assaults.

(a) ***Aggravated Assault.*** An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) ***Simple Assault.*** An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) ***Intimidation.*** To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

> Note: This offense includes stalking.

Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide—Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide—Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

> Note: Kidnapping/Abduction includes hostage taking.

Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

> Note: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

Sex Offenses, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) ***Forcible Rape*** (Except “Statutory Rape”). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) ***Forcible Sodomy.*** Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) ***Sexual Assault With An Object.*** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: An “object” or “instrument” is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.

(d) ***Forcible Fondling.*** The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: Forcible Fondling includes “Indecent Liberties” and “Child Molesting.”

Nonforcible Sex Offenses (Except “Prostitution Offenses”)

Unlawful, nonforcible sexual intercourse.

(a) ***Incest.*** Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) ***Statutory Rape.*** Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[65 FR 41854, July 6, 2000]

Title 2 —Federal Financial Assistance
Subtitle A —Office of Management and Budget Guidance for Federal Financial Assistance
Chapter II —Office of Management and Budget Guidance

PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

Authority: 31 U.S.C. 503; 31 U.S.C. 6101-6106; 31 U.S.C. 6307; 31 U.S.C. 7501-7507.

Source: 89 FR 30136, Apr. 22, 2024, unless otherwise noted.

Subpart A—Acronyms and Definitions

ACRONYMS

§ 200.0 Acronyms.

(a) CAS Cost Accounting Standards

(b) CFR Code of Federal Regulations

(c) F&A Facilities and Administration

(d) FAC Federal Audit Clearinghouse

(e) FAIN Federal Award Identification Number

(f) FAR Federal Acquisition Regulation

(g) FASB Financial Accounting Standards Board

(h) FFATA Federal Funding Accountability and Transparency Act of 2006 or Transparency Act, Public Law 109-282, as amended (See 31 U.S.C. 6101, statutory note)

(i) FOIA Freedom of Information Act

(j) FR Federal Register

(k) GAAP Generally Accepted Accounting Principles

(l) GAGAS Generally Accepted Government Auditing Standards

(m) GASB Government Accounting Standards Board

(n) GAO Government Accountability Office

(o) GSA General Services Administration

(p) IBS Institutional Base Salary

(q) IHE Institutions of Higher Education

(r) IRC Internal Revenue Code

(s) ISDEAA Indian Self-Determination and Education and Assistance Act

(t) MTC Modified Total Cost

(u) MTDC Modified Total Direct Cost

(v) NFE Non-Federal Entity

(w) NOFO Notice of Funding Opportunity

(x) OMB Office of Management and Budget

(y) PII Personally Identifiable Information

(z) PMS Payment Management System

(aa) SAM System for Award Management (*SAM.gov*)

(bb) UEI Unique Entity Identifier

(cc) U.S.C. United States Code

(dd) VAT Value Added Tax

§ 200.1 Definitions.

The following is a list of definitions of key terms frequently used in 2 CFR part 200. Definitions found in Federal statutes or regulations that apply to particular programs take precedence over the following definitions. However, where the following definitions implement specific statutory requirements that apply government-wide, such as the Single Audit Act, the following definitions take precedence over Federal regulations. For purposes of this part, the following definitions apply:

Acquisition cost means the (total) cost of the asset including the cost to ready the asset for its intended use. For example, acquisition cost for equipment means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Acquisition costs for software include those development costs capitalized in accordance with generally accepted accounting principles (GAAP). Ancillary charges such as taxes, duty, protective in transit insurance, freight, and installation may be included in or excluded from the acquisition cost in accordance with the recipient's or subrecipient's regular accounting practices.

Advance payment means a payment that a Federal agency or pass-through entity makes by any appropriate payment mechanism and payment method before the recipient or subrecipient disburses the funds for program purposes.

Allocation means the process of assigning a cost, or a group of costs, to one or more cost objective(s), in reasonable proportion to the benefit provided or other equitable relationship. The process may entail assigning a cost(s) directly to a final cost objective or through one or more intermediate cost objectives.

Assistance Listings refer to the publicly available listing of Federal assistance programs managed and administered by the General Services Administration (GSA) at *SAM.gov*.

Assistance Listing number means a unique number assigned to identify an Assistance Listing.

Assistance Listing program title means the title that corresponds to the Assistance Listing number.

Audit finding means deficiencies which the auditor is required to report in the schedule of findings and questioned costs. (See § 200.516(a))

Auditee means any non-Federal entity that must be audited under this part. (See § 200.501)

Auditor means an auditor who is a public accountant or a Federal, State, local government, or Indian Tribe audit organization that meets the general standards specified for external auditors in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of nonprofit organizations.

Budget means the financial plan for the Federal award that the Federal agency or pass-through entity approves during the Federal award process or in subsequent amendments to the Federal award. It may include the Federal and non-Federal share or only the Federal share, as determined by the Federal agency or pass-through entity.

Budget period means the time interval from the start date of a funded portion of an award to the end date of that funded portion, during which recipients and subrecipients are authorized to incur financial obligations of the funds awarded, including any funds carried forward or other revisions pursuant to § 200.308.

Capital assets means:

(1) Tangible or intangible assets used in operations having a useful life of more than one year which are capitalized in accordance with GAAP. Capital assets include:

(i) Land, buildings (facilities), equipment, and intellectual property (including software), whether acquired by purchase, construction, manufacture, exchange, or through a lease accounted for as financed purchase under Government Accounting Standards Board (GASB) standards or a finance lease under Financial Accounting Standards Board (FASB) standards; and

(ii) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

(2) For purpose of this part, capital assets do not include intangible right-to-use assets (per GASB) and right-to-use operating lease assets (per FASB). For example, assets capitalized that recognize a lessee's right to control the use of property or equipment for a period of time under a lease contract. See § 200.465.

Capital expenditures means expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.

Central service cost allocation plan means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a State, local government, or Indian Tribe to its departments and agencies on a centralized basis. The costs of these services may be allocated or billed to users.

Claim means, depending on the context, either:

(1) A written demand or assertion by one of the parties to a Federal award seeking as a matter of right:

(i) The payment of money;

(ii) The adjustment or interpretation of the terms and conditions of the Federal award; or

(iii) Other relief arising under or relating to a Federal award.

(2) A request for payment not in dispute when submitted.

Class of Federal awards means a group of Federal awards either awarded under a specific program or group of programs or to a specific type of recipient or group of recipients to which specific provisions or exceptions may apply.

Closeout means the process by which the Federal agency or pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in § 200.344.

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. "Other clusters" are defined by OMB in the compliance supplement or designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating "other clusters," a State must identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with § 200.332. A cluster of programs must be considered one program when determining major programs as described in § 200.518, and with the exception of R&D as described in § 200.501(d), whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 200.513(a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of Federal agency Single Audit contacts can be found on the Federal Audit Clearinghouse (FAC) website.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating and approving cost allocation plans or indirect cost proposals on behalf of all Federal agencies. The cognizant agency for indirect cost is not necessarily the same as the cognizant agency for audit. For assignments of cognizant agencies, see the following:

(1) For Institutions of Higher Education (IHEs): Appendix III, paragraph C.11.

(2) For nonprofit organizations: Appendix IV, paragraph C.2.a.

(3) For State and local governments: Appendix V, paragraph F.1.

(4) For Indian Tribes: Appendix VII, paragraph D.1.

Compliance supplement means an annually updated authoritative source of information for auditors that identifies existing important compliance requirements that the Federal Government expects to be considered as part of an audit. Auditors use it to understand the Federal program's objectives, procedures, and compliance requirements, as well as audit objectives and suggested audit procedures for determining compliance with the relevant Federal program.

Computing devices means machines that acquire, store, analyze, process, and publish data and other information electronically, including accessories (or "peripherals") for printing, transmitting and receiving, or storing electronic information. See also the definitions of *supplies* and *information technology systems* in this section.

Contract means, for the purpose of Federal financial assistance, a legal instrument by which a recipient or subrecipient conducts procurement transactions under a Federal award. For additional information on subrecipient and contractor determinations, see § 200.331. See also the definition of *subaward* in this section.

Contractor means an entity that receives a contract.

Continuation funding means the second or subsequent budget period within an identified period of performance.

Cooperative agreement means a legal instrument of financial assistance between a Federal agency and a recipient or between a pass-through entity and subrecipient, consistent with 31 U.S.C. 6302-6305:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

(2) Is distinguished from a grant in that it provides for substantial involvement of the Federal agency or pass-through entity in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or

(ii) An agreement that provides only:

(A) Direct United States Government cash assistance to an individual;

(B) A subsidy;

(C) A loan;

(D) A loan guarantee; or

(E) Insurance.

Corrective action means action taken by the auditee that:

(1) Corrects identified deficiencies;

(2) Produces recommended improvements; or

(3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Cost allocation plan means a central service or public assistance cost allocation plan.

Cost objective means a program, function, activity, award, organizational subdivision, contract, or work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, and capital projects. A cost objective may be a major function of the recipient or subrecipient, a particular service or project, a Federal award, or an indirect cost activity, as described in subpart E. See also the definitions of *final cost objective* and *intermediate cost objective* in this section.

Cost sharing means the portion of project costs not paid by Federal funds or contributions (unless authorized by Federal statute). This term includes *matching,* which refers to required levels of cost share that must be provided. See § 200.306.

Disallowed cost means charges to a Federal award that the Federal agency or pass-through entity determines to be unallowable in accordance with applicable Federal statutes, regulations, the provisions of this part, or the terms and conditions of the Federal award.

Discretionary award means an award in which the Federal agency, in keeping with specific statutory authority that enables the agency to exercise judgment ("discretion"), selects the recipient or the amount of Federal funding awarded through a competitive process or based on merit of proposals. A discretionary award may be selected on a non-competitive basis, as appropriate.

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization level established by the recipient or subrecipient for financial statement purposes, or $10,000. See the definitions of *capital assets, computing devices, general purpose equipment, information technology systems, special purpose equipment,* and *supplies* in this section.

Expenditures means charges made by a recipient or subrecipient to a project or program for which a Federal award is received.

(1) The charges may be reported on a cash or accrual basis as long as the methodology is disclosed and consistently applied.

(2) For reports prepared on a cash basis, expenditures are the sum of:

(i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense charged;

(iii) The value of third-party in-kind contributions applied; and

(iv) The amount of cash advance payments and payments made to subrecipients.

(3) For reports prepared on an accrual basis, expenditures are the sum of:

(i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense incurred;

(iii) The value of third-party in-kind contributions applied; and

(iv) The net increase or decrease in the amounts owed by the recipient or subrecipient for:

(A) Goods and other property received;

(B) Services performed by employees, contractors, subrecipients, and other payees; and

(C) Programs for which no current services or performance are required, such as annuities, insurance claims, or other benefit payments.

Federal agency means an "agency" as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f). The term generally refers to the agency that provides a Federal award directly to a recipient unless the context indicates otherwise. See also definitions of Federal award and recipient.

Federal Audit Clearinghouse (FAC) means the repository of record designated by OMB where non-Federal entities must transmit the information required by subpart F.

Federal award has the meaning, depending on the context, in either paragraph (1) or (2) of this definition:

(1)

(i) The Federal financial assistance that a recipient receives directly from a Federal agency or indirectly from a pass-through entity, as described in § 200.101; or

(ii) The cost-reimbursement contract under the Federal Acquisition Regulation that a non-Federal entity receives directly from a Federal agency or indirectly from a pass-through entity, as described in § 200.101.

(2) The instrument setting forth the terms and conditions. The instrument is the grant agreement, cooperative agreement, other agreement for assistance covered in paragraph (2) of the definition of *Federal financial assistance* in this section, or the cost-reimbursement contract awarded under the Federal Acquisition Regulations.

(3) Federal award does not include other contracts that a Federal agency uses to buy goods or services from a contractor or a contract to operate government-owned, contractor- operated (GOCO) facilities.

(4) See also definitions of Federal financial assistance, grant agreement, and cooperative agreement.

Federal award date means the date when the authorized official of the Federal agency signed (physically or digitally) the Federal award or when an alternative, consistent with the requirements of 31 U.S.C. 1501, is reached with the recipient.

Federal financial assistance means:

(1) Assistance that recipients or subrecipients receive or administer in the form of:

(i) Grants;

(ii) Cooperative agreements;

(iii) Non-cash contributions or donations of property (including donated surplus property);

(iv) Direct appropriations;

(v) Food commodities; and

(vi) Other financial assistance (except assistance listed in paragraph (2) of this definition).

(2) For § 200.203 and subpart F of this part, *Federal financial assistance* also includes assistance that recipients or subrecipients receive or administer in the form of:

(i) Loans;

(ii) Loan Guarantees;

(iii) Interest subsidies; and

(iv) Insurance.

(3) For § 200.216, Federal financial assistance includes assistance that recipients or subrecipients receive or administer in the form of:

(i) Grants;

(ii) Cooperative agreements;

(iii) Loans; and

(iv) Loan Guarantees.

(4) Federal financial assistance does not include amounts received as reimbursement for services rendered to individuals as described in § 200.502(h) and (i).

(5) For part 184 of this title, in addition to the forms of assistance listed in paragraph (1) of this definition, *Federal financial assistance* also includes assistance that recipients or subrecipients receive or administer in the form of:

(i) Loans; and

(ii) Loan Guarantees.

Federal interest means, for purposes of § 200.330 or when used in connection with the acquisition or improvement of real property, equipment, or supplies under a Federal award, the dollar amount that is the product of the:

(1) The percentage of Federal participation in the total cost of the real property, equipment, or supplies; and

(2) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

Federal program means:

(1) All Federal awards which are assigned a single Assistance Listings Number.

(2) When no Assistance Listings Number is assigned, all Federal awards from the same agency made for the same purpose must be combined and considered one program.

(3) Notwithstanding paragraphs (1) and (2) of this definition, a cluster of programs. The types of clusters of programs are:

(i) Research and development (R&D);

(ii) Student financial aid (SFA); and

(iii) "Other clusters," as described in the definition of *cluster of programs* in this section. *Federal share* means the portion of the Federal award costs paid using Federal funds.

Final cost objective means a cost objective that has allocated to it both direct and indirect costs and, in the recipient's or subrecipient's accumulation system, is one of the final accumulation points, such as a particular award, internal project, or other direct activity of a recipient or subrecipient. See also the definitions of *cost objective* and *intermediate cost objective* in this section.

Financial obligations means orders placed for property and services, contracts and subawards made, and similar transactions that require payment by a recipient or subrecipient under a Federal award that will result in expenditures by a recipient or subrecipient under a Federal award.

Fixed amount award means a type of grant or cooperative agreement pursuant to which the Federal agency or pass-through entity provides a specific amount of funding without regard to actual costs incurred under the Federal award. This type of Federal award reduces some of the administrative burden and record-keeping requirements for both the recipient or subrecipient and the Federal agency or pass-through entity. Accountability is based primarily on performance and results. See §§ 200.102(c), 200.101(b), 200.201(b), and 200.333.

For-profit organization generally means an organization or entity organized for the purpose of earning a profit. The term includes but is not limited to:

(1) An "S corporation" incorporated under subchapter S of the Internal Revenue Code;

(2) A corporation incorporated under another authority;

(3) A partnership;

(4) A limited liability company or partnership; and

(5) A sole proprietorship.

Foreign organization means an entity that is:

(1) A public or private organization located in a country other than the United States and its territories that is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;

(2) A private nongovernmental organization located in a country other than the United States that solicits and receives cash contributions from the general public;

(3) A charitable organization located in a country other than the United States that is nonprofit and tax-exempt under the laws of the country where it is registered and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, an organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entities organized primarily for religious purposes; or

(4) An organization located in a country other than the United States not recognized as a foreign public entity.

Foreign public entity means:

(1) A foreign government or foreign governmental entity;

(2) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f);

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

General purpose equipment means equipment that is not limited to research, medical, scientific, or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles. See also the definitions of *equipment* and *special purpose equipment* in this section.

Generally accepted accounting principles (GAAP) has the meaning specified in accounting standards issued by the Government Accounting Standards Board (GASB) and the Financial Accounting Standards Board (FASB).

Generally accepted government auditing standards (GAGAS), also known as the Yellow Book, means generally accepted government auditing standards issued by the Comptroller General of the United States, which apply to financial audits.

Grant agreement or grant means a legal instrument of financial assistance between a Federal agency and a recipient or between a pass-through entity and a subrecipient, consistent with 31 U.S.C. 6302, 6304:

(1) Is used to enter into a relationship, the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal agency or pass-through entity's direct benefit or use;

(2) Is distinguished from a cooperative agreement in that it does not provide for substantial involvement of the Federal agency in carrying out the activity contemplated by the Federal award.

(3) Does not include an agreement that provides only:

(i) Direct United States Government cash assistance to an individual;

(ii) A subsidy;

(iii) A loan;

(vi) A loan guarantee; or

(v) Insurance.

Highest-level owner means the entity that owns or controls an immediate owner of an applicant or that owns or controls one or more entities that control an immediate owner of an applicant. No entity owns or exercises control of the highest-level owner as defined in the Federal Acquisition Regulations (FAR) (48 CFR 52.204-17).

Hospital means a facility licensed as a hospital under the law of any State or a facility operated as a hospital by the United States, a State, or a subdivision of a State.

Improper payment means a payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirements. The term improper payment includes: any payment to an ineligible recipient; any payment for an ineligible good or service;

any duplicate payment; any payment for a good or service not received, except for those payments where authorized by law; any payment that is not authorized by law; and any payment that does not account for credit for applicable discounts. See OMB Circular A-123 Appendix C, *Requirements for Payment Integrity Improvement* for additional definitions and guidance on the requirements for payment integrity.

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. See 25 U.S.C. 5304(e). This includes any Indian Tribe identified in the annually published Bureau of Indian Affairs list of "*Indian Entities Recognized and Eligible to Receive Services"* and other entities that qualify as an Alaska Native village or regional village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act.

Indirect cost means those costs incurred for a common or joint purpose benefitting more than one cost objective and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. It may be necessary to establish multiple pools of indirect costs to facilitate equitable distribution of indirect expenses to the cost objectives served. Indirect cost pools must be distributed to benefitted cost objectives on basis that will produce an equitable result in consideration of relative benefits derived. For Institutions of Higher Education (IHE), the term facilities and administrative (F&A) cost is often used to refer to indirect costs.

Indirect cost rate proposal means the documentation prepared by a recipient to substantiate its request to establish an indirect cost rate as described in appendices III through VII and appendix IX to this part.

Information technology systems means computing devices, ancillary equipment, software, firmware, and related procedures, services (including support services), and resources. See also the definitions of *computing devices* and *equipment* in this section.

Institution of Higher Education (IHE) is defined at 20 U.S.C. 1001.

Intangible property means property having no physical existence, such as trademarks, copyrights, data (including data licenses), websites, IP licenses, trade secrets, patents, patent applications, and property such as loans, notes and other debt instruments, lease agreements, stocks and other instruments of property ownership of either tangible or intangible property, such as intellectual property, software, or software subscriptions or licenses.

Intermediate cost objective means a cost objective that is used to accumulate indirect costs or service center costs that are subsequently allocated to one or more indirect cost pools or final cost objectives. See this section's definitions of *cost objective* and *final cost objective*.

Internal control for recipients and subrecipients means processes designed and implemented by recipients and subrecipients to provide reasonable assurance regarding the achievement of objectives in the following categories:

(1) Effectiveness and efficiency of operations;

(2) Reliability of reporting for internal and external use; and

(3) Compliance with applicable laws and regulations.

Loan means a Federal loan or loan guarantee received or administered by a recipient or subrecipient, except as used in this section's definition of *program income*.

(1) The term "direct loan" means a disbursement of funds by the Federal Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest. The term includes the purchase of, or participation in, a loan made by another lender and financing arrangements that defer payment for more than 90 days, including the sale of a Federal Government asset on credit terms. The term does not include the acquisition of a federally guaranteed loan in satisfaction of default claims or the price support loans of the Commodity Credit Corporation.

(2) The term "direct loan obligation" means a binding agreement by a Federal agency to make a direct loan when specified conditions are fulfilled by the borrower.

(3) The term "loan guarantee" means any Federal Government guarantee, insurance, or other pledges for the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender but does not include the insurance of deposits, shares, or other withdrawable accounts in financial institutions.

(4) The term "loan guarantee commitment" means a binding agreement by a Federal agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreement.

Local government means any unit of government within a State, including a:

(1) County;

(2) Borough;

(3) Municipality;

(4) City;

(5) Town;

(6) Township;

(7) Parish;

(8) Local public authority, including any public housing agency under the United States Housing Act of 1937;

(9) Special district;

(10) School district;

(11) Intrastate district;

(12) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and

(13) Any other agency or instrumentality of a multi-, regional, or intra-State or local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with § 200.518 or a program identified as a major program by a Federal agency or pass-through entity in accordance with § 200.503(e).

Management decision means the Federal agency's or pass-through entity's written determination, provided to the auditee, of the adequacy of the auditee's proposed corrective actions to address the findings based on its evaluation of the audit findings and proposed corrective actions.

Micro-purchase means an individual procurement transaction for supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases comprise a subset of a recipient's or subrecipient's small purchases using informal procurement methods as set forth in § 200.320.

Micro-purchase threshold means the dollar amount at or below which a recipient or subrecipient may purchase property, or services using micro-purchase procedures (see § 200.320). Generally, except as provided in § 200.320, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the FAR at 48 CFR part 2, subpart 2.1, unless a higher threshold is requested by the recipient or subrecipient and approved by the cognizant agency for indirect costs.

Modified Total Direct Cost (MTDC) means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first $50,000 of each subaward (regardless of the period of performance of the subawards under the award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs, and the portion of each subaward in excess of $50,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs and with the approval of the cognizant agency for indirect costs.

Non-discretionary award means an award made by the Federal agency to specific recipients in accordance with statutory, eligibility, and compliance requirements, such that in keeping with specific statutory authority, the Federal agency cannot exercise judgment ("discretion"). A non-discretionary award amount could be specifically determined or by formula.

Non-Federal entity (NFE) 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.

Nonprofit organization means any organization that:

(1) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;

(2) Is not organized primarily for profit;

(3) Uses net proceeds to maintain, improve, or expand the organization's operations; and

(4) Is not an IHE.

Notice of funding opportunity means a formal announcement of the availability of Federal funding through a financial assistance program from a Federal agency. The notice of funding opportunity provides information on the award, such as who is eligible to apply, the evaluation criteria for selecting a recipient or subrecipient, the required components of an application, and how to submit the application. The notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a "program announcement," "notice of funding availability," "broad agency announcement," "research announcement," "solicitation," or some other term.

Office of Management and Budget (OMB) means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal agency that provides the predominant amount of funding directly (direct funding) (as listed on the schedule of expenditures of Federal awards, see § 200.510(b)) to a recipient or subrecipient unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total Federal expenditures (as direct and sub-awards) by the recipient or subrecipient, then the Federal agency with the predominant amount of total funding is the

designated oversight agency for audit. When there is no direct funding, the Federal agency that is the predominant source of pass-through funding must assume the oversight responsibilities. The duties of the oversight agency for audit and the process for any reassignments are described in § 200.513(b).

Participant generally means an individual participating in or attending program activities under a Federal award, such as trainings or conferences, but who is not responsible for implementation of the Federal award. Individuals committing effort to the development or delivery of program activities under a Federal award (such as consultants, project personnel, or staff members of a recipient or subrecipient) are not participants. Examples of participants may include community members participating in a community outreach program, members of the public whose perspectives or input are sought as part of a program, students, or conference attendees.

Participant support costs means direct costs that support participants (see definition for *Participant* in § 200.1) and their involvement in a Federal award, such as stipends, subsistence allowances, travel allowances, registration fees, temporary dependent care, and per diem paid directly to or on behalf of participants.

Pass-through entity means a recipient or subrecipient that provides a subaward to a subrecipient (including lower tier subrecipients) to carry out part of a Federal program. The authority of the pass-through entity under this part flows through the subaward agreement between the pass-through entity and subrecipient.

Performance goal means a measurable target level of performance expressed as a tangible, measurable objective, against which actual achievement can be compared, including a goal expressed as a quantitative standard, value, or rate. In some instances (for example, discretionary research awards), this may be limited to the requirement to submit technical performance reports (to be evaluated in accordance with agency policy).

Period of performance means the time interval between the start and end date of a Federal award, which may include one or more budget periods. Identification of the period of performance in the Federal award consistent with § 200.211(b)(5) does not commit the Federal agency to fund the award beyond the currently approved budget period.

Personal property means property other than real property. It may be tangible or intangible.

Personally Identifiable Information (PII) means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual. Some PII is available in public sources such as telephone books, websites, and university listings. The definition of PII is not attached to any single category of information or technology. Instead, it requires a case-by-case assessment of the specific risk that an individual can be identified. Non-PII can become PII whenever additional information is made publicly available, in any medium and from any source, that could be used to identify an individual when combined with other available information.

Prior approval means the written approval obtained in advance by an authorized official of a Federal agency or pass-through entity of certain costs or programmatic decisions.

Program income means gross income earned by the recipient or subrecipient that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance except as provided in § 200.307(c). Program income includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees, and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes,

regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. See § 200.407. See also 35 U.S.C. 200-212 "Disposition of Rights in Educational Awards," which applies to inventions made under Federal awards.

Project cost means total allowable costs incurred under a Federal award and all cost sharing, including third-party contributions.

Property means real property or personal property. See this section's definitions of *real property* and *personal property.*

Protected Personally Identifiable Information (Protected PII) means PII (see definition in this section), except for PII that must be disclosed by law. Examples of PII include, but are not limited to, social security number; passport number; credit card numbers; clearances, bank numbers; biometrics; date and place of birth; mother's maiden name; criminal, medical and financial records; and educational transcripts.

Questioned cost has the meaning given in paragraphs (1) through (3).

(1) ***Questioned cost*** means an amount, expended or received from a Federal award, that in the auditor's judgment:

(i) Is noncompliant or suspected noncompliant with Federal statutes, regulations, or the terms and conditions of the Federal award;

(ii) At the time of the audit, lacked adequate documentation to support compliance; or

(iii) Appeared unreasonable and did not reflect the actions a prudent person would take in the circumstances.

(2) The questioned cost amount under (1)(ii) is calculated as if the portion of a transaction that lacked adequate documentation were confirmed noncompliant.

(3) There is no questioned cost solely because of:

(i) Deficiencies in internal control; or

(ii) Noncompliance with the reporting type of compliance requirement (described in the compliance supplement) if this noncompliance does not affect the amount expended or received from the Federal award.

(4) ***Known questioned cost*** means a questioned cost specifically identified by the auditor. Known questioned costs are a subset of likely questioned costs.

(5) ***Likely questioned cost*** means the auditor's best estimate of total questioned costs, not just the known questioned costs. Likely questioned costs are developed by extrapolating from audit evidence obtained, for example, by projecting known questioned costs identified in an audit sample to the entire population from which the sample was drawn. In evaluating the effect of questioned costs on the opinion on compliance, the auditor considers the likely questioned costs, not just the known questioned costs.

(6) Questioned costs are not improper payments until reviewed and confirmed to be improper payments as defined in OMB Circular A-123 Appendix C.

Real property means land, including land improvements, structures, and appurtenances thereto, and legal interests in land, including fee interest, licenses, rights of way, and easements. Real property excludes moveable machinery and equipment.

Recipient means an entity that receives a Federal award directly from a Federal agency to carry out an activity under a Federal program. The term recipient does not include subrecipients or individuals that are participants or beneficiaries of the award.

Renewal award means a Federal award for which the start date is contiguous with, or closely follows, the end of the expiring Federal award. The start date of a renewal award begins a new and distinct period of performance.

Research and Development (R&D) means all basic and applied research activities and all development activities performed by a recipient or subrecipient. The term research also includes activities involving the training of individuals in research techniques where such activities use the same facilities as other research and development activities and where such activities are not included in the instruction function. "Research" is the systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the systematic use of knowledge and understanding gained from research to produce useful materials, devices, systems, or methods, including designing and developing prototypes and processes.

Simplified acquisition threshold means the dollar amount below which a recipient or subrecipient may purchase property or services using small purchase methods (see § 200.320). Recipients and subrecipients adopt small purchase procedures to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold set in the FAR at 48 CFR part 2, subpart 2.1 is used in this part as the simplified acquisition threshold for secondary procurement activities administered under Federal awards. The recipient or subrecipient is responsible for determining an appropriate simplified acquisition threshold, which is less than or equal to the dollar value established in the FAR, based on internal controls, an evaluation of risk, and its documented procurement procedures. Recipients and subrecipients should also determine if local government purchasing laws apply. This threshold must never exceed the dollar value established in the FAR.

Special purpose equipment means equipment that is used only for research, medical, scientific, or other similar technical activities. Examples of special purpose equipment include microscopes, x-ray machines, surgical instruments, spectrometers, and associated software. See also the definitions of *equipment* and *general purpose equipment* in this section.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

Student Financial Aid (SFA) means Federal awards under those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended (20 U.S.C. 1070-1099d), which the U.S. Department of Education administers, and similar programs provided by other Federal agencies. It does not include Federal awards under programs that provide fellowships or similar Federal awards to students on a competitive basis or for specified studies or research.

Subaward means an award provided by a pass-through entity to a subrecipient for the subrecipient to contribute to the goals and objectives of the project by carrying out part of a Federal award received by the pass-through entity. It does not include payments to a contractor, beneficiary, or participant. A subaward may be provided through any form of legal agreement consistent with criteria in with § 200.331, including an agreement the pass-through entity considers a contract.

Subrecipient means an entity that receives a subaward from a pass-through entity to carry out part of a Federal award. The term subrecipient does not include a beneficiary or participant. A subrecipient may also be a recipient of other Federal awards directly from a Federal agency.

Subsidiary means an entity in which more than 50 percent of the entity is owned or controlled directly by a parent corporation or through another subsidiary of a parent corporation.

Supply means all tangible personal property other than those described in the *equipment* definition. A computing device is a supply if the acquisition cost is below the lesser of the capitalization level established by the recipient or subrecipient for financial statement purposes or $10,000, regardless of the length of its useful life. See this section's definitions of *computing devices* and *equipment*.

Telecommunications cost means the cost of using communication technologies such as mobile phones, landlines, and the internet.

Termination means the action a Federal agency or pass-through entity takes to discontinue a Federal award, in whole or in part, at any time before the planned end date of the period of performance. Termination does not include discontinuing a Federal award due to a lack of available funds.

Third-party in-kind contributions means the value of non-cash contributions (*meaning,* property or services) that:

(1) Benefit a project or program funded by a Federal award; and

(2) Are contributed by non-Federal third parties, without charge, to a recipient or subrecipient under a Federal award.

Unliquidated financial obligation means financial obligations incurred by the recipient or subrecipient but not paid (liquidated) for financial reports prepared on a cash basis. For reports prepared on an accrual basis, these are financial obligations incurred by the recipient or subrecipient but for which expenditures have not been recorded.

Unobligated balance means the amount of funds under a Federal award that the recipient or subrecipient has not obligated. The amount is computed by subtracting the cumulative amount of the recipient's or subrecipient's unliquidated financial obligations and expenditures under the Federal award from the cumulative amount of funds the Federal agency or pass-through entity authorized the recipient or subrecipient to obligate.

Voluntary committed cost sharing means cost sharing specifically pledged voluntarily in the proposal's budget on the part of the recipient or subrecipient, which becomes a binding requirement of the Federal award. See § 200.306.

[89 FR 30136, Apr. 22, 2024, as amended at 89 FR 79732, Oct. 1, 2024]

Subpart B—General Provisions

§ 200.100 Purpose.

(a) ***Purpose.***

(1) This part establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards. Federal agencies must not impose additional requirements except as allowed in §§ 200.102, 200.211, or unless specifically required by Federal statute, regulation, or Executive order.

(2) This part provides Federal agencies with the policy for collecting and submitting information on all Federal financial assistance programs to the Office of Management and Budget (OMB) and communicating this information to the public. It also establishes Federal policies related to the

delivery of this information to the public, including through the use of electronic media. It also sets forth how the General Services Administration (GSA), OMB, and Federal agencies implement the Federal Program Information Act (31 U.S.C. 6101-6106).

(b) ***Administrative requirements.*** Subparts B through D set forth the uniform administrative requirements for Federal financial assistance. This includes establishing requirements for Federal agencies management of Federal financial assistance programs before a Federal award is made, and requirements that Federal agencies may impose on recipients and subrecipients throughout the lifecycle of a Federal award.

(c) ***Cost principles.*** Subpart E establishes principles for determining allowable costs incurred by recipients and subrecipients under Federal awards. These principles are for the purpose of cost determination. They do not address the circumstances nor dictate the extent of Federal Government funding of a particular program or project.

(d) ***Single Audit Requirements and Audit Follow-up.*** Subpart F is issued pursuant to the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507). Subpart F sets forth the standards for achieving consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards. Subpart F also provides the policies and procedures for Federal agencies or pass-through entities when using the results of these audits.

§ 200.101 Applicability.

(a) ***General applicability to Federal agencies.***

(1) Subparts A through F apply to Federal agencies that make Federal awards to non-Federal entities. As provided in paragraph (a)(2), subparts A through E may also apply to Federal agencies that make Federal awards to other entities.

(2) Federal agencies must apply subparts A though F of this part to non-Federal entities unless a particular section of this part or Federal statute provides otherwise. Federal agencies may apply subparts A through E of this part to Federal agencies, for-profit organizations, foreign public entities, or foreign organizations as permitted in agency regulations or program statutes, except when a Federal agency determines that the application of these subparts would be inconsistent with the international responsibilities of the United States or the laws of a foreign government. Subpart F only applies to non-Federal entities as defined in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507). Federal agencies should apply the requirements to all recipients in a consistent and equitable manner to the extent permitted within applicable statutes, regulations, and policies.

(3) Throughout subparts A through F, the word “must” indicates a requirement. The words “should” or “may” indicate a recommended approach and permit discretion.

(4) Throughout subparts A through E, when the word “or” is used between the terms “recipient” and “subrecipient,” any requirements or recommendations in the relevant provisions of this part apply to the recipient, the subrecipient, or both, as applicable. The use of “or” between recipient and subrecipient does not mean that applicable requirements or recommendations only apply to one of these entities unless the context clearly indicates otherwise.

(b) ***Applicability to Federal financial assistance.***

(1) Paragraphs (b)(2) through (b)(5) of this section describe what portions of this part apply to specific types of Federal financial assistance. Paragraphs (d) and (e) of this section explain additional exceptions related to governing provisions and Federal program applicability. The terms and conditions of Federal awards (including this part) flow down to subawards to subrecipients unless a

particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise. Pass-through entities must comply with the requirements described in subpart D, §§ 200.331 through 200.333, and any other sections of this part addressing pass-through entities.

(2) Subpart A (Acronyms and Definitions) and subpart B (General Provisions) apply to all Federal financial assistance, except that §§ 200.111 (English language), 200.112 (Conflict of interest), and 200.113 (Mandatory disclosures) do not apply to agreements for loans, loan guarantees, interest subsidies, and insurance.

(3) Subpart C (Pre-Federal Award Requirements and Contents of Federal Awards) and subpart D (Post Federal Award Requirements) only apply to grants and cooperative agreements with the following exceptions:

(i) Section 200.203 (Requirement to provide public notice of Federal financial assistance programs) also applies to agreements for loans, loan guarantees, interest subsidies, and insurance;

(ii) Section 200.216 (Prohibition on certain telecommunications and video surveillance equipment or services) applies to loans and grants (see Pub. L. 115-232, Div. A, Title VIII, § 889, as amended); and

(iii) Sections 200.303 (Internal controls) and 200.331 through 200.333 (Subrecipient monitoring and management) also apply to all types of Federal financial assistance.

(4) Subpart E (Cost Principles) applies to grants and cooperative agreements, but does not apply to the following:

(i) Food commodities provided through grants and cooperative agreements;

(ii) Fixed amount awards, except for §§ 200.400(g), 200.402 through 200.405, and 200.407(d), which do apply;

(iii) Agreements for loans, loan guarantees, interest subsidies, and insurance; and

(iv) Federal awards to hospitals (see Appendix IX—Hospital Cost Principles).

(5) Subpart F (Audit Requirements) only applies to the following items when awarded to a non-Federal entity:

(i) Grants and cooperative agreements (including fixed amount awards);

(ii) Contracts and subcontracts awarded under the FAR (except for fixed price contracts and subcontracts);

(iii) Agreements for loans, loan guarantees, interest subsidies, and insurance; and

(iv) Any other form of Federal financial assistance as defined by the Single Audit Act Amendment of 1996 (codified at 31 U.S.C. 7501-7507).

(c) ***Applicability to different types of contracts and subcontracts awarded by a Federal agency to a non-Federal entity under the Federal Acquisition Regulations (FAR).***

(1) Paragraphs (c)(2) and (c)(3) of this section describe what portions of this part apply to specific types of contracts and subcontracts awarded by a Federal agency to a non-Federal entity. See also paragraph (b)(5)(ii) on audit requirements. For both paragraphs (c)(2) and (c)(3):

(i) In cases of conflict between the requirements of applicable portions of this part and the terms and conditions of the contract, the terms and conditions of the contract and the FAR prevail.

(ii) When the Cost Accounting Standards (CAS) are applicable to the contract or subcontract, they also take precedence over this part.

(iii) In addition, costs that are identified as unallowable under 41 U.S.C. 4304(a) and as stated in the FAR (48 CFR part 31, subpart 31.2, and 48 CFR 31.603) are always unallowable.

(2) ***Cost-reimbursement contract under the FAR awarded to a non-Federal entity.*** When a non-Federal entity is awarded a cost-reimbursement contract under the FAR, only subpart D, §§ 200.331 through 200.333, and subparts E and F are applicable.

(3) ***Fixed-price contract or subcontract under the FAR awarded to a non-Federal entity.*** When a non-Federal entity is awarded a fixed-price contract or subcontract under the FAR, only subpart A, subpart B (except for §§ 200.111, 200.112, and 200.113), subpart D (only at § 200.303 and §§ 200.331 through 200.333), and subpart E are applicable to the contract, except that subpart E is not applicable to fixed-price contracts and subcontracts that are not negotiated.

(d) ***Governing provisions.*** With the exception of subpart F, which is required by the Single Audit Act, Federal statutes or regulations govern in any circumstances where they conflict with the provisions of this part. For agreements with Indian Tribes, this includes the provisions of the Indian Self-Determination and Education and Assistance Act (ISDEAA), as amended (see 25 U.S.C. 5301-5423).

(e) ***Program applicability.*** Except for §§ 200.203, 200.216, and 200.331 through 200.333, the requirements in subparts C, D, and E do not apply to the following programs:

(1) The block grant awards authorized by the Omnibus Budget Reconciliation Act of 1981 (including Community Services), except to the extent that subpart E apply to subrecipients of Community Services Block Grant funds pursuant to 42 U.S.C. 9916(a)(1)(B);

(2) Federal awards to local education agencies under 20 U.S.C. 7702-7703b, (portions of the Impact Aid program);

(3) Payments under the Department of Veterans Affairs' State Home Per Diem Program (38 U.S.C. 1741); and

(4) Federal awards authorized under the Child Care and Development Block Grant Act of 1990, as amended:

(i) Child Care and Development Block Grant (42 U.S.C. 9858).

(ii) Child Care Mandatory and Matching Funds of the Child Care and Development Fund (42 U.S.C. 9858).

(f) ***Additional program applicability.*** Except for §§ 200.203 and 200.216, the guidance in subpart C does not apply to the following programs:

(1) Entitlement Federal awards to carry out the following programs of the Social Security Act:

(i) Temporary Assistance for Needy Families (Title IV-A of the Social Security Act, 42 U.S.C. 601-619);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Social Security Act, 42 U.S.C. 651-669b);

(iii) Federal Payments for Foster Care, Prevention, and Permanency (Title IV-E of the Act, 42 U.S.C. 670-679c);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act, as amended);

(v) Medical Assistance (Medicaid) (Title XIX of the Act, 42 U.S.C. 1396-1396w-5) not including the State Medicaid Fraud Control program authorized by Section 1903(a)(6)(B) of the Social Security Act (42 U.S.C. 1396b(a)(6)(B)); and

(vi) Children's Health Insurance Program (Title XXI of the Act, 42 U.S.C. 1397aa-1397mm).

(2) A Federal award for an experimental, pilot, or demonstration project that is also supported by a Federal award listed in paragraph (f)(1) of this section.

(3) Federal awards under subsection 412(e) of the Immigration and Nationality Act and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits (8 U.S.C. 1522(e)).

(4) Entitlement awards under the following programs of The National School Lunch Act:

(i) National School Lunch Program (Section 4 of the Act, 42 U.S.C. 1753);

(ii) Commodity Assistance (Section 6 of the Act, 42 U.S.C. 1755);

(iii) Special Meal Assistance (Section 11 of the Act, 42 U.S.C. 1759a);

(iv) Summer Food Service Program for Children (Section 13 of the Act, 42 U.S.C. 1761); and

(v) Child and Adult Care Food Program (Section 17 of the Act, 42 U.S.C. 1766).

(5) Entitlement awards under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk Program (Section 3 of the Act, 42 U.S.C. 1772);

(ii) School Breakfast Program (Section 4 of the Act, 42 U.S.C. 1773); and

(iii) State Administrative Expenses (Section 7 of the Act, 42 U.S.C. 1776).

(6) Entitlement awards for State Administrative Expenses under The Food and Nutrition Act of 2008 (Section 16 of the Act, 7 U.S.C. 2025).

(7) Non-discretionary Federal awards under the following non-entitlement programs:

(i) Special Supplemental Nutrition Program for Women, Infants and Children (Section 17 of the Child Nutrition Act of 1966) 42 U.S.C. 1786;

(ii) The Emergency Food Assistance Programs (Emergency Food Assistance Act of 1983) 7 U.S.C. 7501 note; and

(iii) Commodity Supplemental Food Program (Section 5 of the Agriculture and Consumer Protection Act of 1973) 7 U.S.C. 612c note.

§ 200.102 Exceptions.

(a) ***OMB class exceptions.*** Except for subpart F, OMB may allow exceptions from requirements of this part for classes of Federal awards, recipients, or subrecipients when the exceptions are not prohibited by statute. For example, Federal agencies may request exceptions in support of innovative program designs that

apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. See also § 200.206. Federal agencies may also request exceptions in emergency situations. When OMB allows an exception to requirements of this part, the Federal agency remains responsible for ensuring the exception is applied to Federal awards in a manner consistent with Federal statutes and regulations.

(b) ***Statutory and regulatory exceptions.*** A Federal agency may adjust requirements to a class of Federal awards, recipients, or subrecipients when required by Federal statutes or regulations, except for the requirements in subpart F. Except for provisions in subpart F, when a Federal statute requires exceptions to requirements of this part for a class of Federal awards, recipients, or subrecipients, a Federal agency does not need OMB approval to allow those exceptions. See also § 200.106.

(c) ***Federal agency exceptions.*** Federal agencies may allow exceptions to requirements of this part on a case-by-case basis for individual Federal awards, recipients, or subrecipients, except when the exceptions are prohibited by law or other approval is expressly required by this part. Only the cognizant agency for indirect costs may authorize exceptions related to cost allocation plans or indirect cost rate proposals. A Federal agency may also apply less restrictive requirements when issuing fixed amount awards (see § 200.1), except for those requirements imposed by statute or in subpart F.

§ 200.103 Authorities.

This part is issued under the following authorities.

(a) Subparts B through D are authorized under 31 U.S.C. 503 (the Chief Financial Officers Act, Functions of the Deputy Director for Management); the Federal Program Information Act (Pub, L. 95-220 and Pub. L. 98-169, as amended, codified at 31 U.S.C. 6101-6106); the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224, as amended, codified at 31 U.S.C. 6301-6309); 41 U.S.C. 1101-1131 (the Office of Federal Procurement Policy Act); Reorganization Plan No. 2 of 1970 and Executive Order 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President"); and the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507).

(b) Subpart E is authorized under the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended (31 U.S.C. 1101-1126); the Chief Financial Officers Act of 1990 (31 U.S.C. 503-504); Reorganization Plan No. 2 of 1970; and Executive Order 11541, "Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President." OMB also relies on authority under 31 U.S.C. 503 and 31 U.S.C. 6307.

(c) Subpart F is authorized under the Single Audit Act Amendments of 1996 (codified at 31 U.S.C. 7501-7507). OMB also relies on authority under 31 U.S.C. 503 and 31 U.S.C. 6307.

§ 200.104 Supersession.

This part superseded previous OMB guidance issued under Title 2, subtitle A, chapter II of the Code of Federal Regulations and certain OMB circulars related to uniform administrative requirements, cost principles, and audit requirements for Federal awards.

§ 200.105 Effect on other issuances.

(a) ***Superseding inconsistent requirements.*** For Federal awards made subject to this part by a Federal agency, this part takes precedence over any administrative requirements, program manuals, handbooks, and other non-regulatory materials that are inconsistent with the requirements of this part upon implementation by the Federal agency, except to the extent that they are required by statute or authorized in accordance with § 200.102.

(b) ***Imposition of requirements on recipients.*** Agencies may only impose legally binding requirements on recipients and subrecipients through:

(1) Notice and public comment procedures through an approved agency process, including as authorized by this part, other statutes, or regulations; or

(2) Incorporating requirements into the terms and conditions of a Federal award as permitted by Federal statute, regulation, or this part.

§ 200.106 Agency implementation.

The specific requirements and responsibilities of Federal agencies, non-Federal entities, recipients, and subrecipients are set forth in this part. Federal agencies making Federal awards to non-Federal entities must implement the language in subparts C through F of this part in codified regulations unless different provisions are required by Federal statute or are approved by OMB.

§ 200.107 OMB responsibilities.

OMB will review Federal agency regulations and implementation of this part. OMB will provide interpretations of policy requirements and assistance to ensure effective, efficient, and consistent implementation. Any exceptions will be subject to approval by OMB and only with adequate justification from the Federal agency.

§ 200.108 Inquiries.

Inquiries from Federal agencies concerning this part may be directed to OMB. Inquiries from recipients or subrecipients should be addressed to the Federal agency, the cognizant agency for indirect costs, the cognizant agency for audit, or the pass-through entity as appropriate.

§ 200.109 Review date.

OMB will review this part periodically.

§ 200.110 Effective date.

(a) The standards set forth in this part affecting the administration of Federal awards by Federal agencies become effective once implemented by Federal agencies or when any future amendment to this part becomes final.

(b) Existing negotiated indirect cost rates will remain in place until they expire. The effective date of changes to indirect cost rates must be based upon the date a newly re-negotiated rate goes into effect for the recipient's or subrecipient's fiscal year. Therefore, for indirect cost rates and cost allocation plans, the revisions to this part (as of the publication date for revisions to this guidance) become effective in generating proposals and negotiating a new rate (when the rate is re-negotiated).

§ 200.111 English language.

(a) All Federal financial assistance announcements, applications, and Federal award information should be in the English language and must be in terms of U.S. dollars. However, Federal agencies, recipients, and subrecipients may issue or translate a Federal award or other documents into another language. A Federal agency may translate formal or informal announcements of the availability of Federal funding through a financial assistance program, such as a notice of funding opportunity, when translations may serve to increase the pool of applicants or the participation of a specific community (for example, programs administered in foreign countries where the primary language is not English). Federal agencies must maintain an official controlling English version of the Federal financial assistance announcement and the Federal award, including the terms and conditions.

(b) Applications, reports, and official correspondence may be submitted in languages other than English if specified in the notice of funding opportunity or the terms and conditions of the Federal award.

(c) In the event of inconsistency between English and another language, the English language meaning will control. When a significant portion of the recipient's or subrecipient's employees administering a Federal award are not fluent in English, the Federal award should be provided in English and the language(s) with which employees are more familiar.

§ 200.112 Conflict of interest.

Federal agencies must establish conflict of interest policies for Federal awards. A recipient or subrecipient must disclose in writing any potential conflict of interest to the Federal agency or pass-through entity in accordance with the established Federal agency policies.

§ 200.113 Mandatory disclosures.

An applicant, recipient, or subrecipient of a Federal award must promptly disclose whenever, in connection with the Federal award (including any activities or subawards thereunder), it has credible evidence of the commission of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act (31 U.S.C. 3729-3733). The disclosure must be made in writing to the Federal agency, the agency's Office of Inspector General, and pass-through entity (if applicable). Recipients and subrecipients are also required to report matters related to recipient integrity and performance in accordance with Appendix XII of this part. Failure to make required disclosures can result in any of the remedies described in § 200.339. (See also 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313.)

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

§ 200.200 Purpose.

Sections 200.201 through 200.217 prescribe instructions and other pre-award matters to be used by Federal agencies in the program planning, announcement, application, and award processes.

§ 200.201 Use of grants, cooperative agreements, fixed amount awards, and contracts.

(a) ***Federal awards.*** The Federal agency or pass-through entity must decide on the appropriate type of agreement for a Federal award (for example, a grant, cooperative agreement, subaward, or contract) in accordance with this guidance. See the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-6309).

(b) ***Fixed amount awards.*** The Federal agency or pass-through entity (see § 200.333) may use fixed amount awards (see the definition of *fixed amount awards* in § 200.1) for which the following conditions apply:

(1) The Federal award amount is negotiated using the cost principles (or other pricing information) as a guide. See § 200.101(b)(4)(ii) for further information on which provisions in subpart E (cost principles) apply to fixed amount awards. The Federal agency or pass-through entity may use fixed amount awards if the project scope has measurable goals and objectives and if accurate cost, historical, or unit pricing data is available to establish a fixed budget based on a reasonable estimate of actual costs. Budgets for fixed amount awards are negotiated with the recipient or subrecipient and the total amount of Federal funding is determined in accordance with the recipient's or subrecipient's proposal, available pricing data, and subpart E. Accountability must be based on performance and results, which can be communicated in performance reports or through routine monitoring. There is no expected routine monitoring of the actual costs incurred by the recipient or subrecipient under the Federal award. Therefore, no financial reporting is required. This does not absolve the recipient or subrecipient from the record retention requirements contained in §§ 200.334 through 200.338; nor does it absolve the recipient or subrecipient of the responsibilities of making records available for review during an audit. See § 200.101(b)(5)(i). Payments must be based on meeting specific requirements of the Federal award. Some of the ways in which the Federal award may be paid include, but are not limited to:

(i) In several partial payments. The amount of each payment as well as the “milestone” or event triggering the payment, should be agreed to in advance and included in the Federal award;

(ii) On a unit price basis. The defined unit(s) or price(s) should be agreed to in advance and included in the Federal award; or

(iii) In one payment at the completion of the Federal award.

(2) A fixed amount award must not be used in programs that require cost sharing.

(3) A fixed amount award may generate and use program income in accordance with the terms and conditions of the Federal award; however, the requirements of § 200.307 do not apply.

(4) At the end of a fixed amount award, the recipient or subrecipient must certify in writing to the Federal agency or pass-through entity that the project was completed as agreed to in the Federal award, or identify those activities that were not completed, and that all expenditures were incurred in accordance with § 200.403. When the required activities were not carried out, including fixed amount awards paid on a unit price basis under 200.201(b)(1)(ii), the amount of the Federal award must be reduced by the amount that reflects the activities that were not completed in accordance with the Federal award. When the required activities were completed in accordance with the terms and conditions of the Federal award, the recipient or subrecipient is entitled to any unexpended funds.

(5) Periodic reports may be established for fixed amount awards.

(6) Prior approval requirements that apply to fixed amount awards are § 200.308(f) (paragraphs 1 through 3, 6 through 8, and 10) and § 200.333.

§ 200.202 Program planning and design.

(a) The Federal agency must design a program and create an Assistance Listing before announcing the Notice of Funding Opportunity. A program must be designed:

(1) With clear goals and objectives that provide meaningful results and be consistent with the Federal authorizing legislation of the program;

(2) To measure performance based on the goals and objectives developed during program planning and design. Performance measures may differ depending on the type of program. See § 200.301 for more information on performance measurement;

(3) To align with the strategic goals and objectives within the Federal agency's performance plan and support the Federal agency's performance measurement, management, customer service initiatives, and reporting as required by Part 6 of OMB Circular A-11 (Preparation, Submission, and Execution of the Budget);

(4) To align with the Program Management Improvement Accountability Act (Pub. L. 114-264) as well as the Foundations for Evidence-Based Policymaking Act (Pub. L. 115-435), as applicable; and

(5) To encourage applicants to engage, when practicable, during the design phase, members of the community that will benefit from or be impacted by a program.

(b) Federal agencies should develop programs in consultation with communities benefiting from or impacted by the program. In addition, Federal agencies should consider available data, evidence, and evaluation results from past programs and make every effort to extend eligibility requirements to all potential applicants. Federal agencies are encouraged to coordinate with other agencies during program planning and design, particularly when the goals and objectives of a program or project align with those of other agencies.

§ 200.203 Requirement to provide public notice of Federal financial assistance programs.

(a) The Federal agency must maintain an accurate list of Federal programs in the Assistance Listings maintained by the General Services Administration (GSA) at *SAM.gov.*

(1) The Assistance Listings is the comprehensive government-wide source of Federal financial assistance program information produced by the executive branch of the Federal Government.

(2) The information that the Federal agency must submit to GSA for approval by OMB is listed in paragraph (b). GSA must prescribe the format for the submission in coordination with OMB.

(3) The Federal agency must assign the appropriate Assistance Listing before making the Federal award unless exigent circumstances require otherwise (for example, timing requirements imposed by a Federal statute).

(b) To the extent practicable, the Federal agency must create, update, and manage Assistance Listing entries based on the authorizing statute for the program and comply with additional guidance provided by GSA (in consultation with OMB) to ensure consistent and accurate information is available to prospective applicants. Assistance Listings should be communicated to the public in plain language. Accordingly, Federal agencies must submit the following information to GSA when creating an Assistance Listing:

(1) ***Program Description, Purpose, Goals, and Measurement.*** A brief summary of the statutory or regulatory requirements of the program and its intended outcome. Where appropriate, the program description, purpose, goals, and performance measurement should align with the strategic goals and objectives within the Federal agency's performance plan and should support the Federal agency's performance measurement, management, customer experience initiatives, and reporting as required by Part 6 of OMB Circular A-11;

(2) ***Identification.*** Identification of whether the program will issue Federal awards on a discretionary or non-discretionary basis;

(3) ***Projected total amount of funds available for the program.*** Estimates based on previous year funding are acceptable if current appropriations are not available at the time of the submission;

(4) ***Anticipated source of available funds.*** The statutory authority for funding the program and the agency, sub-agency, or specific program unit that will issue the Federal awards (to the extent possible) and associated funding identifier (for example, Treasury Account Symbol(s));

(5) ***General eligibility requirements.*** The statutory, regulatory, or other eligibility factors or considerations that determine the applicant's qualification for Federal awards under the program (for example, type of recipient); and

(6) ***Applicability of Single Audit Requirements.*** Applicability of Single Audit Requirements as required by subpart F.

§ 200.204 Notices of funding opportunities.

The Federal agency must announce specific funding opportunities for Federal financial assistance that will be openly competed. The term openly competed means opportunities that are not directed to one or more specifically identified applicants. To the extent possible, the Federal agency should communicate opportunities to the public in plain language to ensure the announcement is accessible to diverse communities of eligible applicants, including underserved communities. The Federal agency should also make efforts to limit the length and complexity of the announcement and only include the information that is necessary for the effective communication of the program objectives. Federal agencies may offer pre-application technical assistance or provide clarifying information for funding opportunities. However, Federal agencies must ensure these resources are made accessible and widely available to all potential applicants (for example, by posting answers to questions and requests on *Grants.gov*). The Federal agency should make every effort to identify in the NOFO all eligible applicants (for example, different types of nonprofit organizations such as labor unions and tribal organizations). The following information must be provided in a public notice:

(a) ***Summary information in notices of funding opportunities.*** The Federal agency must display the following information on *Grants.gov,* in a location preceding the full text of the announcement:

(1) Federal Agency Name;

(2) Funding Opportunity Title;

(3) Announcement Type (whether the funding opportunity is the initial announcement or a modification of a previously announced opportunity);

(4) Funding Opportunity Number (required, if the Federal agency has assigned a number to the funding opportunity announcement);

(5) Assistance Listing Number(s);

(6) Funding Details. To the extent appropriate, the total amount of funding that the Federal agency expects to award, the anticipated number of awards, and the expected dollar values of individual awards, which may be a range or average;

(7) Key Dates. Key dates include due dates for submitting applications or Executive Order 12372 submissions, as well as for any letters of intent or preapplications. For any announcement issued before a program's application materials are available, key dates also include the date on which

those materials will be released; and any other additional information, as deemed applicable by the Federal agency. If possible, the Federal agency should provide an anticipated award date. If the NOFO states that applications will be evaluated on a "rolling" basis (that is, at different points during a specified period of time), the Federal agency should provide an estimate of the time needed to process an application and notify the applicant of the Federal agency's decision;

(8) Executive Summary. A brief description that is written in plain language and summarizes the goals and objectives of the program, the target audience, and eligible applicants. The text of the executive summary should not exceed 500 words; and

(9) Agency contact information.

(b) ***Availability period.*** The Federal agency should make all funding opportunities available for application for at least 60 calendar days. However, the Federal agency may modify the availability period of an opportunity as needed. For example, extending the period may be necessary to provide technical assistance to an applicant pool that was not anticipated when the announcement was made or has less experience with applying for Federal financial assistance. The Federal agency may also determine that an availability period of less than 60 days is sufficient for a particular funding opportunity. However, no funding opportunity should be available for less than 30 calendar days unless the Federal agency determines that exigent circumstances justify this.

(c) ***Full text of funding opportunities.***

(1) The Federal agency must include the information in Appendix I for every funding opportunity.

(2) Federal agencies should ensure that funding opportunities are written using plain language. To the extent possible Federal agencies must streamline opportunities to make them accessible, particularly for funding opportunities that are new, targeted to underserved communities, or intended to reach inexperienced applicants.

(3) To reduce application burden, Federal agencies should consider whether programmatic or administrative requirements specific to the agency, program, or funding opportunity must be met at the time of application or as a requirement of receiving a Federal award.

§ 200.205 Federal agency review of merit of proposals.

Unless prohibited by Federal statute, the Federal agency must design and execute a merit review process of applications for discretionary Federal awards. The objective of a merit review process is to select recipients most likely to be successful in delivering results based on the program objectives as outlined in section § 200.202. A merit review is an objective process of evaluating Federal award applications in accordance with the written standards of the Federal agency. These standards should identify the number of people the agency requires to participate in the merit review process and provide opportunities for a diverse group of participants, including those representing underserved communities. The merit review process explained in this section must be described or incorporated by reference in the applicable funding opportunity. See appendix I to this part. See also § 200.204. The Federal agency must also periodically review its merit review process.

§ 200.206 Federal agency review of risk posed by applicants.

(a) ***Review of OMB-designated repositories of government-wide data.***

(1) Prior to making a Federal award, the Federal agency is required to review eligibility information for applicants and financial integrity information for applicants available in OMB-designated databases per the Payment Integrity Information Act of 2019 (Pub. L. 116-117), the "Do Not Pay Initiative" (31 U.S.C. 3354), and 41 U.S.C. 2313.

(2) The Federal agency is required to review the responsibility and qualification records available in the non-public segment of the System for Award Management (*SAM.gov*) prior to making a Federal award where the Federal share is expected to exceed the simplified acquisition threshold, defined at 41 U.S.C. 134, over the period of performance. See 41 U.S.C. 2313. The Federal agency must consider all of the information available in *SAM.gov* with regard to the applicant and any immediate highest-level owner, predecessor (meaning, an organization that is replaced by a successor), or subsidiary, identified for that applicant in *SAM.gov*. See Public Law 112-239, National Defense Authorization Act for Fiscal Year 2013; 41 U.S.C. 2313(d). The information in the system for a prior recipient of a Federal award must demonstrate a satisfactory record of administering programs or activities under Federal financial assistance or procurement awards, and integrity and business ethics. The Federal agency may make a Federal award to a recipient that does not fully meet these standards if it is determined that the information is not relevant to the Federal award under consideration or there are specific conditions that can appropriately mitigate the risk associated with the recipient in accordance with § 200.208.

(b) ***Risk Assessment.***

(1) The Federal agency must establish and maintain policies and procedures for conducting a risk assessment to evaluate the risks posed by applicants before issuing Federal awards. This assessment helps identify risks that may affect the advancement toward or the achievement of a project's goals and objectives. Risk assessments assist Federal managers in determining appropriate resources and time to devote to project oversight and monitor recipient progress. This assessment may incorporate elements such as the quality of the application, award amount, risk associated with the program, cybersecurity risks, fraud risks, and impacts on local jobs and the community. If the Federal agency determines that the Federal award will be made, specific conditions that address the assessed risk may be implemented in the Federal award. The risk criteria to be evaluated must be described in the announcement of the funding opportunity described in § 200.204.

(2) In evaluating risks posed by applicants, the Federal agency should consider the following items:

(i) ***Financial stability.*** The applicant's record of effectively managing financial risks, assets, and resources;

(ii) ***Management systems and standards.*** Quality of management systems and ability to meet the management standards prescribed in this part;

(iii) ***History of performance.*** The applicant's record of managing previous and current Federal awards, including compliance with reporting requirements and conformance to the terms and conditions of Federal awards, if applicable;

(iv) ***Audit reports and findings.*** Reports and findings from audits performed under subpart F or the reports and findings of any other available audits, if applicable; and

(v) ***Ability to effectively implement requirements.*** The applicant's ability to effectively implement statutory, regulatory, or other requirements imposed on recipients of Federal awards.

(c) ***Adjustments to the Risk Assessment.*** The Federal agency may modify the risk assessment at any time during the period of performance, which may justify changes to the terms and conditions of the Federal award. See § 200.208.

(d) ***Suspension and debarment compliance.*** The Federal agency must comply with the government-wide suspension and debarment guidance in 2 CFR part 180 and individual Federal agency suspension and debarment requirements in title 2 of the Code of Federal Regulations. Federal agencies must also require recipients to comply with these requirements. These requirements restrict making Federal awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from receiving Federal awards or participating in Federal awards.

§ 200.207 Standard application requirements.

(a) ***Paperwork clearances.*** The Federal agency may only use application information collections approved by OMB under the Paperwork Reduction Act of 1995 and OMB's implementing regulations in 5 CFR part 1320 and in alignment with OMB-approved, government-wide data elements available from the OMB-designated standards lead. Examples of application information collections approved by OMB include the Standard Forms 424 (SF-424), which is available on *Grants.gov*, and the Biographical Sketch Common Form (OMB Control Number 3145-0279), which Federal agencies should use to collect biographical sketches and other disclosure information from award applicants. OMB will authorize additional information collections only on a limited basis and consistent with these requirements.

(b) ***Information collection.*** The Federal agency may inform applicants that they do not need to provide certain information already being collected through other means.

§ 200.208 Specific conditions.

(a) Federal agencies are responsible for ensuring that specific Federal award conditions and performance expectations are consistent with the program design (See § 200.202 and § 200.301).

(b) The Federal agency or pass-through entity may adjust specific conditions in the Federal award based on an analysis of the following factors:

(1) Review of OMB-designated repositories of government-wide data (for example, *SAM.gov*) or review of its risk assessment (See § 200.206);

(2) The recipient's or subrecipient's history of compliance with the terms and conditions of Federal awards;

(3) The recipient's or subrecipient's ability to meet expected performance goals as described in § 200.211; or

(4) A determination of whether a recipient or subrecipient has inadequate financial capability to perform the Federal award.

(c) Specific conditions may include the following:

(1) Requiring payments as reimbursements rather than advance payments;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance;

(3) Requiring additional or more detailed financial reports;

(4) Requiring additional project monitoring;

(5) Requiring the recipient or subrecipient to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(d) Prior to imposing specific conditions, the Federal agency or pass-through entity must notify the recipient or subrecipient as to:

(1) The nature of the specific condition(s);

(2) The reason why the specific condition(s) is being imposed;

(3) The nature of the action needed to remove the specific condition(s);

(4) The time allowed for completing the actions; and

(5) The method for requesting the Federal agency or pass-through entity to reconsider imposing a specific condition.

(e) Any specific conditions must be promptly removed once the conditions that prompted them have been satisfied.

§ 200.209 Certifications and representations.

Unless prohibited by the U.S. Constitution, Federal statutes, or regulations, a Federal agency or pass-through entity is authorized to require a recipient to submit annual certifications and representations. Submission may be required more frequently if a recipient or subrecipient fails to meet a requirement of a Federal award. When a recipient is provided an exception to the requirements of 2 CFR 25.110, the recipient must submit the appropriate assurance form (for example, SF-424B).

§ 200.210 Pre-award costs.

For requirements on costs incurred by the applicant prior to the start date of the period of performance of the Federal award, see § 200.458.

§ 200.211 Information contained in a Federal award.

The Federal award must include the following information:

(a) ***Federal award performance goals.*** Where applicable, performance goals, indicators, targets, and baseline data must be included in the Federal award. The Federal agency must also specify in the terms and conditions of the Federal award how performance will be assessed, including the timing and scope of expected performance. See §§ 200.202 and 200.301 for more information on Federal award performance goals.

(b) ***General Federal award information.*** The Federal agency must include the following information in each Federal award:

(1) Recipient Name (which must match the name associated with its unique entity identifier as defined at 2 CFR 25.400);

(2) Recipient's Unique Entity Identifier;

(3) Unique Federal Award Identification Number (FAIN);

(4) Federal Award Date (see Federal award date in § 200.1);

(5) Period of Performance Start and End Date;

(6) Budget Period Start and End Date;

(7) Amount of Federal Funds Obligated by this Action;

(8) Total Amount of Federal Funds Obligated;

(9) Total Approved Cost Sharing, where applicable;

(10) Total Amount of the Federal Award including approved Cost Sharing;

(11) Budget Approved by the Federal Agency;

(12) Federal Award Description (to comply with statutory requirements (for example, FFATA));

(13) Name of the Federal agency (including contact information for the awarding official);

(14) Assistance Listings Number and Title;

(15) Identification of whether the Award is R&D; and

(16) Indirect Cost Rate for the Federal award (including if the de minimis rate is charged per § 200.414).

(c) ***General terms and conditions.***

(1) Federal agencies must incorporate the following general terms and conditions either in the Federal award or by reference, as applicable:

(i) ***Administrative requirements.*** Administrative requirements implemented by the Federal agency as specified in this part.

(ii) ***National policy requirements.*** These include statutory, executive order, other Presidential directive, or regulatory requirements that apply by specific reference and are not program-specific. See § 200.300 Statutory and national policy requirements.

(iii) ***Recipient integrity and performance matters.*** When the total Federal share of the Federal award may include more than $500,000 over the period of performance, the Federal agency must include the terms and conditions available in Appendix XII. See also § 200.113.

(iv) ***Future budget periods.*** When it is anticipated that the period of performance will include multiple budget periods, the Federal agency must indicate that subsequent budget periods are subject to the availability of funds, program authority, satisfactory performance, and compliance with the terms and conditions of the Federal award.

(v) ***Termination provisions.*** Federal agencies must inform recipients of the termination provisions in § 200.340, including the applicable termination provisions in the Federal agency's regulations or terms and conditions of the Federal award.

(2) The Federal award must incorporate, by reference, all general terms and conditions of the Federal award, which must be maintained on the Federal agency's website.

(3) The Federal agency must provide a copy of the full text of the general terms and conditions if a recipient requests it.

(4) The Federal agency must maintain an archive of previous versions of the general terms and conditions, with effective dates, for use by a recipient, auditors, or others. The archive should be located on the Federal agency's website in the same place where current terms and conditions are available.

(d) ***Federal award specific terms and conditions.*** The Federal agency must include in each Federal award any specific terms and conditions that are in addition to the general terms and conditions. See also § 200.208. For loan and loan guarantee programs, the Federal agency must specify whether or not the Federal award has continuing compliance requirements. Whenever practicable, these specific terms and conditions should also be available on the Federal agency's website and in notices of funding opportunities (as outlined in § 200.204).

(e) ***Federal agency requirements.*** Any other information required by the Federal agency.

§ 200.212 Public access to Federal award information.

(a) Except as noted in paragraph (c) of this section, the Federal agency must publish the required Federal award information on *USAspending.gov* in accordance with the guidance provided by OMB and the U.S. Department of the Treasury's Government-wide Spending Data Model (GSDM).

(b) All responsibility and qualification records posted in *SAM.gov* will be publicly available after a waiting period of 14 calendar days, except for:

(1) Past performance reviews required by Federal Government contractors (See Federal Acquisition Regulation (FAR) 48 CFR part 42, subpart 42.15);

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar day waiting period by a Federal agency.

(c) Nothing in this section may be construed as requiring the publication of information otherwise exempt under the Freedom of Information Act (5 U.S.C. 552), or controlled unclassified information pursuant to Executive Order 13556.

§ 200.213 Reporting a determination that an applicant is not qualified for a Federal award.

(a) The Federal agency must report in *SAM.gov* if it does not make a Federal award to an applicant because it determines that the applicant does not meet the minimum qualification standards as described in § 200.206(a)(2). The Federal agency must report that determination only if all of the following apply:

(1) The only basis for the determination is the applicant's prior record of performance on administering Federal awards or its record of integrity and business ethics, as described in § 200.206(a)(2) (meaning, the applicant was determined to be qualified based on all factors other than those two standards); and

(2) The total Federal share of the Federal award was expected to exceed the simplified acquisition threshold over the period of performance.

(b) The Federal agency is not required to report a determination that an applicant is not qualified for a Federal award if they issue the Federal award in accordance with the requirements of § 200.208.

(c) If the Federal agency reports a determination that an applicant is not qualified for a Federal award, the Federal agency also must notify the applicant that:

(1) The determination was made and reported in *SAM.gov*. The notification from the Federal agency to the applicant should also provide a brief explanation for the determination;

(2) The information will be kept in the system for a period of five years from the date of the determination and then archived (See section 872 of Public Law 110-417, as amended, codified at 41 U.S.C. 2313);

(3) Each Federal agency that considers making a Federal award to the applicant during that five-year period will consider that information in determining the applicant's qualification to receive a Federal award when the total Federal share of a Federal award is expected to exceed the simplified acquisition threshold over the period of performance;

(4) The applicant may review the responsibility and qualification records accessible in *SAM.gov* and comment on any information the system contains about the applicant; and

(5) Federal agencies must consider the applicant's comments in determining whether the applicant is qualified for a future Federal award.

(d) If the Federal agency enters information into *SAM.gov* about a determination that an applicant is not qualified for a Federal award and subsequently:

(1) Learns that any of that information is erroneous, the Federal agency must correct the information in the system within three business days; and

(2) Obtains an update to that information that could be helpful to other Federal agencies, the Federal agency should amend the information in the system within 30 days.

(e) Federal agencies must not post any information that will be made publicly available in the non-public segment of the responsibility and qualification records that is covered by a disclosure exemption under the Freedom of Information Act. If a recipient asserts within seven calendar days to a Federal agency that some or all of the publicly available information is covered by a disclosure exemption under the Freedom of Information Act, the Federal agency that posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

§ 200.214 Suspension and debarment.

Recipients and subrecipients are subject to the nonprocurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, as well as 2 CFR part 180. The regulations in 2 CFR part 180 restrict making Federal awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from receiving or participating in Federal awards.

§ 200.215 Never contract with the enemy.

Federal agencies, recipients, and subrecipients are subject to the guidance implementing Never Contract with the Enemy in 2 CFR part 183. The guidance in 2 CFR part 183 affects covered contracts, grants, and cooperative agreements that are expected to exceed $50,000 during the period of performance, are performed outside the United States and its territories, and are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

§ 200.216 Prohibition on certain telecommunications and video surveillance equipment or services.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

(1) Procure or obtain covered telecommunications equipment or services;

(2) Extend or renew a contract to procure or obtain covered telecommunications equipment or services; or

(3) Enter into a contract (or extend or renew a contract) to procure or obtain covered telecommunications equipment or services.

(b) As described in section 889 of Public Law 115-232, "covered telecommunications equipment or services" means any of the following:

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment;

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country;

(c) For the purposes of this section, "covered telecommunications equipment or services" also include systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

(d) In implementing the prohibition under section 889 of Public Law 115-232, heads of executive agencies administering loan, grant, or subsidy programs must prioritize available funding and technical support to assist affected businesses, institutions, and organizations as is reasonably necessary for those affected entities to transition from covered telecommunications equipment or services, to procure replacement equipment or services, and to ensure that communications service to users and customers is sustained.

(e) When the recipient or subrecipient accepts a loan or grant, it is certifying that it will comply with the prohibition on covered telecommunications equipment and services in this section. The recipient or subrecipient is not required to certify that funds will not be expended on covered telecommunications equipment or services beyond the certification provided upon accepting the loan or grant and those provided upon submitting payment requests and financial reports.

(f) For additional information, see section 889 of Public Law 115-232 and § 200.471.

§ 200.217 Whistleblower protections.

An employee of a recipient or subrecipient must not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (a)(2) of 41 U.S.C. 4712 information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant. The recipient and subrecipient must inform their employees in writing of employee whistleblower rights and protections under 41 U.S.C. 4712. See statutory requirements for whistleblower protections at 10 U.S.C. 4701, 41 U.S.C. 4712, 41 U.S.C. 4304, and 10 U.S.C. 4310.

Subpart D—Post Federal Award Requirements

§ 200.300 Statutory and national policy requirements.

(a) The Federal agency or pass-through entity must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, applicable Federal statutes and regulations—including provisions protecting free speech, religious liberty, public welfare, and the environment, and those prohibiting discrimination—and the requirements of this part. The Federal agency or pass-through entity must communicate to a recipient or subrecipient all relevant requirements, including those contained in general appropriations provisions, and incorporate them directly or by reference in the terms and conditions of the Federal award.

(b) In administering Federal awards that are subject to a Federal statute prohibiting discrimination based on sex, the Federal agency or pass-through entity must ensure that the award is administered in a way that does not unlawfully discriminate based on sexual orientation or gender identity if the statute's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity consistent with the Supreme Court's reasoning in *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020).

(c) In administering awards in accordance with the U.S. Constitution, the Federal agency must take account of the heightened constitutional scrutiny that may apply under the Constitution's Equal Protection guarantee for government action that provides differential treatment based on protected characteristics.

§ 200.301 Performance measurement.

(a) The Federal agency must measure the recipient's performance to show achievement of program goals and objectives, share lessons learned, improve program outcomes, and foster the adoption of promising practices. The Federal agency should establish program goals and objectives during program planning and design (see § 200.202). The Federal agency should clearly communicate the specific program goals and objectives in the Federal award, including how the Federal agency will measure the achievement of the goals and objectives, the expected timeline, and information on how the recipient must report the achievement of program goals and objectives. The Federal agency should also clearly communicate in the Federal award any expected outcomes (such as outputs, service performance, or public impacts of any of these), indicators, targets, baseline data, or data collections that the recipient is responsible for measuring and reporting. The Federal agency must ensure all requirements for measuring performance align with the Federal agency's strategic goals, strategic objectives, or performance goals relevant to a program (see OMB Circular A-11, Preparation, Submission, and Execution of the Budget Part 6).

(b) When establishing performance reporting frequency and content, the Federal agency should consider what information will be necessary to measure the recipient's progress, to identify promising practices of recipients, and build the evidence upon which the Federal agency makes program and performance decisions. The Federal agency should not require additional information that is not necessary for measuring program performance and evaluation. See § 200.329 for more information on reporting program performance.

(c) The Federal agency should also specify in the Federal award any requirements of the recipients' participation in federally funded evaluations.

§ 200.302 Financial management.

(a) Each State must expend and account for the Federal award in accordance with State laws and procedures for expending and accounting for the State's funds. All recipient and subrecipient financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the Federal award, must be sufficient to permit the preparation of reports required by the terms and conditions; and tracking expenditures to establish that funds have been used in accordance with Federal statutes, regulations, and the terms and conditions of the Federal award. See § 200.450.

(b) The recipient's and subrecipient's financial management system must provide for the following (see §§ 200.334, 200.335, 200.336, and 200.337):

(1) Identification of all Federal awards received and expended and the Federal programs under which they were received. Federal program and Federal award identification must include, as applicable, the Assistance Listings title and number, Federal award identification number, year the Federal award was issued, and name of the Federal agency or pass-through entity.

(2) Accurate, current, and complete disclosure of the financial results of each Federal award or program in accordance with the reporting requirements in §§ 200.328 and 200.329. When a Federal agency or pass-through entity requires reporting on an accrual basis from a recipient or subrecipient that maintains its records other than on an accrual basis, the recipient or subrecipient must not be required to establish an accrual accounting system. This recipient or subrecipient may develop accrual data for its reports based on an analysis of the documentation on hand.

(3) Maintaining records that sufficiently identify the amount, source, and expenditure of Federal funds for Federal awards. These records must contain information necessary to identify Federal awards, authorizations, financial obligations, unobligated balances, as well as assets, expenditures, income, and interest. All records must be supported by source documentation.

(4) Effective control over and accountability for all funds, property, and assets. The recipient or subrecipient must safeguard all assets and ensure they are used solely for authorized purposes. See § 200.303.

(5) Comparison of expenditures with budget amounts for each Federal award.

(6) Written procedures to implement the requirements of § 200.305.

(7) Written procedures for determining the allowability of costs in accordance with subpart E and the terms and conditions of the Federal award.

§ 200.303 Internal controls.

The recipient and subrecipient must:

(a) Establish, document, and maintain effective internal control over the Federal award that provides reasonable assurance that the recipient or subrecipient is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should align with the guidance in "Standards for Internal Control in the Federal Government" issued by the Comptroller General of the United States or the "Internal Control-Integrated Framework" issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(b) Comply with the U.S. Constitution, Federal statutes, regulations, and the terms and conditions of the Federal award.

(c) Evaluate and monitor the recipient's or subrecipient's compliance with statutes, regulations, and the terms and conditions of Federal awards.

(d) Take prompt action when instances of noncompliance are identified.

(e) Take reasonable cybersecurity and other measures to safeguard information including protected personally identifiable information (PII) and other types of information. This also includes information the Federal agency or pass-through entity designates as sensitive or other information the recipient or subrecipient considers sensitive and is consistent with applicable Federal, State, local, and tribal laws regarding privacy and responsibility over confidentiality.

§ 200.304 Bonds.

(a) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal agency may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(b) The Federal agency may require adequate fidelity bond coverage where the recipient lacks coverage to protect the interest of the Federal Government.

(c) Where bonds, insurance, or both are required in the situations described above, the bonds and insurance must be obtained from companies holding certificates of authority issued by the U.S. Department of Treasury (see 31 CFR part 223).

§ 200.305 Federal payment.

(a) ***Payments for States.*** Payments for States are governed by Treasury-State Cash Management Improvement Act (CMIA) agreements and default procedures codified at 31 CFR part 205 and Treasury Financial Manual (TFM) 4A-2000, "Overall Disbursing Rules for All Federal Agencies."

(b) ***Payments for recipients and subrecipients other than States.*** For recipients and subrecipients other than States, payment methods must minimize the time elapsing between the transfer of funds from the Federal agency or the pass-through entity and the disbursement of funds by the recipient or subrecipient regardless of whether the payment is made by electronic funds transfer or by other means. See § 200.302(b)(6). Except as noted in this part, the Federal agency must require recipients to use only OMB-approved, government-wide information collections to request payment.

(1) The recipient or subrecipient must be paid in advance, provided it maintains or demonstrates the willingness to maintain both written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient or subrecipient, and financial management systems that meet the standards for fund control and accountability as established in this part. Advance payments to a recipient or subrecipient must be limited to the minimum amounts needed and be timed with actual, immediate cash requirements of the recipient or subrecipient in carrying

out the purpose of the approved program or project. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the recipient or subrecipient for direct program or project costs and the proportionate share of any allowable indirect costs. The recipient or subrecipient must make timely payments to contractors in accordance with the contract provisions.

(2) Whenever possible, advance payment requests by the recipient or subrecipient must be consolidated to cover anticipated cash needs for all Federal awards received by the recipient from the awarding Federal agency or pass-through entity.

(i) Advance payment mechanisms must comply with 31 CFR part 208 and include, but are not limited to, Treasury checks and electronic funds transfers.

(ii) Recipients and subrecipients must be authorized to submit payment requests as often as necessary when electronic fund transfers are used or at least monthly when electronic transfers are not used. See Electronic Fund Transfer Act (15 U.S.C. 1693-1693r).

(3) Reimbursement is preferred when the requirements in paragraph (b) cannot be met, when the Federal agency or pass-through entity sets a specific condition per § 200.208, when requested by the recipient or subrecipient, when a Federal award is for construction, or when a significant portion of the construction project is accomplished through private market financing or Federal loans and the Federal award constitutes a minor portion of the project. When the reimbursement method is used, the Federal agency or pass-through entity must make payment within 30 calendar days after receipt of the payment request unless the Federal agency or pass-through entity reasonably believes the request to be improper.

(4) If the recipient or subrecipient cannot meet the criteria for advance payments and the Federal agency or pass-through entity has determined that reimbursement is not feasible because the recipient or subrecipient lacks sufficient working capital, the Federal agency or pass-through entity may provide cash on a working capital advance basis. Under this procedure, the Federal agency or pass-through entity must advance cash payments to the recipient or subrecipient to cover its estimated disbursement needs for an initial period generally aligned to the recipient's or subrecipient's disbursing cycle. After that, the Federal agency or pass-through entity must reimburse the recipient or subrecipient for its actual cash disbursements. Use of the working capital advance payment method requires that the pass-through entity provide timely advance payments to any subrecipients to meet the subrecipient's actual cash disbursements. The pass-through entity must not use the working capital advance method of payment if the reason for using this method is the unwillingness or inability of the pass-through entity to provide timely advance payments to the subrecipient to meet the subrecipient's actual cash disbursements.

(5) If available, the recipient or subrecipient must disburse funds available from program income (including repayments to a revolving fund), rebates, refunds, contract settlements, audit recoveries, and interest earned on Federal funds before requesting additional cash payments.

(6) Payments for allowable costs must not be withheld at any time during the period of performance unless required by Federal statute, regulations, or in one of the following instances:

(i) The recipient or subrecipient has failed to comply with the terms and conditions of the Federal award; or

(ii) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A-129, "Policies for Federal Credit Programs and Non-Tax Receivables." Under such conditions, the Federal agency or pass-through entity may, after providing reasonable notice, withhold payments to the recipient or subrecipient for financial obligations incurred after a specified date until the conditions are corrected or the debt is repaid to the Federal Government.

(7) A payment withheld for failure to comply with the terms and conditions of the Federal award must be released to the recipient or subrecipient upon subsequent compliance. When a Federal award is suspended, payment adjustments must be made in accordance with § 200.343.

(8) A payment must not be made to a recipient or subrecipient for amounts that the recipient or subrecipient withholds from contractors to assure satisfactory completion of work. Payment must be made when the recipient or subrecipient disburses the withheld funds to the contractors or to escrow accounts established to ensure satisfactory completion of work.

(9) The Federal agency or pass-through entity must not require separate depository accounts for funds provided to the recipient or subrecipient or establish any eligibility requirements for depositories. However, the recipient or subrecipient must be able to account for all Federal funds received, obligated, and expended.

(10) Advance payments of Federal funds must be deposited and maintained in insured accounts whenever possible.

(11) The recipient or subrecipient must maintain advance payments of Federal funds in interest-bearing accounts unless one of the following applies:

(i) The recipient or subrecipient receives less than $250,000 in Federal funding per year;

(ii) The best available interest-bearing account would not reasonably be expected to earn interest in excess of $500 per year on Federal cash balances;

(iii) The depository would require an average or minimum balance so high that it would not be feasible with the expected Federal and non-Federal cash resources;

(iv) A foreign government or banking system prohibits or precludes interest-bearing accounts; or

(v) An interest-bearing account is not readily accessible (for example, due to public or political unrest in a foreign country).

(12) The recipient or subrecipient may retain up to $500 per year of interest earned on Federal funds to use for administrative expenses of the recipient or subrecipient. Any additional interest earned on Federal funds must be returned annually to the Department of Health and Human Services Payment Management System (PMS) through either the Automated Clearing House (ACH) network or a Fedwire Funds Service payment. All interest in excess of $500 per year must be returned to PMS regardless of whether the recipient or subrecipient was paid through PMS. Instructions for returning interest can be found at *https://pms.psc.gov/grant-recipients/returning-funds-interest.html*.

(13) All other Federal funds must be returned to the payment system of the Federal agency. Returns should follow the instructions provided by the Federal agency. All returns to PMS should follow the instructions provided at *https://pms.psc.gov/grant-recipients/returning-funds-interest.html*.

§ 200.306 Cost sharing.

(a) Voluntary committed cost sharing is not expected under Federal research grants. The Federal agency may not use voluntary committed cost sharing as a factor during the merit review of applications or proposals for Federal research grants unless authorized by Federal statutes or agency regulations and specified in the notice of funding opportunity. Federal agencies are also discouraged from using voluntary committed cost sharing as a factor during the merit review of applications for other Federal financial assistance programs. If voluntary committed cost sharing is used for this purpose for other programs, the notice of funding opportunity must specify how an applicant's proposed cost sharing will be considered. See §§ 200.414, 200.204, and Appendix I.

(b) For all Federal awards, the Federal agency or pass-through entity must accept any cost sharing funds (including cash and third-party in-kind contributions, and also including funds committed by the recipient, subrecipient, or third parties) as part of the recipient's or subrecipient's contributions to a program when the funds:

(1) Are verifiable in the recipient's or subrecipient's records;

(2) Are not included as contributions for any other Federal award;

(3) Are necessary and reasonable for achieving the objectives of the Federal award;

(4) Are allowable under subpart E;

(5) Are not paid by the Federal Government under another Federal award, except where the program's Federal authorizing statute specifically provides that Federal funds made available for the program can be applied to cost sharing requirements of other Federal programs;

(6) Are provided for in the approved budget when required by the Federal agency; and

(7) Conform to other applicable provisions of this part.

(c) Unrecovered indirect costs, including indirect costs on cost sharing, may be included as part of cost sharing with the prior approval of the Federal agency or pass-through entity. Unrecovered indirect cost means the difference between the amount charged to the Federal award and the amount which could have been charged to the Federal award under the recipient's or subrecipient's approved indirect cost rate.

(d) Values for recipient or subrecipient contributions of services and property must be established in accordance with the cost principles in subpart E. When a Federal agency or pass-through entity authorizes the recipient or subrecipient to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing must be the lesser of paragraph (d)(1) or (2) below.

(1) The value of the remaining life of the property recorded in the recipient's or subrecipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal agency or pass-through may approve using the current fair market value of the donated property, even if it exceeds the value described in paragraph (d)(1) at the time of donation.

(e) Volunteer services furnished by third-party professional and technical personnel, consultants, and other labor may be counted as cost sharing if the service is necessary for the program. Rates for third-party volunteer services must be consistent with those paid for similar work by the recipient or subrecipient. When the required skills are not found in the recipient's or subrecipient's workforce, rates must be

consistent with those paid for similar work in the labor market where the recipient or subrecipient competes for the services involved. In either case, fringe benefits that are allowable, allocable, and reasonable may be included in the valuation.

(f) When a third-party organization furnishes the services of an employee, these services must be valued at the employee's regular rate of pay plus an amount of fringe benefits that is reasonable, necessary, allocable, and otherwise allowable, and indirect costs at either the third-party organization's approved federally-negotiated indirect cost rate or, a rate in accordance with § 200.414(d) provided these services employ the same skill(s) for which the employee is normally paid. Where donated services are treated as indirect costs, indirect cost rates will separate the value of the donated services so that reimbursement for the donated services will not be made.

(g) Donated property from third parties may include items such as equipment, office supplies, laboratory supplies, or workshop and classroom supplies. The assessed value of donated property included as cost sharing must not exceed the property's fair market value at the time of the donation.

(h) The method used for determining the value of donated equipment, buildings, and land for which title passes to the recipient or subrecipient may differ according to the following:

(1) If the purpose of the Federal award is to assist the recipient or subrecipient in acquiring equipment, buildings, or land, the aggregate value of the donated property may be claimed as cost sharing.

(2) If the purpose of the Federal award is to support activities that require the use of equipment, buildings, or land, only depreciation charges for equipment and buildings may be made. However, the fair market value of equipment or other capital assets and fair rental charges for land may be allowed if provided in the terms and conditions of the Federal award. See § 200.420.

(i) The value of donated property must be determined in accordance with the accounting policies of the recipient or subrecipient with the following qualifications:

(1) The value of donated land and buildings must not exceed its fair market value at the time of donation to the recipient or subrecipient as established by an independent appraiser (for example, certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient or subrecipient as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601-4655) except as provided in the implementing regulations at 49 CFR part 24, "Uniform Relocation Assistance And Real Property Acquisition For Federal And Federally-Assisted Programs."

(2) The value of donated equipment must not exceed the fair market value at the time of donation.

(3) The value of donated space must not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment must not exceed its fair rental value.

(j) The fair market value of third-party in-kind contributions must be documented and, to the extent feasible, supported by the same methods used internally by the recipient or subrecipient.

(k) For institutions of higher education (IHE), voluntary uncommitted cost sharing should be treated differently from mandatory or voluntary committed cost sharing. Voluntary uncommitted cost sharing should not be included in the organized research base for computing the indirect cost rate or reflected in any allocation of indirect costs. Voluntary uncommitted cost sharing includes faculty-donated additional

time above that agreed to as part of the award. See OMB memorandum M-01-06, dated January 5, 2001, Clarification of OMB A-21 Treatment of Voluntary Uncommitted Cost Sharing and Tuition Remission Costs.

§ 200.307 Program income.

(a) ***General.*** The recipient or subrecipient is encouraged to earn income to defray program costs when appropriate. Program income must be used for the original purpose of the Federal award. Program income earned during the period of performance may only be used for costs incurred during the period of performance or allowable closeout costs. See § 200.472(b). Program income must be expended prior to requesting additional Federal funds. Program income exceeding amounts specified in the Federal award may be added to or deducted from the total allowable costs in accordance with the terms and conditions of the Federal award.

(b) ***Use of program income.*** There are three methods of applying program income: deduction; addition; and cost-sharing. The Federal agency should specify what program income method(s) will be used in the terms and conditions of the Federal award. The deduction method will be used if the Federal agency does not specify a method for applying program income. When no program income method is specified in the Federal award, prior approval is required to use the addition or cost sharing methods. However, the addition method will be used when no method is specified for awards made to institutions of higher education (IHE) and nonprofit research institutions. In specifying alternatives to the deduction and addition methods, the Federal agency may distinguish between income earned by the recipient and income earned by subrecipients as well as between the sources, kinds, or amounts of income.

(1) ***Deduction.*** Program income is deducted from the total allowable costs, reducing the overall total amount of the Federal award.

(2) ***Addition.*** Program income is added to the total allowable costs, increasing the overall total amount of the Federal award.

(3) ***Cost sharing.*** Program income is used to meet the Federal award's cost sharing requirement.

(c) ***Income after the period of performance.*** There are no requirements governing the disposition of program income earned after the end of the period of performance of the Federal award unless stipulated in the Federal agency regulations or the terms and conditions of the Federal award. The Federal agency may negotiate agreements with recipients regarding appropriate uses of income earned after the end of the period of performance as part of the closeout process. See § 200.344.

(d) ***Cost of generating program income.*** If authorized by Federal regulations or the Federal award, costs incidental to generating program income may be deducted from gross income to determine program income, provided these costs have not been charged to the Federal award.

(e) ***Not considered program income.*** The following are not considered program income unless specified in Federal statutes, regulations, or the terms and conditions of the Federal award:

(1) ***Governmental revenues.*** Taxes, special assessments, levies, fines, and similar revenues the recipient or subrecipient raised.

(2) ***Property.*** Proceeds from the sale of real property, equipment, or supplies. The proceeds must be handled in accordance with the requirements of the Property Standards of §§ 200.311, 200.313, 200.314, or as explicitly identified in Federal statutes, regulations, or the terms and conditions of the Federal award.

(3) ***License fees and royalties.*** License fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions made under the Federal award subject to 37 CFR part 401.

§ 200.308 Revision of budget and program plans.

(a) ***Approved budget in general.*** The approved budget for the Federal award summarizes the financial aspects of the project or program as approved during the Federal award process. It may include the Federal share and non-Federal share or only the Federal share, as determined by the Federal agency or pass-through entity.

(b) ***Deviations from approved budget.*** The recipient or subrecipient must report deviations from the approved budget, project or program scope, or objective(s) in accordance with § 200.329. The recipient or subrecipient must request prior approvals from the Federal agency or pass-through entity for budget and program plan revisions in accordance with this section.

(c) ***Requesting approval for budget revisions.*** When requesting approval for budget revisions, the recipient or subrecipient must use the same format for budget information that was used in their application, except if the Federal agency has approved an alternative format. Alternative formats may include the use of electronic systems, email, or other agency-approved mechanisms that document the request.

(d) ***Federal agency or pass-through entity review.*** The Federal agency or pass-through entity must review the request for budget or program plan revision and should notify the recipient or subrecipient whether the revisions have been approved within 30 days of receipt of the request. The Federal agency or pass-through entity must inform the recipient or subrecipient in writing when a decision can be expected if more than 30 days is required for a review.

(e) ***Limitation on other prior approval requirements.*** Unless specified in this guidance, the Federal agency must not impose additional prior approval requirements without OMB approval. See also §§ 200.102 and 200.407.

(f) ***Revisions Requiring Prior Approval.*** A recipient or subrecipient must request prior written approval from the Federal agency or pass-through entity for the following program and budget-related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in key personnel (including employees and contractors) that are identified by name or position in the Federal award.

(3) The disengagement from a project for more than three months, or a 25 percent reduction in time and effort devoted to the Federal award over the course of the period of performance, by the approved project director or principal investigator.

(4) The inclusion, unless waived by the Federal agency, of costs that require prior approval in accordance with subpart E as applicable.

(5) The transfer of funds budgeted for participant support costs to other budget categories.

(6) Subaward activities not proposed in the application and approved in the Federal award. A change of subrecipient only requires prior approval if the Federal agency or pass-through entity includes the requirement in the terms and conditions of the Federal award. In general, a Federal agency or pass-through entity should not require prior approval of a change of subrecipient unless the inclusion was a determining factor in the merit review or eligibility process. This requirement does not apply to procurement transactions for goods and services.

(7) Changes in the total approved cost-sharing amount.

(8) The need arises for additional Federal funds to complete the project. Before providing approval, the Federal agency must ensure that adequate funds are available to avoid a violation of the Antideficiency Act.

(9) Transferring funds between the construction and non-construction work under a Federal award.

(10) A no-cost extension (meaning, an extension of time that does not require the obligation of additional Federal funds) of the period of performance, other than any one-time extension authorized by the Federal agency in accordance with paragraph (g)(2). All requests for no-cost extensions should be submitted at least 10 calendar days before the conclusion of the period of performance. The Federal agency may approve multiple no-cost extensions under a Federal award if not prohibited by Federal statute or regulation.

(g) ***Waiver of certain prior approvals.*** Except for the requirements listed in paragraphs (f)(1) through (10), the Federal agency is authorized to waive other cost-related and administrative prior written approval requirements contained in subparts D and E. Such waivers may include authorizing recipients to do one or more of the following:

(1) ***Pre-award costs.*** Incur project costs 90 calendar days before the Federal award date. Expenses incurred more than 90 calendar days before the Federal award date require prior approval of the Federal agency. All costs incurred before the Federal award date are at the recipient's own risk (*for example,* the Federal agency is not required to reimburse such costs if the recipient does not receive the Federal award or if the Federal award is less than anticipated and inadequate to cover such costs). Pre-award costs must be charged to the initial budget period of the Federal award unless otherwise specified by the Federal agency. See also § 200.458.

(2) ***One-time extensions.*** Initiate a one-time extension of the period of performance by up to 12 months unless one or more of the conditions outlined in paragraphs (g)(2)(i) through (iii) of this section apply. Prior approval is not required if a recipient is authorized in the terms and conditions of the Federal award to initiate a one-time extension. However, the recipient must notify the Federal agency in writing with the supporting justification and a revised period of performance at least 10 calendar days before the conclusion of the period of performance. A one-time extension may not be exercised for the sole purpose of using unobligated balances. This paragraph does not preclude the Federal agency from approving further no-cost extensions to the Federal award. One-time extensions require prior approval from the Federal agency when:

(i) The terms and conditions of the Federal award prohibit the extension;

(ii) The extension requires additional Federal funds; or

(iii) The extension involves any change in the approved scope of the project.

(3) ***Unobligated Balances.*** Carry forward unobligated balances to subsequent budget periods.

(h) ***Prior approvals for research awards.*** The prior approval requirements for the actions described in paragraph (g) of this section are automatically waived for Federal awards that support research unless stipulated in the Federal agency's regulations or terms and conditions of the Federal award. However, one-time extensions require the Federal agency's prior approval when one of the conditions in paragraph (g)(2) of this section applies.

(i) ***Transfer of funds.*** The Federal agency must not permit a transfer of funds that would cause any Federal appropriation to be used for purposes other than those consistent with the appropriation. The Federal agency may also, at its option, restrict the transfer of funds among direct cost categories (for example, personnel, travel, and supplies) or programs, functions, and activities when:

(1) The Federal share of the Federal award exceeds the simplified acquisition threshold; and

(2) The cumulative amount of a transfer exceeds or is expected to exceed 10 percent of the total budget, including cost share, as last approved by the Federal agency.

§ 200.309 Modifications to Period of Performance.

When the Federal agency or pass-through entity approves an extension to a Federal award, or if a recipient extends under § 200.308(g)(2), the period of performance will be amended to end at the completion of the extension. If termination occurs, the period of performance will be amended to end upon the effective date of termination. The start date of a renewal award begins a new and distinct period of performance.

PROPERTY STANDARDS

§ 200.310 Insurance coverage.

The recipient or subrecipient must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved with Federal funds as provided to property and equipment owned by the recipient or subrecipient. Insurance is not required for Federally owned property unless required by the terms and conditions of the Federal award.

§ 200.311 Real property.

(a) ***Title.*** Subject to the requirements and conditions set forth in this section, title to real property acquired or improved under the Federal award will vest upon acquisition in the recipient or subrecipient.

(b) ***Use.*** Except as otherwise provided by Federal statutes or the Federal agency, real property must be used for the originally authorized purpose as long as it is needed for that purpose. While the property is being used for the originally authorized purpose, the recipient or subrecipient must not dispose of or encumber its title or other interests except as provided by the Federal agency. Easements for utility, cable, and similar services that benefit the real property and are consistent with the authorized use are not considered an encumbrance.

(c) ***Appraisals.*** When an appraisal of real property is required and obtained by the recipient or subrecipient, it must be conducted by an independent appraiser (for example, certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient or subrecipient as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601-4655) except as provided in the implementing regulations at 49 CFR part 24, "Uniform Relocation Assistance And Real Property Acquisition For Federal And Federally-Assisted Programs."

(d) ***Disposition.*** When real property is no longer needed for the originally authorized purpose, the recipient or subrecipient must obtain disposition instructions from the Federal agency or pass-through entity. The instructions must specify one of the following disposition methods:

(1) ***Retain title after compensating the Federal agency.*** When the recipient or subrecipient retains title to the property, it must pay the Federal agency an amount calculated by multiplying the percentage of the Federal agency's contribution towards the original purchase (and costs of any improvements) by the current fair market value of the property. However, in situations where the recipient or subrecipient is disposing of real property acquired or improved with the Federal award and acquiring replacement real property under the same Federal award, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) ***Sell the property and compensate the Federal agency.*** When a recipient or subrecipient sells the property, it must pay the Federal agency an amount calculated by multiplying the percentage of the Federal agency's contribution towards the original purchase (and cost of any improvements) by the proceeds of the sale after deducting any actual and reasonable expenses paid to sell or fix up the property for sale. When the Federal award has not been closed out, the net proceeds from the sale may be offset against the original cost of the property. When directed to sell the property, the recipient or subrecipient must sell the property utilizing procedures that provide for competition to the extent practicable and that result in the highest possible return.

(3) ***Transfer title to the Federal agency or a third party designated/approved by the Federal agency.*** When a recipient or subrecipient transfers title to the property to a Federal agency or third party designated or approved by the Federal agency, the recipient or subrecipient is entitled to be paid an amount calculated by multiplying the percentage of the recipient's or subrecipient's contribution towards the original purchase of the real property (and cost of any improvements) by the current fair market value of the property.

§ 200.312 Federally owned and exempt property.

(a) Title to Federally owned property remains vested in the Federal Government. The recipient or subrecipient must submit an inventory listing of Federally owned property in its custody to the Federal agency or pass-through entity on an annual basis. The recipient or subrecipient must request disposition instructions from the Federal agency or pass-through entity upon completion of the Federal award or when the property is no longer needed.

(b) If the Federal agency has no further need for the property, it must declare the property excess and report it for disposal to the appropriate Federal disposal authority unless the Federal agency has statutory authority to dispose of the property by alternative methods (*for example,* the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(i)). The Federal agency or pass-through entity must issue appropriate instructions to the recipient or subrecipient.

(c) Exempt property means property acquired under the Federal award where the Federal agency has chosen to vest title to the property to the recipient or subrecipient without further responsibility to the Federal Government. The Federal agency may only exercise this option when permitted by Federal statute and set forth in the terms and conditions of the Federal award. Absent statutory authority and specific terms and conditions of the Federal award, the title to exempt property acquired under the Federal award remains with the Federal Government.

§ 200.313 Equipment.

See also § 200.439.

(a) ***Title.*** Title to equipment acquired under the Federal award will vest upon acquisition in the recipient or subrecipient subject to the conditions of this section. This title must be a conditional title unless a Federal statute specifically authorizes the Federal agency to vest title in the recipient or subrecipient without further responsibility to the Federal Government (and the Federal agency elects to do so). A conditional title means a clear title is withheld by the Federal agency until conditions and requirements specified in the terms and conditions of a Federal award have been fulfilled. Title for equipment vested in a recipient or subrecipient is subject to the following conditions:

(1) Use the equipment for the authorized purposes of the project during the period of performance or until the property is no longer needed for the purposes of the project.

(2) While the equipment is being used for the originally-authorized purpose, the recipient or subrecipient must not dispose of or encumber its title or other interests without the approval of the Federal agency or pass-through entity.

(3) Use and dispose of the property in accordance with paragraphs (b), (c), and (e) of this section.

(b) ***General.*** A State must use, manage and dispose of equipment acquired under a Federal award in accordance with State laws and procedures. Indian Tribes must use, manage, and dispose of equipment acquired under a Federal award in accordance with tribal laws and procedures. If such laws and procedures do not exist, Indian Tribes must follow the guidance in this section. Other recipients and subrecipients, including subrecipients of a State or Indian Tribe, must follow paragraphs (c) through (e) of this section.

(c) ***Use.***

(1) The recipient or subrecipient must use equipment for the project or program for which it was acquired and for as long as needed, whether or not the project or program continues to be supported by the Federal award. The recipient or subrecipient must not encumber the equipment without prior approval of the Federal agency or pass-through entity. The Federal agency may require the submission of the applicable common forms for reporting on equipment. When no longer needed for the original project or program, the equipment may be used in other activities in the following order of priority:

(i) Activities under other Federal awards from the Federal agency that funded the original program or project; then

(ii) Activities under Federal awards from other Federal agencies. These activities include consolidated equipment for information technology systems.

(2) During the time that equipment is used on the project or program for which it was acquired, the recipient or subrecipient must also make the equipment available for use on other programs or projects supported by the Federal Government, provided that such use will not interfere with the purpose for which it was originally acquired. First preference for other use of the equipment must be given to other programs or projects supported by the Federal agency that financed the equipment. Second preference must be given to programs or projects under Federal awards from other Federal agencies. Use for non-federally-funded projects is also permissible, provided such use will not interfere with the purpose for which it was originally acquired. The recipient or subrecipient should consider charging user fees as appropriate.

(3) Notwithstanding the encouragement in § 200.307 to earn program income, the recipient or subrecipient must not use equipment acquired with the Federal award to provide services for a fee that is less than a private company would charge for similar services unless specifically authorized by Federal statute. This restriction is effective as long as the Federal Government retains an interest in the equipment.

(4) When acquiring replacement equipment, the recipient or subrecipient may either trade-in or sell the equipment and use the proceeds to offset the cost of the replacement equipment.

(d) ***Management requirements.*** Regardless of whether equipment is acquired in part or its entirety under the Federal award, the recipient or subrecipient must manage equipment (including replacement equipment) utilizing procedures that meet the following requirements:

(1) Property records must include a description of the property, a serial number or another identification number, the source of funding for the property (including the FAIN), the title holder, the acquisition date, the cost of the property, the percentage of the Federal agency contribution towards the original purchase, the location, use and condition of the property, and any disposition data including the date of disposal and sale price of the property. The recipient and subrecipient are responsible for maintaining and updating property records when there is a change in the status of the property.

(2) A physical inventory of the property must be conducted, and the results must be reconciled with the property records at least once every two years.

(3) A control system must be in place to ensure safeguards for preventing property loss, damage, or theft. Any loss, damage, or theft of equipment must be investigated. The recipient or subrecipient must notify the Federal agency or pass-through entity of any loss, damage, or theft of equipment that will have an impact on the program.

(4) Regular maintenance procedures must be in place to ensure the property is in proper working condition.

(5) If the recipient or subrecipient is authorized or required to sell the property, proper sales procedures must be in place to ensure the highest possible return.

(e) ***Disposition.*** When equipment acquired under a Federal award is no longer needed for the original project, program, or for other activities currently or previously supported by a Federal agency, the recipient or subrecipient must request disposition instructions from the Federal agency or pass-through entity if required by the terms and conditions of the Federal award. Disposition of the equipment will be made as follows, in accordance with Federal agency or pass-through entity disposition instructions:

(1) Equipment with a current fair market value of $10,000 or less (per unit) may be retained, sold, or otherwise disposed of with no further responsibility to the Federal agency or pass-through entity.

(2) Except as provided in § 200.312(b), or if the Federal agency or pass-through entity fails to provide requested disposition instructions within 120 days, items of equipment with a current fair market value in excess of $10,000 (per-unit) may be retained or sold by the recipient or subrecipient. However, the Federal agency is entitled to an amount calculated by multiplying the percentage of the Federal agency's contribution towards the original purchase by the current market value or proceeds from the sale. If the equipment is sold, the Federal agency or pass-through entity may permit the recipient or subrecipient to retain, from the Federal share, $1,000 of the proceeds to cover expenses associated with the selling and handling of the equipment.

(3) The recipient or subrecipient may transfer title to the property to the Federal Government or to an eligible third party provided that the recipient or subrecipient must be entitled to compensation for its attributable percentage of the current fair market value of the property.

(4) In cases where a recipient or subrecipient fails to take appropriate disposition actions, the Federal agency or pass-through entity may direct the recipient or subrecipient to take disposition actions.

(f) ***Equipment retention.*** When included in the terms and conditions of the Federal award, the Federal agency may permit the recipient to retain equipment, or authorize a pass-through entity to permit the subrecipient to retain equipment, with no further obligation to the Federal Government unless prohibited by Federal statute or regulation.

§ 200.314 Supplies.

See also § 200.453.

(a) Title to supplies acquired under the Federal award will vest upon acquisition in the recipient or subrecipient. When there is a residual inventory of unused supplies exceeding $10,000 in aggregate value at the end of the period of performance, and the supplies are not needed for any other Federal award, the recipient or subrecipient may retain or sell the unused supplies. Unused supplies means supplies that are in new condition, not having been used or opened before. The aggregate value of unused supplies consists of all supply types, not just like-item supplies. The Federal agency or pass-through entity is entitled to compensation in an amount calculated by multiplying the percentage of the Federal agency's or pass-through entity's contribution towards the cost of the original purchase(s) by the current market value or proceeds from the sale. If the supplies are sold, the Federal agency or pass-through entity may permit the recipient or subrecipient to retain, from the Federal share, $1,000 of the proceeds to cover expenses associated with the selling and handling of the supplies.

(b) Unless expressly authorized by Federal statute, the recipient or subrecipient must not use supplies acquired with the Federal award to provide services for a fee that is less than a private company would charge for similar services. This restriction is effective as long as the Federal Government retains an interest in the supplies or as authorized by Federal statute.

§ 200.315 Intangible property.

(a) Title to intangible property acquired under a Federal award vests upon acquisition in the recipient or subrecipient. The recipient or subrecipient must use that intangible property for the originally authorized purpose and must not encumber the property without the approval of the Federal agency or pass-through entity. When no longer needed for the originally authorized purpose, disposition of the intangible property must occur in accordance with the provisions in § 200.313(e).

(b) To the extent permitted by law, the recipient or subrecipient may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a Federal award. The Federal agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes and to authorize others to do so. This includes the right to require recipients and subrecipients to make such works available through agency-designated public access repositories.

(c) The recipient or subrecipient is subject to applicable regulations governing patents and inventions, including government-wide regulations in 37 CFR part 401.

(d) The Federal Government has the right to:

(1) Obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use the data for Federal purposes.

(e)

(1) The recipient or subrecipient must provide research data relating to published research findings produced under the Federal award and that were used by the Federal Government in developing an agency action that has the force and effect of law if requested by the Federal agency in response to a Freedom of Information Act (FOIA) request. When the Federal agency obtains the research data solely in response to a FOIA request, the Federal agency may charge the requester a fee for the cost of obtaining the research data. This fee should reflect the costs incurred by the Federal agency and the recipient or subrecipient. This fee is in addition to any fees the Federal agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) Published research findings mean:

(i) Research findings published in a peer-reviewed scientific or technical journal; or

(ii) Research findings publicly cited by a Federal agency in developing an agency action that has the force and effect of law.

(3) Research data means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings. Research data does not include any of the following:

(i) Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This “recorded” material excludes physical objects (for example, laboratory samples).

(ii) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(iii) Personnel, medical, and other personally identifiable information that, if disclosed, would constitute an invasion of personal privacy. Information that could identify a particular person in a research study is not considered research data.

(f) Federal agencies should work with recipients to maximize public access to Federally funded research results and data in a manner that protects data providers' confidentiality, privacy, and security. Agencies should provide guidance to recipients to make restricted-access data available through a variety of mechanisms. FOIA may not be the most appropriate mechanism for providing access to intangible property, including Federally funded research results and data.

§ 200.316 Property trust relationship.

Real property, equipment, and intangible property acquired or improved with the Federal award must be held in trust by the recipient or subrecipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Federal agency or pass-through entity may require the recipient or subrecipient to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a Federal award and that use and disposition conditions apply to the property.

PROCUREMENT STANDARDS

§ 200.317 Procurements by States and Indian Tribes.

When conducting procurement transactions under a Federal award, a State or Indian Tribe must follow the same policies and procedures it uses for procurements with non-Federal funds. If such policies and procedures do not exist, States and Indian Tribes must follow the procurement standards in §§ 200.318 through 200.327. In addition to its own policies and procedures, a State or Indian Tribe must also comply with the following procurement standards: §§ 200.321, 200.322, 200.323, and 200.327. All other recipients and subrecipients, including subrecipients of a State or Indian Tribe, must follow the procurement standards in §§ 200.318 through 200.327.

§ 200.318 General procurement standards.

(a) ***Documented procurement procedures.*** The recipient or subrecipient must maintain and use documented procedures for procurement transactions under a Federal award or subaward, including for acquisition of property or services. These documented procurement procedures must be consistent with State, local, and tribal laws and regulations and the standards identified in §§ 200.317 through 200.327.

(b) ***Oversight of contractors.*** Recipients and subrecipients must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. See also § 200.501(h).

(c) ***Conflicts of interest.***

(1) The recipient or subrecipient must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of contracts. No employee, officer, agent, or board member with a real or apparent conflict of interest may participate in the selection, award, or administration of a contract supported by the Federal award. A conflict of interest includes when the employee, officer, agent, or board member, any member of their immediate family, their partner, or an organization that employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from an entity considered for a contract. An employee, officer, agent, and board member of the recipient or subrecipient may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors. However, the recipient or subrecipient may set standards for situations where the financial interest is not substantial or a gift is an unsolicited item of nominal value. The recipient's or subrecipient's standards of conduct must also provide for disciplinary actions to be applied for violations by its employees, officers, agents, or board members.

(2) If the recipient or subrecipient has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian Tribe, the recipient or subrecipient must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest mean that because of relationships with a parent company, affiliate, or subsidiary organization, the recipient or subrecipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) ***Avoidance of unnecessary or duplicative items.*** The recipient's or subrecipient's procedures must avoid the acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. When appropriate, an analysis should be made between leasing and purchasing property or equipment to determine the most economical approach.

(e) ***Procurement arrangements using strategic sourcing.*** When appropriate for the procurement or use of common or shared goods and services, recipients and subrecipients are encouraged to enter into State and local intergovernmental agreements or inter-entity agreements for procurement transactions. These or similar procurement arrangements using strategic sourcing may foster greater economy and efficiency. Documented procurement actions of this type (using strategic sourcing, shared services, and other similar procurement arrangements) will meet the competition requirements of this part.

(f) ***Use of excess and surplus Federal property.*** The recipient or subrecipient is encouraged to use excess and surplus Federal property instead of purchasing new equipment and property when it is feasible and reduces project costs.

(g) ***Use of value engineering clauses.*** When practical, the recipient or subrecipient is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering means analyzing each contract item or task to ensure its essential function is provided at the overall lowest cost.

(h) ***Responsible contractors.*** The recipient or subrecipient must award contracts only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed contract. The recipient or subrecipient must consider contractor integrity, public policy compliance, proper classification of employees (see the Fair Labor Standards Act, 29 U.S.C. 201, chapter 8), past performance record, and financial and technical resources when conducting a procurement transaction. See also § 200.214.

(i) ***Procurement records.*** The recipient or subrecipient must maintain records sufficient to detail the history of each procurement transaction. These records must include the rationale for the procurement method, contract type selection, contractor selection or rejection, and the basis for the contract price.

(j) ***Time-and-materials type contracts.***

(1) The recipient or subrecipient may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a recipient or subrecipient is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Because this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the recipient or subrecipient awarding such a contract must assert a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) ***Settlement of contractual and administrative issues.*** The recipient or subrecipient is responsible for the settlement of all contractual and administrative issues arising out of its procurement transactions. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the recipient or subrecipient of any contractual responsibilities under its contracts. The Federal agency will not substitute its judgment for that of the recipient or subrecipient unless the matter is primarily a Federal concern. The recipient or subrecipient must report violations of law to the Federal, State, or local authority with proper jurisdiction.

(l) *Examples of labor and employment practices.*

(1) The procurement standards in this subpart do not prohibit recipients or subrecipients from:

(i) Using Project Labor Agreements (PLAs) or similar forms of pre-hire collective bargaining agreements;

(ii) Requiring construction contractors to use hiring preferences or goals for people residing in high-poverty areas, disadvantaged communities as defined by the Justice40 Initiative (see OMB Memorandum M-21-28), or high-unemployment census tracts within a region no smaller than the county where a federally funded construction project is located. The hiring preferences or goals should be consistent with the policies and procedures of the recipient or subrecipient, and must not prohibit interstate hiring;

(iii) Requiring a contractor to use hiring preferences or goals for individuals with barriers to employment (as defined in section 3 of the Workforce Innovation and Opportunity Act (29 U.S.C. 3102(24)), including women and people from underserved communities as defined by Executive Order 14091;

(iv) Using agreements intended to ensure uninterrupted delivery of services; using agreements intended to ensure community benefits; or

(v) Offering employees of a predecessor contractor rights of first refusal under a new contract.

(2) Recipients and subrecipients may use the practices listed in paragraph (1) if consistent with the U.S. Constitution, applicable Federal statutes and regulations, the objectives and purposes of the applicable Federal financial assistance program, and other requirements of this part.

§ 200.319 Competition.

(a) All procurement transactions under the Federal award must be conducted in a manner that provides full and open competition and is consistent with the standards of this section and § 200.320.

(b) To ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids must be excluded from competing on those procurements.

(c) Examples of situations that may restrict competition include, but are not limited to:

(1) Placing unreasonable requirements on firms for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(d) The recipient or subrecipient must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Are made in accordance with § 200.319(b);

(2) Incorporate a clear and accurate description of the technical requirements for the property, equipment, or service being procured. The description may include a statement of the qualitative nature of the property, equipment, or service to be procured. When necessary, the description must provide minimum essential characteristics and standards to which the property, equipment, or service must conform. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to clearly and accurately describe the technical requirements, a "brand name or equivalent" description of features may be used to provide procurement requirements. The specific features of the named brand must be clearly stated; and

(3) Identify any additional requirements which the offerors must fulfill and all other factors that will be used in evaluating bids or proposals.

(e) The recipient or subrecipient must ensure that all prequalified lists of persons, firms, or products used in procurement transactions are current and include enough qualified sources to ensure maximum open competition. When establishing or amending prequalified lists, the recipient or subrecipient must consider objective factors that evaluate price and cost to maximize competition. The recipient or subrecipient must not preclude potential bidders from qualifying during the solicitation period.

(f) To the extent consistent with established practices and legal requirements applicable to the recipient or subrecipient, this subpart does not prohibit recipients or subrecipients from developing written procedures for procurement transactions that incorporate a scoring mechanism that rewards bidders that commit to specific numbers and types of U.S. jobs, minimum compensation, benefits, on-the-job-training for employees making work products or providing services on a contract, and other worker protections. This subpart also does not prohibit recipients and subrecipients from making inquiries of bidders about these subjects and assessing the responses. Any scoring mechanism must be consistent with the U.S. Constitution, applicable Federal statutes and regulations, and the terms and conditions of the Federal award.

(g) Noncompetitive procurements can only be awarded in accordance with § 200.320(c).

§ 200.320 Procurement methods.

There are three types of procurement methods described in this section: informal procurement methods (for micro-purchases and simplified acquisitions); formal procurement methods (through sealed bids or proposals); and noncompetitive procurement methods. For any of these methods, the recipient or subrecipient must maintain and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319.

(a) ***Informal procurement methods for small purchases.*** These procurement methods expedite the completion of transactions, minimize administrative burdens, and reduce costs. Informal procurement methods may be used when the value of the procurement transaction under the Federal award does not exceed the simplified acquisition threshold as defined in § 200.1. Recipients and subrecipients may also establish a lower threshold. Informal procurement methods include:

(1) ***Micro-purchases*** —

(i) ***Distribution.*** The aggregate amount of the procurement transaction does not exceed the micro-purchase threshold defined in § 200.1. To the extent practicable, the recipient or subrecipient should distribute micro-purchases equitably among qualified suppliers.

(ii) ***Micro-purchase awards.*** Micro-purchases may be awarded without soliciting competitive price or rate quotations if the recipient or subrecipient considers the price reasonable based on research, experience, purchase history, or other information; and maintains documents to support its conclusion. Purchase cards may be used as a method of payment for micro-purchases.

(iii) ***Micro-purchase thresholds.*** The recipient or subrecipient is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the recipient or subrecipient must be authorized or not prohibited under State, local, or tribal laws or regulations. The recipient or subrecipient may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

(iv) ***Recipient or subrecipient increase to the micro-purchase threshold up to $50,000.*** The recipient or subrecipient may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The recipient or subrecipient may self-certify a threshold up to $50,000 on an annual basis and must maintain documentation to be made available to the Federal agency or pass-through entity and auditors in accordance with § 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

(A) A qualification as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit;

(B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,

(C) For public institutions, a higher threshold is consistent with State law.

(v) ***Recipient or subrecipient increase to the micro-purchase threshold over $50,000.*** Micro-purchase thresholds higher than $50,000 must be approved by the cognizant agency for indirect costs. The recipient or subrecipient must submit a request that includes the requirements in paragraph (a)(1)(iv) of this section. The increased threshold is valid until any factor that was relied on in the establishment and rationale of the threshold changes.

(2) ***Simplified acquisitions*** —

(i) ***Simplified acquisition procedures.*** The aggregate dollar amount of the procurement transaction is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If simplified acquisition procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. Unless specified by the Federal agency, the recipient or subrecipient may exercise judgment in determining what number is adequate.

(ii) ***Simplified acquisition thresholds.*** The recipient or subrecipient is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk, and its documented procurement procedures, which may be lower than, but must not exceed, the threshold established in the FAR.

(b) ***Formal procurement methods.*** Formal procurement methods are required when the value of the procurement transaction under a Federal award exceeds the simplified acquisition threshold of the recipient or subrecipient. Formal procurement methods are competitive and require public notice. The following formal methods of procurement are used for procurement transactions above the simplified acquisition threshold determined by the recipient or subrecipient in accordance with paragraph (a)(2)(ii) of this section:

(1) ***Sealed bids.*** This is a procurement method in which bids are publicly solicited through an invitation and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid conforms with all the material terms and conditions of the invitation and is the lowest in price. The sealed bids procurement method is preferred for procuring construction services.

(i) For sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders have been identified as willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm-fixed-price contract, and the selection of the successful bidder can be made principally based on price.

(ii) If sealed bids are used, the following requirements apply:

(A) Bids must be solicited from an adequate number of qualified sources, providing them with sufficient response time prior to the date set for opening the bids. Unless specified by the Federal agency, the recipient or subrecipient may exercise judgment in determining what number is adequate. For local governments, the invitation for bids must be publicly advertised.

(B) The invitation for bids must define the items or services with specific information, including any required specifications, for the bidder to properly respond;

(C) All bids will be opened at the time and place prescribed in the invitation for bids. For local governments, the bids must be opened publicly.

(D) A firm-fixed-price contract is awarded in writing to the lowest responsive bid and responsible bidder. When specified in the invitation for bids, factors such as discounts, transportation cost, and life-cycle costs must be considered in determining which bid is the lowest. Payment discounts must only be used to determine the low bid when the recipient or subrecipient determines they are a valid factor based on prior experience.

(E) The recipient or subrecipient must document and provide a justification for all bids it rejects.

(2) ***Proposals.*** This is a procurement method used when conditions are not appropriate for using sealed bids. This procurement method may result in either a fixed-price or cost-reimbursement contract. They are awarded in accordance with the following requirements:

(i) Requests for proposals require public notice, and all evaluation factors and their relative importance must be identified. Proposals must be solicited from multiple qualified entities. To the maximum extent practicable, any proposals submitted in response to the public notice must be considered.

(ii) The recipient or subrecipient must have written procedures for conducting technical evaluations and making selections.

(iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the recipient or subrecipient considering price and other factors; and

(iv) The recipient or subrecipient may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby the offeror's qualifications are evaluated, and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where the price is not used as a selection factor, can only be used to procure architectural/engineering (A/E) professional services. The method may not be used to purchase other services provided by A/E firms that are a potential source to perform the proposed effort.

(c) ***Noncompetitive procurement.*** There are specific circumstances in which the recipient or subrecipient may use a noncompetitive procurement method. The noncompetitive procurement method may only be used if one of the following circumstances applies:

(1) The aggregate amount of the procurement transaction does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);

(2) The procurement transaction can only be fulfilled by a single source;

(3) The public exigency or emergency for the requirement will not permit a delay resulting from providing public notice of a competitive solicitation;

(4) The recipient or subrecipient requests in writing to use a noncompetitive procurement method, and the Federal agency or pass-through entity provides written approval; or

(5) After soliciting several sources, competition is determined inadequate.

§ 200.321 Contracting with small businesses, minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms.

(a) When possible, the recipient or subrecipient should ensure that small businesses, minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms (See U.S. Department of Labor's list) are considered as set forth below.

(b) Such consideration means:

(1) These business types are included on solicitation lists;

(2) These business types are solicited whenever they are deemed eligible as potential sources;

(3) Dividing procurement transactions into separate procurements to permit maximum participation by these business types;

(4) Establishing delivery schedules (for example, the percentage of an order to be delivered by a given date of each month) that encourage participation by these business types;

(5) Utilizing organizations such as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring a contractor under a Federal award to apply this section to subcontracts.

§ 200.322 Domestic preferences for procurements.

(a) The recipient or subrecipient should, to the greatest extent practicable and consistent with law, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards, contracts, and purchase orders under Federal awards.

(b) For purposes of this section:

(1) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) "Manufactured products" means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

(c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.

§ 200.323 Procurement of recovered materials.

(a) A recipient or subrecipient that is a State agency or agency of a political subdivision of a State and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 as amended, 42 U.S.C. 6962. The requirements of Section 6002 include procuring only items designated in the guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

(b) The recipient or subrecipient should, to the greatest extent practicable and consistent with law, purchase, acquire, or use products and services that can be reused, refurbished, or recycled; contain recycled content, are biobased, or are energy and water efficient; and are sustainable. This may include purchasing compostable items and other products and services that reduce the use of single-use plastic products. See Executive Order 14057, section 101, Policy.

§ 200.324 Contract cost and price.

(a) The recipient or subrecipient must perform a cost or price analysis for every procurement transaction, including contract modifications, in excess of the simplified acquisition threshold. The method and degree of analysis conducted depend on the facts surrounding the particular procurement transaction. For example, the recipient or subrecipient should consider potential workforce impacts in their analysis if the procurement transaction will displace public sector employees. However, as a starting point, the recipient or subrecipient must make independent estimates before receiving bids or proposals.

(b) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that the costs incurred or cost estimates included in negotiated prices would be allowable for the recipient or subrecipient under subpart E of this part. The recipient or subrecipient may reference its own cost principles as long as they comply with subpart E of this part.

(c) The recipient or subrecipient must not use the “cost plus a percentage of cost” and “percentage of construction costs” methods of contracting.

§ 200.325 Federal agency or pass-through entity review.

(a) The Federal agency or pass-through entity may review the technical specifications of proposed procurements under the Federal award if the Federal agency or pass-through entity believes the review is needed to ensure that the item or service specified is the one being proposed for acquisition. The recipient or subrecipient must submit the technical specifications of proposed procurements when requested by the Federal agency or pass-through entity. This review should take place prior to the time the specifications are incorporated into a solicitation document. When the recipient or subrecipient desires to accomplish the review after a solicitation has been developed, the Federal agency or pass-through entity may still review the specifications. In those cases, the review should be limited to the technical aspects of the proposed purchase.

(b) When requested, the recipient or subrecipient must provide procurement documents (such as requests for proposals, invitations for bids, or independent cost estimates) to the Federal agency or pass-through entity for pre-procurement review. The Federal agency or pass-through entity may conduct a pre-procurement review when:

(1) The recipient's or subrecipient's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition, or only one bid is expected to be received in response to a solicitation;

(3) The procurement is expected to exceed the simplified acquisition threshold and specifies a “brand name” product;

(4) The procurement is expected to exceed the simplified acquisition threshold, and a sealed bid procurement is to be awarded to an entity other than the apparent low bidder; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(c) The recipient or subrecipient is exempt from the pre-procurement review in paragraph (b) of this section if the Federal agency or pass-through entity determines that its procurement systems comply with the standards of this part.

(1) The recipient or subrecipient may request that the Federal agency or pass-through entity review its procurement system to determine whether it meets these standards for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding and third-party contracts are awarded regularly.

(2) The recipient or subrecipient may self-certify its procurement system. However, self-certification does not limit the Federal agency's or pass-through entity's right to review the system. Under a self-certification procedure, the Federal agency or pass-through entity may rely on written assurances from the recipient or subrecipient that it is complying with the standards of this part. The recipient or subrecipient must cite specific policies, procedures, regulations, or standards as complying with these requirements and have its system available for review.

§ 200.326 Bonding requirements.

The Federal agency or pass-through entity may accept the recipient's or subrecipient's bonding policy and requirements for construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold. Before doing so, the Federal agency or pass-through entity must determine that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The bid guarantee must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute any required contractual documents within the specified timeframe.

(b) A performance bond on the contractor's part for 100 percent of the contract price. A performance bond is a bond executed in connection with a contract to secure the fulfillment of all the contractor's requirements under a contract.

(c) A payment bond on the contractor's part for 100 percent of the contract price. A payment bond is a bond executed in connection with a contract to assure payment as required by the law of all persons supplying labor and material in the execution of the work provided for under a contract.

§ 200.327 Contract provisions.

The recipient's or subrecipient's contracts must contain the applicable provisions described in Appendix II of this part.

PERFORMANCE AND FINANCIAL MONITORING AND REPORTING

§ 200.328 Financial reporting.

(a) The Federal agency must require only OMB-approved government-wide data elements on recipient financial reports. At the time of publication, this consists of the Federal Financial Report (SF-425); however, this also applies to any future OMB-approved government-wide data elements available from the OMB-designated standards lead.

(b) The Federal agency or pass-through entity must collect financial reports no less than annually. The Federal agency or pass-through entity may not collect financial reports more frequently than quarterly unless a specific condition has been implemented in accordance with § 200.208. To the extent practicable, the Federal agency or pass-through entity should collect financial reports in coordination with performance reports.

(c) The recipient or subrecipient must submit financial reports as required by the Federal award. Reports submitted annually by the recipient or subrecipient must be due no later than 90 calendar days after the reporting period. Reports submitted quarterly or semiannually must be due no later than 30 calendar days after the reporting period.

(d) The final financial report submitted by the recipient must be due no later than 120 calendar days after the conclusion of the period of performance. A subrecipient must submit a final financial report to a pass-through entity no later than 90 calendar days after the conclusion of the period of performance. See also § 200.344. The Federal agency or pass-through entity may extend the due date for any financial report with justification from the recipient or subrecipient.

§ 200.329 Monitoring and reporting program performance.

(a) ***Monitoring by the recipient and subrecipient.*** The recipient and subrecipient are responsible for the oversight of the Federal award. The recipient and subrecipient must monitor their activities under Federal awards to ensure they are compliant with all requirements and meeting performance expectations. Monitoring by the recipient and subrecipient must cover each program, function, or activity. See also § 200.332.

(b) ***Reporting program performance.*** The Federal agency must use OMB-approved common information collections (for example, Research Performance Progress Reports) when requesting performance reporting information. The Federal agency or pass-through entity may not collect performance reports more frequently than quarterly unless a specific condition has been implemented in accordance with § 200.208. To the extent practicable, the Federal agency or pass-through entity should align the due dates of performance reports and financial reports. When reporting program performance, the recipient or subrecipient must relate financial data and project or program accomplishments to the performance goals and objectives of the Federal award. Also, the recipient or subrecipient must provide cost information to demonstrate cost-effective practices (for example, through unit cost data) when required by the terms and conditions of the Federal award. In some instances (for example, discretionary research awards), this may be limited to the requirement to submit technical performance reports. Reporting requirements must clearly indicate a standard against which the recipient's or subrecipient's performance can be measured. Reporting requirements should not solicit information from the recipient or subrecipient that is not necessary for the effective monitoring or evaluation of the Federal award. Federal agencies should consult monitoring framework documents such as the agency's Evaluation Plan to make that determination. As noted in OMB Circular A-11, Part 6, Section 280, measures of customer experience are of co-equal importance as traditional measures of financial and operational performance.

(c) ***Submitting performance reports.***

(1) The recipient or subrecipient must submit performance reports as required by the Federal award. Intervals must be no less frequent than annually nor more frequent than quarterly except if specific conditions are applied (See § 200.208). Reports submitted annually by the recipient or subrecipient must be due no later than 90 calendar days after the reporting period. Reports submitted quarterly or semiannually must be due no later than 30 calendar days after the reporting period. Alternatively, the Federal agency or pass-through entity may require annual reports before the anniversary dates of multiple-year Federal awards. The final performance report submitted by the recipient must be due no later than 120 calendar days after the period of performance. A subrecipient must submit a final performance report to a pass-through entity no later than 90 calendar days after the conclusion of the period of performance. See also § 200.344. The Federal agency or pass-through entity may extend the due date for any performance report with justification from the recipient or subrecipient.

(2) As applicable, performance reports should contain information on the following:

(i) A comparison of accomplishments to the objectives of the Federal award established for the reporting period (for example, comparing costs to units of accomplishment). Where performance trend data and analysis would be informative to the Federal agency program, the Federal agency should include this as a performance reporting requirement.

(ii) Explanations on why established goals or objectives were not met; and

(iii) Additional information, analysis, and explanation of cost overruns or higher-than-expected unit costs.

(d) ***Construction performance reports.*** Federal agencies or pass-through entities rely on on-site technical inspections and certified percentage of completion data to monitor progress under Federal awards for construction. Therefore, the Federal agency or pass-through entity may require additional performance reports when necessary to ensure the goals and objectives of Federal awards are met.

(e) ***Significant developments.*** When a significant development that could impact the Federal award occurs between performance reporting due dates, the recipient or subrecipient must notify the Federal agency or pass-through entity. Significant developments include events that enable meeting milestones and objectives sooner or at less cost than anticipated or that produce different beneficial results than originally planned. Significant developments also include problems, delays, or adverse conditions which will impact the recipient's or subrecipient's ability to meet milestones or the objectives of the Federal award. When significant developments occur that negatively impact the Federal Award, the recipient or subrecipient must include information on their plan for corrective action and any assistance needed to resolve the situation.

(f) ***Site visits.*** The Federal agency or pass-through entity may conduct in-person or virtual site visits as warranted.

(g) ***Performance report requirement waiver.*** The Federal agency may waive any performance report that is not necessary to ensure the goals and objectives of the Federal award are being achieved.

§ 200.330 Reporting on real property.

The Federal agency or pass-through entity must require the recipient or subrecipient to submit reports on the status of real property in which the Federal Government retains an interest. Such reports must be submitted at least annually. In instances where the Federal Government's interest in the real property extends for 15 years or more, the Federal agency or pass-through entity may require the recipient or subrecipient to report at various multi-year frequencies. Reports submitted at multi-year frequencies may not exceed a five-year reporting period. The Federal agency must only require OMB-approved government-wide data elements on recipient real property reports.

SUBRECIPIENT MONITORING AND MANAGEMENT

§ 200.331 Subrecipient and contractor determinations.

An entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor. The pass-through entity is responsible for making case-by-case determinations to determine whether the entity receiving Federal funds is a subrecipient or a contractor. The Federal agency may require the pass-through entity to comply with additional guidance to make these determinations, provided such guidance does not conflict with this section. The Federal agency does not have a direct legal relationship with subrecipients or contractors of any tier; however, the Federal agency is responsible for monitoring the pass-through entity's oversight of first-tier subrecipients. All of the characteristics listed below may not be present in all cases, and some characteristics from both categories may be present at the same time. No single factor or any combination of factors is necessarily determinative. The pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract. In making this determination, the substance of the relationship is more important than the form of the agreement.

(a) ***Subrecipients.*** A subaward is for the purpose of carrying out a portion of the Federal award and creates a Federal financial assistance relationship with a subrecipient. See the definition of *Subaward* in § 200.1. Characteristics that support the classification of the entity as a subrecipient include, but are not limited to, when the entity:

(1) Determines who is eligible to receive what Federal assistance;

(2) Has its performance measured in relation to whether the objectives of a Federal program were met;

(3) Has responsibility for programmatic decision-making;

(4) Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and

(5) Implements a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.

(b) ***Contractors.*** A contract is for the purpose of obtaining goods and services for the recipient's or subrecipient's use and creates a procurement relationship with a contractor. See the definition of *contract* in § 200.1. Characteristics that support a procurement relationship between the recipient or subrecipient and a contractor include, but are not limited to, when the contractor:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Normally operates in a competitive environment;

(4) Provides goods or services that are ancillary to the implementation of a Federal program; and

(5) Is not subject to compliance requirements of a Federal program as a result of the agreement. However, similar requirements may apply for other reasons.

§ 200.332 Requirements for pass-through entities.

A pass-through entity must:

(a) Verify that the subrecipient is not excluded or disqualified in accordance with § 180.300. Verification methods are provided in § 180.300, which include confirming in *SAM.gov* that a potential subrecipient is not suspended, debarred, or otherwise excluded from receiving Federal funds.

(b) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the information provided below. A pass-through entity must provide the best available information when some of the information below is unavailable. A pass-through entity must provide the unavailable information when it is obtained. Required information includes:

(1) Federal award identification.

(i) Subrecipient's name (must match the name associated with its unique entity identifier);

(ii) Subrecipient's unique entity identifier;

(iii) Federal Award Identification Number (FAIN);

(iv) Federal Award Date;

(v) Subaward Period of Performance Start and End Date;

(vi) Subaward Budget Period Start and End Date;

(vii) Amount of Federal Funds Obligated in the subaward;

(viii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity, including the current financial obligation;

(ix) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;

(x) Federal award project description, as required by the Federal Funding Accountability and Transparency Act (FFATA);

(xi) Name of the Federal agency, pass-through entity, and contact information for awarding official of the pass-through entity;

(xii) Assistance Listings title and number; the pass-through entity must identify the dollar amount made available under each Federal award and the Assistance Listings Number at the time of disbursement;

(xiii) Identification of whether the Federal award is for research and development; and

(xiv) Indirect cost rate for the Federal award (including if the de minimis rate is used in accordance with § 200.414).

(2) All requirements of the subaward, including requirements imposed by Federal statutes, regulations, and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient for the pass-through entity to meet its responsibilities under the Federal award. This includes information and certifications (see § 200.415) required for submitting financial and performance reports that the pass-through entity must provide to the Federal agency;

(4) Indirect cost rate:

(i) An approved indirect cost rate negotiated between the subrecipient and the Federal Government. If no approved rate exists, a pass-through entity must determine the appropriate rate in collaboration with the subrecipient. The indirect cost rate may be either:

(A) An indirect cost rate negotiated between the pass-through entity and the subrecipient. These rates may be based on a prior negotiated rate between a different pass-through entity and the subrecipient, in which case the pass-through entity is not required to collect information justifying the rate but may elect to do so; or

(B) The de minimis indirect cost rate.

(ii) The pass-through entity must not require the use of the de minimis indirect cost rate if the subrecipient has an approved indirect cost rate negotiated with the Federal Government. Subrecipients may elect to use the cost allocation method to account for indirect costs in accordance with § 200.405(d).

(5) A requirement that the subrecipient permit the pass-through entity and auditors to access the subrecipient's records and financial statements for the pass-through entity to fulfill its monitoring requirements; and

(6) Appropriate terms and conditions concerning the closeout of the subaward.

(c) Evaluate each subrecipient's fraud risk and risk of noncompliance with a subaward to determine the appropriate subrecipient monitoring described in paragraph (f) of this section. When evaluating a subrecipient's risk, a pass-through entity should consider the following:

(1) The subrecipient's prior experience with the same or similar subawards;

(2) The results of previous audits. This includes considering whether or not the subrecipient receives a Single Audit in accordance with subpart F and the extent to which the same or similar subawards have been audited as a major program;

(3) Whether the subrecipient has new personnel or new or substantially changed systems; and

(4) The extent and results of any Federal agency monitoring (for example, if the subrecipient also receives Federal awards directly from the Federal agency).

(d) If appropriate, consider implementing specific conditions in a subaward as described in § 200.208 and notify the Federal agency of the specific conditions.

(e) Monitor the activities of a subrecipient as necessary to ensure that the subrecipient complies with Federal statutes, regulations, and the terms and conditions of the subaward. The pass-through entity is responsible for monitoring the overall performance of a subrecipient to ensure that the goals and objectives of the subaward are achieved. In monitoring a subrecipient, a pass-through entity must:

(1) Review financial and performance reports.

(2) Ensure that the subrecipient takes corrective action on all significant developments that negatively affect the subaward. Significant developments include Single Audit findings related to the subaward, other audit findings, site visits, and written notifications from a subrecipient of adverse conditions which will impact their ability to meet the milestones or the objectives of a subaward. When significant developments negatively impact the subaward, a subrecipient must provide the pass-through entity with information on their plan for corrective action and any assistance needed to resolve the situation.

(3) Issue a management decision for audit findings pertaining only to the Federal award provided to the subrecipient from the pass-through entity as required by § 200.521.

(4) Resolve audit findings specifically related to the subaward. However, the pass-through entity is not responsible for resolving cross-cutting audit findings that apply to the subaward and other Federal awards or subawards. If a subrecipient has a current Single Audit report and has not been excluded from receiving Federal funding (meaning, has not been debarred or suspended), the pass-through entity may rely on the subrecipient's cognizant agency for audit or oversight agency for audit to perform audit follow-up and make management decisions related to cross-cutting audit findings in accordance with section § 200.513(a)(4)(viii). Such reliance does not eliminate the responsibility of the pass-through entity 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 findings that are specifically related to the subaward.

(f) Depending upon the pass-through entity's assessment of the risk posed by the subrecipient (as described in paragraph (c) of this section), the following monitoring tools may be useful for the pass-through entity to ensure proper accountability and compliance with program requirements and achievement of performance goals:

(1) Providing subrecipients with training and technical assistance on program-related matters;

(2) Performing site visits to review the subrecipient's program operations; and

(3) Arranging for agreed-upon-procedures engagements as described in § 200.425.

(g) Verify that a subrecipient is audited as required by subpart F of this part.

(h) Consider whether the results of a subrecipient's audit, site visits, or other monitoring necessitate adjustments to the pass-through entity's records.

(i) Consider taking enforcement action against noncompliant subrecipients as described in § 200.339 and in program regulations.

§ 200.333 Fixed amount subawards.

With prior written approval from the Federal agency, the recipient may provide subawards based on fixed amounts up to $500,000. Fixed amount subawards must meet the requirements of § 200.201.

RECORD RETENTION AND ACCESS

§ 200.334 Record retention requirements.

The recipient and subrecipient must retain all Federal award records for three years from the date of submission of their final financial report. For awards that are renewed quarterly or annually, the recipient and subrecipient must retain records for three years from the date of submission of their quarterly or annual financial report, respectively. Records to be retained include but are not limited to, financial records, supporting documentation, and statistical records. Federal agencies or pass-through entities may not impose any other record retention requirements except for the following:

(a) The records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken if any litigation, claim, or audit is started before the expiration of the three-year period.

(b) When the recipient or subrecipient is notified in writing by the Federal agency or pass-through entity, cognizant agency for audit, oversight agency for audit, or cognizant agency for indirect costs to extend the retention period.

(c) The records for property and equipment acquired with the support of Federal funds must be retained for three years after final disposition.

(d) The three-year retention requirement does not apply to the recipient or subrecipient when records are transferred to or maintained by the Federal agency.

(e) The records for program income earned after the period of performance must be retained for three years from the end of the recipient's or subrecipient's fiscal year in which the program income is earned. This only applies if the Federal agency or pass-through entity requires the recipient or subrecipient to report on program income earned after the period of performance in the terms and conditions of the Federal award.

(f) The records for indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates) must be retained according to the applicable option below:

(1) ***If submitted for negotiation.*** When a proposal, plan, or other computation must be submitted to the Federal Government to form the basis for negotiation of an indirect cost rate (or other standard rates), then the three-year retention period for its supporting records starts from the date of submission.

(2) ***If not submitted for negotiation.*** When a proposal, plan, or other computation is not required to be submitted to the Federal Government to form the basis for negotiation of an indirect cost rate (or other standard rates), then the three-year retention period for its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

§ 200.335 Requests for transfer of records.

The Federal agency must request the transfer of records to its custody from the recipient or subrecipient when it determines that the records possess long-term retention value. However, the Federal agency may arrange for the recipient or subrecipient to retain the records that have long-term retention value so long as they are continuously available to the Federal Government.

§ 200.336 Methods for collection, transmission, and storage of information.

When practicable, the Federal agency or pass-through entity and the recipient or subrecipient must collect, transmit, and store Federal award information in open and machine-readable formats. A machine-readable format is a format in a standard computer language (not English text) that can be read automatically by a computer system. Upon request, the Federal agency or pass-through entity must always provide or accept paper versions of Federal award information to and from the recipient or subrecipient. The Federal agency or pass-through entity must not require additional copies of Federal award information submitted in paper versions. The recipient or subrecipient does not need to create and retain paper copies when original records are electronic and cannot be altered. In addition, the recipient or subrecipient may substitute electronic versions of original paper records through duplication or other forms of electronic conversion, provided that the procedures are subject to periodic quality control reviews. Quality control reviews must ensure that electronic conversion procedures provide safeguards against the alteration of records and assurance that records remain in a format that is readable by a computer system.

§ 200.337 Access to records.

(a) ***Records of recipients and subrecipients.*** The Federal agency or pass-through entity, Inspectors General, the Comptroller General of the United States, or any of their authorized representatives must have the right of access to any records of the recipient or subrecipient pertinent to the Federal award to perform audits, execute site visits, or for any other official use. This right also includes timely and reasonable access to the recipient's or subrecipient's personnel for the purpose of interview and discussion related to such documents or the Federal award in general.

(b) ***Extraordinary and rare circumstances.*** The recipient or subrecipient and Federal agency or pass-through entity must take measures to protect the name of victims of a crime when access to the victim's name is necessary. Only under extraordinary and rare circumstances would such access include a review of the true name of victims of a crime. Routine monitoring cannot be considered extraordinary and rare circumstances that would necessitate access to this information. Any such access, other than under a court order or subpoena pursuant to a bona fide confidential investigation, must be approved by the head or delegate of the Federal agency.

(c) ***Expiration of right of access.*** The Federal agency's or pass-through entity's rights of access are not limited to the required retention period of this part but last as long as the records are retained. Federal agencies or pass-through entities must not impose any other access requirements upon recipients and subrecipients.

§ 200.338 Restrictions on public access to records.

Federal agencies may not place restrictions on the recipient or subrecipient that limit public access to the records of the recipient or subrecipient pertinent to a Federal award, except for protected personally identifiable information (PII) or other sensitive information when the Federal agency can demonstrate that such records will be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the Federal agency. The Freedom of Information Act (5 U.S.C. 552) (FOIA) does not apply to records that remain under the recipient's or subrecipient's control except as required by § 200.315. Unless required by Federal, State, local, or tribal law, recipients and subrecipients are not required to permit public access to their records. The recipient's or subrecipient's records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

REMEDIES FOR NONCOMPLIANCE

§ 200.339 Remedies for noncompliance.

The Federal agency or pass-through entity may implement specific conditions if the recipient or subrecipient fails to comply with the U.S. Constitution, Federal statutes, regulations, or terms and conditions of the Federal award. See § 200.208 for additional information on specific conditions. When the Federal agency or pass-through entity determines that noncompliance cannot be remedied by imposing specific conditions, the Federal agency or pass-through entity may take one or more of the following actions:

(a) Temporarily withhold payments until the recipient or subrecipient takes corrective action.

(b) Disallow costs for all or part of the activity associated with the noncompliance of the recipient or subrecipient.

(c) Suspend or terminate the Federal award in part or in its entirety.

(d) Initiate suspension or debarment proceedings as authorized in 2 CFR part 180 and the Federal agency's regulations, or for pass-through entities, recommend suspension or debarment proceedings be initiated by the Federal agency.

(e) Withhold further Federal funds (new awards or continuation funding) for the project or program.

(f) Pursue other legally available remedies.

§ 200.340 Termination.

(a) The Federal award may be terminated in part or its entirety as follows:

(1) By the Federal agency or pass-through entity if the recipient or subrecipient fails to comply with the terms and conditions of the Federal award;

(2) By the Federal agency or pass-through entity with the consent of the recipient or subrecipient, in which case the two parties must agree upon the termination conditions. These conditions include the effective date and, in the case of partial termination, the portion to be terminated;

(3) By the recipient or subrecipient upon sending the Federal agency or pass-through entity a written notification of the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal agency or pass-through entity

determines that the remaining portion of the Federal award will not accomplish the purposes for which the Federal award was made, the Federal agency or pass-through entity may terminate the Federal award in its entirety; or

(4) By the Federal agency or pass-through entity pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities.

(b) The Federal agency or pass-through entity must clearly and unambiguously specify all termination provisions in the terms and conditions of the Federal award.

(c) When the Federal agency terminates the Federal award prior to the end of the period of performance due to the recipient's material failure to comply with the terms and conditions of the Federal award, the Federal agency must report the termination in *SAM.gov*. A Federal agency must use the Contractor Performance Assessment Reporting System (CPARS) to enter information in *SAM.gov*.

(1) The information required under paragraph (c) of this section is not to be reported in *SAM.gov* until the recipient has either:

(i) Exhausted its opportunities to object or challenge the decision (see § 200.342); or

(ii) Has not, within 30 calendar days after being notified of the termination, informed the Federal agency that it intends to appeal the decision to terminate.

(2) If a Federal agency, after entering information about a termination in *SAM.gov*, subsequently:

(i) Learns that any of that information is erroneous, the Federal agency must correct the information in the system within three business days;

(ii) Obtains an update to that information that could be helpful to other Federal agencies, the Federal agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(3) The Federal agency must not post any information that will be made publicly available in the non-public segment of *SAM.gov* that is covered by a disclosure exemption under the Freedom of Information Act (FOIA). When the recipient asserts within seven calendar days to the Federal agency which posted the information that a disclosure exemption under FOIA covers some of the information made publicly available, the Federal agency that posted the information must remove the posting within seven calendar days of receiving the assertion. Before reposting the releasable information, the Federal agency must resolve the issue in accordance with the agency's FOIA procedures.

(d) When the Federal award is terminated in part or its entirety, the Federal agency or pass-through entity and recipient or subrecipient remain responsible for compliance with the requirements in §§ 200.344 and 200.345.

§ 200.341 Notification of termination requirement.

(a) The Federal agency or pass-through entity must provide written notice of termination to the recipient or subrecipient. The written notice of termination should include the reasons for termination, the effective date, and the portion of the Federal award to be terminated, if applicable.

(b) If the Federal award is terminated for the recipient's material failure to comply with a Federal award, the notification must state the following:

(1) The termination decision will be reported in *SAM.gov*;

(2) The information will be available in *SAM.gov* for five years from the date of the termination and then archived;

(3) Federal agencies that consider making a Federal award to the recipient during the five year period must consider this information in judging whether the recipient is qualified to receive the Federal award when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance;

(4) The recipient may comment on any information in *SAM.gov* about the recipient for future consideration by Federal agencies. The recipient may submit comments in *SAM.gov*.

(5) Federal agencies should consider the recipient's comments when determining whether the recipient is qualified for a Federal award.

(c) Upon termination of the Federal award, the Federal agency must provide the information required by the Federal Funding Accountability and Transparency Act (FFATA) to *USAspending.gov*. In addition, the Federal agency must update or notify any other relevant government-wide systems or entities of any indications of poor performance as required by 41 U.S.C. 2313 and 31 U.S.C. 3321.

§ 200.342 Opportunities to object, hearings, and appeals.

The Federal agency must maintain written procedures for processing objections, hearings, and appeals. Upon initiating a remedy for noncompliance (for example, disallowed costs, a corrective action plan, or termination), the Federal agency must provide the recipient with an opportunity to object and provide information challenging the action. The Federal agency or pass-through entity must comply with any requirements for hearings, appeals, or other administrative proceedings to which the recipient or subrecipient is entitled under any statute or regulation applicable to the action involved.

§ 200.343 Effects of suspension and termination.

Costs to the recipient or subrecipient resulting from financial obligations incurred by the recipient or subrecipient during a suspension or after the termination of a Federal award are not allowable unless the Federal agency or pass-through entity expressly authorizes them in the notice of suspension or termination or subsequently. However, costs during suspension or after termination are allowable if:

(a) The costs result from financial obligations which were properly incurred by the recipient or subrecipient before the effective date of suspension or termination, and not in anticipation of it; and

(b) The costs would be allowable if the Federal award was not suspended or expired normally at the end of the period of performance in which the termination takes effect.

CLOSEOUT

§ 200.344 Closeout.

(a) The Federal agency or pass-through entity must close out the Federal award when it determines that all administrative actions and required work of the Federal award have been completed. When the recipient or subrecipient fails to complete the necessary administrative actions or the required work for an award, the Federal agency or pass-through entity must proceed with closeout based on the information available. This section specifies the administrative actions required at the end of the period of performance.

(b) A recipient must submit all reports (financial, performance, and other reports required by the Federal award) no later than 120 calendar days after the conclusion of the period of performance. A subrecipient must submit all reports (financial, performance, and other reports required by a subaward) to the pass-through entity no later than 90 calendar days after the conclusion of the period of performance of the subaward (or an earlier date as agreed upon by the pass-through entity and subrecipient). When justified, the Federal agency or pass-through entity may approve extensions for the recipient or subrecipient. When the recipient does not have a final indirect cost rate covering the period of performance, a final financial report must still be submitted to fulfill the requirements of this section. The recipient must submit a revised final financial report when all applicable indirect cost rates have been finalized.

(c) The recipient must liquidate all financial obligations incurred under the Federal award no later than 120 calendar days after the conclusion of the period of performance. A subrecipient must liquidate all financial obligations incurred under a subaward no later than 90 calendar days after the conclusion of the period of performance of the subaward (or an earlier date as agreed upon by the pass-through entity and subrecipient). When justified, the Federal agency or pass-through entity may approve extensions for the recipient or subrecipient.

(d) The Federal agency or pass-through entity must not delay payments to the recipient or subrecipient for costs meeting the requirements of subpart E of this part.

(e) The recipient or subrecipient must promptly refund any unobligated funds that the Federal agency or pass-through entity paid and that are not authorized to be retained. See OMB Circular A-129 and § 200.346.

(f) The Federal agency or pass-through entity must make all necessary adjustments to the Federal share of costs after closeout reports are received (for example, to reflect the disallowance of any costs or the deobligation of an unliquidated balance).

(g) The recipient or subrecipient must account for any property acquired with Federal funds or received from the Federal Government in accordance with §§ 200.310 through 200.316 and 200.330.

(h) The Federal agency must make every effort to complete all closeout actions no later than one year after the end of the period of performance. If the indirect cost rate has not been finalized and would delay closeout, the Federal agency is authorized to mutually agree with the recipient to close an award using the current or most recently negotiated rate. However, the recipient is not required to agree to a final rate for a Federal award for the purpose of prompt closeout.

(i) If the recipient does not comply with the requirements of this section, including submitting all final reports, the Federal agency must report the recipient's material failure to comply with the terms and conditions of the Federal award in *SAM.gov*. A Federal agency must use the Contractor Performance Assessment Reporting System (CPARS) to enter or amend information in *SAM.gov*. Federal agencies may also pursue other enforcement actions as appropriate. See § 200.339.

POST-CLOSEOUT ADJUSTMENTS AND CONTINUING RESPONSIBILITIES

§ 200.345 Post-closeout adjustments and continuing responsibilities.

(a) The closeout of the Federal award does not affect any of the following:

(1) The right of the Federal agency or pass-through entity to disallow costs and recover funds on the basis of a later audit or review. However, the Federal agency or pass-through entity must make determinations to disallow costs and notify the recipient or subrecipient within the record retention period.

(2) The recipient's or subrecipient's requirement to return funds or right to receive any remaining and available funds as a result of refunds, corrections, final indirect cost rate adjustments (unless the Federal award in closed in accordance with § 200.344(h)), or other transactions.

(3) The ability of the Federal agency or pass-through entity to make financial adjustments to a previously closed Federal award, such as resolving indirect cost payments and making final payments.

(4) Audit requirements in subpart F of this part.

(5) Property management and disposition requirements in §§ 200.310 through 200.316.

(6) Records retention as required in §§ 200.334 through 200.337.

(b) After the closeout of the Federal award, a relationship created under the Federal award may be modified or ended in whole or in part. This may only be done with the consent of the awarding Federal agency or pass-through entity and the recipient or subrecipient, provided the responsibilities of the recipient or subrecipient referred to in paragraph (a) of this section, including those for property management as applicable, are considered and provisions are made for continuing responsibilities of the recipient or subrecipient, as appropriate.

COLLECTION OF AMOUNTS DUE

§ 200.346 Collection of amounts due.

Any Federal funds paid to the recipient or subrecipient in excess of the amount that the recipient or subrecipient is determined to be entitled to under the Federal award constitute a debt to the Federal Government. The Federal agency must collect all debts arising out of its Federal awards in accordance with the Standards for the Administrative Collection of Claims (31 CFR part 901).

Subpart E—Cost Principles

GENERAL PROVISIONS

§ 200.400 Policy guide.

The application of these cost principles is based on the fundamental premises that:

(a) The recipient and subrecipient are responsible for the efficient and effective administration of the Federal award through sound management practices.

(b) The recipient and subrecipient are responsible for administering Federal funds in a manner consistent with Federal statutes, regulations, and the terms and conditions of the Federal award.

(c) The recipient and subrecipient, in recognition of their unique combination of staff, facilities, and experience, are responsible for employing organization and management techniques necessary to ensure the proper and efficient administration of the Federal award.

(d) The accounting practices of the recipient and subrecipient must be consistent with these cost principles and support the accumulation of costs as required by these cost principles, including maintaining adequate documentation to support costs charged to the Federal award.

(e) When reviewing, negotiating, and approving cost allocation plans or indirect cost proposals, the cognizant agency for indirect costs should ensure that the recipient consistently applies these cost principles. Where wide variations exist in the treatment of a given cost item by the recipient, the reasonableness and equity of such treatments should be fully considered. See the definition of *indirect costs* in § 200.1.

(f) For recipients and subrecipients that educate and engage students in research, the dual role of students as both trainees and employees (including pre- and post-doctoral staff) contributing to the completion of Federal awards for research must be recognized in the application of these principles.

(g) The recipient or subrecipient must not earn or keep any profit resulting from Federal financial assistance unless explicitly authorized by the terms and conditions of the Federal award. See also § 200.307. When the required activities of a fixed amount award were completed in accordance with the terms and conditions of the award, the unexpended funds retained by the recipient or subrecipient are not considered profit.

§ 200.401 Application.

(a) ***General.*** The recipient and subrecipient must apply these principles in determining allowable costs under Federal awards. The recipient and subrecipient must also use these principles as a guide in pricing fixed-price contracts and subcontracts when costs are used in determining the appropriate price. These cost principles do not apply to:

(1) Arrangements under which Federal financing is in the form of loans, scholarships, fellowships, traineeships, or other fixed amounts based on items such as education allowance or published tuition rates and fees.

(2) Capitation awards based on case counts or the number of beneficiaries.

(3) Fixed amount awards, except as provided in § 200.101(b). See also § 200.201.

(4) Federal awards to hospitals (see Appendix IX of this part).

(5) Food commodities provided through grants and cooperative agreements.

(6) Other awards under which the recipient or subrecipient is not required to account for actual costs incurred.

(b) ***Federal contract.*** A Federal contract awarded to a recipient is subject to the Cost Accounting Standards (CAS). It must incorporate the applicable CAS requirements per 48 CFR Chapter 99 and 48 CFR part 30 (FAR Part 30). With respect to the allocation of costs, the Cost Accounting Standards at 48 CFR parts 9904 or 9905 take precedence over the cost principles in subpart E. When a contract with a recipient is subject to full CAS coverage, the allowability of certain costs under the cost principles will be affected by the allocation provisions of the Cost Accounting Standards (for example, CAS 414—48 CFR 9904.414—Cost of Money as an Element of the Cost of Facilities Capital, and CAS 417—48 CFR 9904.417—Cost of Money as an Element of the Cost of Capital Assets Under Construction, apply instead of the allowability provisions of § 200.449). For example, the allowability of costs in CAS-covered contracts is determined first by the allocation provisions of the Cost Accounting Standards rather than the allowability provisions in § 200.449 (unless the CAS does not address the specific costs). In complying with those requirements, the recipient's application of cost accounting practices for estimating,

accumulating, and reporting costs for Federal awards and CAS-covered contracts must be consistent with 48 CFR. The recipient only needs to maintain one set of accounting records supporting the allocation of costs if the recipient administers both Federal awards and CAS-covered contracts.

(c) ***Exemptions.*** Some nonprofit organizations, because of their size and nature of operations, can be considered to be similar to for-profit organizations in terms of the applicability of cost principles. These nonprofit organizations must operate under Federal cost principles that apply to for-profit organizations located at 48 CFR 31.2. Appendix VIII contains a list of these nonprofit organizations. Other organizations may be added to this list if approved by the cognizant agency for indirect costs.

BASIC CONSIDERATIONS

§ 200.402 Composition of costs.

The total cost of a Federal award is the sum of the allowable direct and allocable indirect costs minus any applicable credits

§ 200.403 Factors affecting allowability of costs.

Except where otherwise authorized by statute, costs must meet the following criteria to be allowable under Federal awards:

(a) Be necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles.

(b) Conform to any limitations or exclusions set forth in these principles or in the Federal award as to types or amount of cost items.

(c) Be consistent with policies and procedures that apply uniformly to both federally financed and other activities of the recipient or subrecipient.

(d) Be accorded consistent treatment. For example, a cost must not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.

(e) Be determined in accordance with generally accepted accounting principles (GAAP), except, for State and local governments and Indian Tribes only, as otherwise provided for in this part.

(f) Not be included as a cost or used to meet cost sharing requirements of any other federally-financed program in either the current or a prior period. See § 200.306(b).

(g) Be adequately documented. See §§ 200.300 through 200.309.

(h) Administrative closeout costs may be incurred until the due date of the final report(s). If incurred, these costs must be liquidated prior to the due date of the final report(s) and charged to the final budget period of the award unless otherwise specified by the Federal agency. All other costs must be incurred during the approved budget period. At its discretion, the Federal agency is authorized to waive prior written approvals to carry forward unobligated balances to subsequent budget periods. See § 200.308(g)(3).

§ 200.404 Reasonable costs.

A cost is reasonable if it does not exceed an amount that a prudent person would incur under the circumstances prevailing when the decision was made to incur the cost. In determining the reasonableness of a given cost, consideration must be given to the following:

(a) Whether the cost is generally recognized as ordinary and necessary for the recipient's or subrecipient's operation or the proper and efficient performance of the Federal award;

(b) The restraints or requirements imposed by such factors as sound business practices; arm's-length bargaining; Federal, State, local, tribal, and other laws and regulations; and terms and conditions of the Federal award;

(c) Market prices for comparable costs for the geographic area;

(d) Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the recipient or subrecipient, its employees, its students or membership (if applicable), the public at large, and the Federal Government; and

(e) Whether the cost represents a deviation from the recipient's or subrecipient's established written policies and procedures for incurring costs.

§ 200.405 Allocable costs.

(a) ***Allocable costs in general.*** A cost is allocable to a Federal award or other cost objective if the cost is assignable to that Federal award or other cost objective in accordance with the relative benefits received. This standard is met if the cost satisfies any of the following criteria:

(1) Is incurred specifically for the Federal award;

(2) Benefits both the Federal award and other work of the recipient or subrecipient and can be distributed in proportions that may be approximated using reasonable methods; or

(3) Is necessary to the overall operation of the recipient or subrecipient and is assignable in part to the Federal award in accordance with these cost principles.

(b) ***Allocation of indirect costs.*** All activities which benefit from the recipient's or subrecipient's indirect cost, including unallowable activities and donated services by the recipient or subrecipient or third parties, will receive an appropriate allocation of indirect costs.

(c) ***Limitation on charging certain allocable costs to other Federal awards.*** A cost allocable to a particular Federal award may not be charged to other Federal awards (for example, to overcome fund deficiencies or to avoid restrictions imposed by Federal statutes, regulations, or the terms and conditions of the Federal awards). However, this prohibition would not preclude the recipient or subrecipient from shifting costs that are allowable under two or more Federal awards in accordance with existing Federal statutes, regulations, or the terms and conditions of the Federal awards.

(d) ***Direct cost allocation principles.*** If a cost benefits two or more projects or activities in proportions that can be determined without undue effort or cost, the cost must be allocated to the projects based on the proportional benefit However, when those proportions cannot be determined because of the interrelationship of the work involved, then, notwithstanding paragraph (c), the costs may be allocated or transferred to benefitted projects on any reasonable documented basis. Where the purchase of equipment or other capital asset is specifically authorized under a Federal award, the costs are

assignable to the Federal award regardless of the use that may be made of the equipment or other capital asset involved, when no longer needed for the purpose for which it was originally required. See also §§ 200.310 through 200.316 and 200.439.

(e) ***Costs of contracts subject to CAS.*** If a contract is subject to CAS, costs must be allocated to that contract according to the Cost Accounting Standards, which take precedence over the allocation provisions in this part.

§ 200.406 Applicable credits.

(a) Applicable credits refer to transactions that offset or reduce direct or indirect costs allocable to a Federal award. Examples of such transactions are purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds or rebates, and adjustments of overpayments or erroneous charges. To the extent that such credits accruing to or received by the recipient or subrecipient relate to allowable costs, they must be credited to the Federal award either as a cost reduction or cash refund, as appropriate.

(b) In some instances, the amounts received from the Federal Government to finance activities or service operations of the recipient or subrecipient should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing requirements) must be recognized in determining the rates or amounts to be charged to the Federal award. See §§ 200.436 and 200.468 for potential application areas.

§ 200.407 Prior written approval (prior approval).

The reasonableness and allocability of certain costs under Federal awards may be difficult to determine. To avoid subsequent disallowance or dispute based on unreasonableness or nonallocability, the recipient may seek the prior written approval of the Federal agency (or, for indirect costs, the cognizant agency for indirect costs) before incurring the cost. The absence of prior written approval on any element of cost will not, in itself, affect the reasonableness or allocability of that cost unless prior approval is specifically required for allowability as described under certain circumstances in the following sections:

(a) Section 200.306 Cost sharing;

(b) Section 200.307 Program income;

(c) Section 200.308 Revision of budget and program plans;

(d) Section 200.333 Fixed amount subawards;

(e) Section 200.430 Compensation—personal services, paragraph (h);

(f) Section 200.431 Compensation—fringe benefits;

(g) Section 200.439 Equipment and other capital expenditures;

(h) Section 200.440 Exchange rates;

(i) Section 200.441 Fines, penalties, damages and other settlements;

(j) Section 200.442 Fund raising and investment management costs;

(k) Section 200.445 Goods or services for personal use;

(l) Section 200.447 Insurance and indemnification;

(m) Section 200.455 Organization costs;

(n) Section 200.458 Pre-award costs;

(o) Section 200.462 Rearrangement and reconversion costs;

(p) Section 200.475 Travel costs.

§ 200.408 Limitation on allowance of costs.

Statutory requirements may limit the allowability of costs. Any costs that exceed the maximum amount allowed by statute may not be charged to the Federal award. Only the amount allowable by statute may be charged to the Federal award.

§ 200.409 Special considerations.

Other sections in this part describe special considerations and requirements applicable to states, local governments, Indian Tribes, and IHEs. In addition, certain provisions among the items of cost in this subpart are only applicable to certain types of recipients and subrecipients, as specified in the following sections:

(a) Direct and Indirect Costs (§§ 200.412-200.415);

(b) Special Considerations for States, Local Governments and Indian Tribes (§§ 200.416 and 200.417); and

(c) Special Considerations for Institutions of Higher Education (§§ 200.418 and 200.419).

§ 200.410 Collection of unallowable costs.

Payments made for costs determined to be unallowable by either the awarding Federal agency, cognizant agency for indirect costs, or pass-through entity must be refunded with interest to the Federal Government. Unless directed by Federal statute or regulation, repayments must be made in accordance with the instructions provided by the Federal agency or pass-through entity that made the allowability determination. See §§ 200.300 through 200.309, and § 200.346.

§ 200.411 Adjustment of previously negotiated indirect cost rates containing unallowable costs.

(a) Negotiated indirect cost rates based on a proposal later found to have included costs that:

(1) Are unallowable as specified by Federal statutes, regulations or the terms and conditions of a Federal award; or

(2) Are unallowable because they are not allocable to the Federal award(s), must be adjusted, or a refund must be made in accordance with the requirements of this section. These adjustments or refunds are intended to correct the proposals used to establish the rates and do not constitute a reopening of the rate negotiation. The adjustments or refunds must be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

(b) For rates covering a future fiscal year of the recipient or subrecipient, the unallowable costs must be removed from the indirect cost pools and the rates must be adjusted.

(c) For rates covering a past period, the Federal share of the unallowable costs must be computed for each year involved, and a cash refund (including interest) must be made to the Federal Government in accordance with the directions provided by the cognizant agency for indirect costs. When cash refunds are made for past periods covered by provisional or fixed rates, appropriate adjustments must be made when the rates are finalized to avoid duplicate recovery of the unallowable costs.

(d) For rates covering the current period, either a rate adjustment or a refund, as described in paragraphs (b) and (c) of this section, must be required by the cognizant agency for indirect costs. The choice of method must be at the discretion of the cognizant agency for indirect costs, based on its judgment as to which method would be most practical.

(e) The amount or proportion of unallowable costs included in each year's rate will be assumed to be the same as the amount or proportion of unallowable costs included in the base year proposal used to establish the rate.

DIRECT AND INDIRECT COSTS

§ 200.412 Classification of costs.

There is no universal rule for classifying certain costs as direct or indirect costs. A cost may be direct for some specific service or function but indirect for the Federal award or other final cost objective. Therefore, each cost incurred for the same purpose in like circumstances must be treated consistently either as a direct or an indirect cost to avoid possible double-charging of Federal awards. Guidelines for determining direct and indirect costs charged to Federal awards are provided in this subpart.

§ 200.413 Direct costs.

(a) ***General.*** Direct costs are those costs that can be identified specifically with a particular final cost objective, such as a Federal award, or other internally or externally funded activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy. Costs incurred for the same purpose in like circumstances must be treated consistently as direct or indirect costs. See § 200.405.

(b) ***Application to Federal awards.*** The association of costs with a Federal award determines whether costs are direct or indirect. Costs charged directly to a Federal award are typically incurred specifically for that Federal award (including, for example, supplies needed to achieve the award's objectives and the proportion of employee compensation and fringe benefits expended in relation to that specific award). Costs that otherwise would be treated as indirect costs may also be considered direct costs if they are directly related to a specific award (including, for example, extraordinary utility consumption, the cost of materials supplied from stock or services rendered by specialized facilities, cybersecurity, integrated data systems, asset management systems, performance management costs, program evaluation costs, or other institutional service operations).

(c) ***Administrative and clerical staff salaries.*** Administrative and clerical staff salaries should normally be treated as indirect costs. Direct charging of these costs may be appropriate only if they meet all of the following conditions:

(1) The administrative or clerical services are integral to a Federal award;

(2) Individuals involved can be specifically identified with a Federal award; and

(3) The costs are not also recovered as indirect costs.

(d) ***Minor items.*** A direct cost of a minor amount may be treated as an indirect cost, for reasons of practicality, provided that it is treated consistently for all Federal and non-Federal purposes.

(e) ***Treatment of unallowable costs in determining indirect cost rates.*** The costs of certain activities are not allowable as charges to Federal awards. Even though these costs are unallowable, they must be treated as direct costs for purposes of determining indirect cost rates and be allocated their equitable share of the recipient's or subrecipient's indirect costs if they represent activities which:

(1) Include the salaries of personnel;

(2) Occupy space; and

(3) Benefit from the recipient's or subrecipient's indirect costs.

(f) ***Treatment of certain costs for nonprofit organizations.*** For nonprofit organizations, the costs of activities performed by the nonprofit organization primarily as a service to members, clients, or the general public when significant and necessary to the organization's mission must be treated as direct costs whether or not allowable, and be allocated an equitable share of indirect costs. Some examples of these types of activities include:

(1) Maintenance of membership rolls, subscriptions, publications, and related functions. See § 200.454.

(2) Providing services and information to members, the government, or the public. See §§ 200.454 and 200.450.

(3) Promotion, lobbying, and other forms of public relations. See §§ 200.421 and 200.450.

(4) Conferences (except those held to conduct the general administration of the recipient or subrecipient). See also § 200.432.

(5) Maintenance, protection, and investment of special funds not used in the recipient's or subrecipient's operation. See also § 200.442.

(6) Administration of group benefits on behalf of members or clients, including life and hospital insurance, annuity or retirement plans, and financial aid. See also § 200.431.

§ 200.414 Indirect costs.

(a) ***Facilities and administration classification.*** For major Institutions of Higher Education (IHE) and major nonprofit organizations, indirect costs must be classified within two broad categories: “Facilities” and “Administration.” “Facilities” is defined as depreciation on buildings, equipment and capital improvements, interest on debt associated with certain buildings, equipment and capital improvements, and operations and maintenance expenses. “Administration” is defined as general administration and general expenses such as the director's office, accounting, personnel, and all other types of expenditures not listed specifically under one of the subcategories of “Facilities” (including cross allocations from other pools, where applicable). For nonprofit organizations, library expenses are included in the “Administration” category; for IHEs, they are included in the “Facilities” category. Major IHEs are defined as those required to use the Standard Format for Submission as noted in Appendix III. Major nonprofit organizations are those which receive more than $10 million in direct Federal funding.

(b) ***Diversity of nonprofit organizations.*** It is not always possible to specify the types of costs that may be classified as indirect costs for nonprofit organizations due to the diversity of their accounting practices. The association of a cost with a Federal award is the determining factor in distinguishing direct from indirect costs. However, typical examples of indirect cost for many nonprofit organizations may include

depreciation on buildings and equipment, the costs of operating and maintaining facilities, and general administration and general expenses, such as the salaries and expenses of executive officers, personnel administration, and accounting.

(c) ***Federal Agency Acceptance of Negotiated Indirect Cost Rates.*** (See § 200.306.)

(1) Negotiated indirect cost rates must be accepted by all Federal agencies. A Federal agency may use a rate different from the negotiated rate for either a class of Federal awards or a single Federal award only when required by Federal statute or regulation, or when approved by the awarding Federal agency in accordance with paragraph (c)(3) of this section.

(2) The Federal agency must notify OMB of any approved deviations. The recipient or subrecipient may notify OMB of any disputes with Federal agencies regarding the application of a federally negotiated indirect cost rate.

(3) The Federal agency must implement, and make publicly available, the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates.

(4) The Federal agency must include, in the notice of funding opportunity, the policies relating to indirect cost rate reimbursement or cost share as approved under paragraph (e). As appropriate, the Federal agency should incorporate discussion of these policies into its outreach activities with applicants before posting a notice of funding opportunity. See § 200.204.

(d) ***Pass-through entities.*** Pass-through entities are subject to the requirements in § 200.332(b)(4) and must accept all federally negotiated indirect costs rates for subrecipients.

(e) ***Appendices.*** Requirements for development and submission of indirect cost rate proposals and cost allocation plans are contained in the following Appendices:

(1) Appendix III to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs);

(2) Appendix IV to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations;

(3) Appendix V to Part 200—State/Local Government-wide Central Service Cost Allocation Plans;

(4) Appendix VI to Part 200—Public Assistance Cost Allocation Plans;

(5) Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposals; and

(6) Appendix IX to Part 200—Hospital Cost Principles.

(f) ***De minimis rate.*** Recipients and subrecipients that do not have a current Federal negotiated indirect cost rate (including provisional rate) may elect to charge a de minimis rate of up to 15 percent of modified total direct costs (MTDC). The recipient or subrecipient is authorized to determine the appropriate rate up to this limit. Federal agencies and pass-through entities may not require recipients and subrecipients to use a de minimis rate lower than the negotiated indirect cost rate or the rate elected pursuant to this subsection unless required by Federal statute or regulation. The de minimis rate must not be applied to cost reimbursement contracts issued directly by the Federal Government in accordance with the FAR. Recipients and subrecipients are not required to use the de minimis rate. When applying the de minimis rate, costs must be consistently charged as either direct or indirect costs and may not be double charged

or inconsistently charged as both. The de minimis rate does not require documentation to justify its use and may be used indefinitely. Once elected, the recipient or subrecipient must use the de minimis rate for all Federal awards until the recipient or subrecipient chooses to receive a negotiated rate.

(g) ***One-time extension of indirect rates.*** A recipient or subrecipient with a current Federal negotiated indirect cost rate may apply for a one-time extension of that agreement for up to four years. This extension will be subject to review and approval by the cognizant agency for indirect costs. If this extension is granted, the recipient or subrecipient may not request a rate review until the extension period ends. The recipient or subrecipient must re-apply to negotiate a new rate when the extension ends. After a new rate has been negotiated, the recipient or subrecipient may again apply for a one-time extension of the new rate in accordance with this paragraph.

§ 200.415 Required certifications.

(a) Financial reports must include a certification, signed by an official who is authorized to legally bind the recipient, which reads as follows: "By signing this report, I certify to the best of my knowledge and belief that the report is true, complete, and accurate, and the expenditures, disbursements and cash receipts are for the purposes and objectives set forth in the terms and conditions of the Federal award. I am aware that any false, fictitious, or fraudulent information, or the omission of any material fact, may subject me to criminal, civil or administrative penalties for fraud, false statements, false claims or otherwise. (U.S. Code Title 18, Section 1001 and Title 31, Sections 3729-3730 and 3801-3812)."

(b) Subrecipients under the Federal award must certify to the pass-through entity whenever applying for funds, requesting payment, and submitting financial reports: "I certify to the best of my knowledge and belief that the information provided herein is true, complete, and accurate. I am aware that the provision of false, fictitious, or fraudulent information, or the omission of any material fact, may subject me to criminal, civil, or administrative consequences including, but not limited to violations of U.S. Code Title 18, Sections 2, 1001, 1343 and Title 31, Sections 3729-3730 and 3801-3812." Each such certification must be maintained pursuant to the requirements of § 200.334. This paragraph applies to all tiers of subrecipients.

(c) Certification of cost allocation plan or indirect cost rate proposal. Each cost allocation plan or indirect cost rate proposal must comply with the following:

(1) A proposal to establish a cost allocation plan or an indirect cost rate, whether submitted to a Federal cognizant agency for indirect costs or maintained on file by the recipient, must be certified by the recipient using the *Certificate of Cost Allocation Plan* or *Certificate of Indirect Costs* as set forth in appendices III through VII, and IX of this part. The certificate must be signed on behalf of the recipient by an individual at a level no lower than the vice president or chief financial officer of the recipient that submits the proposal.

(2) The Federal Government may either disallow all indirect costs or unilaterally establish an indirect cost rate when the recipient fails to submit a certified proposal for establishing a rate. This rate should be based upon audited historical data or other data furnished to the cognizant agency for indirect costs and for which it can be demonstrated that all unallowable costs have been excluded. The rate established must ensure that potentially unallowable costs are not reimbursed. Alternatively, the recipient may use the de minimis indirect cost rate. See § 200.414(f).

(d) Nonprofit organizations must certify that they did not meet the definition of a major nonprofit organization as defined in § 200.414(a), if applicable.

(e) The recipient must certify that the requirements and standards for lobbying (see § 200.450) have been met when submitting its indirect cost rate proposal.

SPECIAL CONSIDERATIONS FOR STATES, LOCAL GOVERNMENTS AND INDIAN TRIBES

§ 200.416 Cost allocation plans and indirect cost proposals.

(a) Awards to states, local governments, and Indian Tribes are often implemented at the level of department within the State, local government, or Indian Tribe. A central service cost allocation plan is established to allow such department to claim a portion of centralized service costs that are incurred in proportion to the award's activities. Examples of centralized service costs may include motor pools, computer centers, purchasing, and accounting. Since Federal awards are performed within the individual operating agencies, there needs to be a process whereby these central service costs can be identified and assigned to benefitted activities on a reasonable and consistent basis. The central service cost allocation plan establishes this process.

(b) Individual departments typically charge Federal awards for indirect costs through an indirect cost rate. A separate indirect cost rate proposal for each operating department is usually necessary to claim indirect costs under Federal awards. Indirect costs include:

(1) The indirect costs originating in each operating department of the State, local government, or Indian Tribe carrying out Federal awards; and

(2) The costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

(c) The requirements for developing and submitting cost allocation plans (for central service costs and public assistance programs) and indirect cost rate proposals are contained in appendices V, VI, and VII of this part.

§ 200.417 Interagency service.

An operating department may provide services to another operating department of the same State, local government, or Indian Tribe. In these instances, the cost of services provided may include allowable direct costs of the service plus a pro-rated share of indirect costs. A standard indirect cost rate equal to 15 percent of the direct salaries and wages for providing the service (excluding overtime, shift premiums, and fringe benefits) may be used instead of determining the actual indirect costs of the service. These services do not include centralized services that are included in central service cost allocation plans described in Appendix V of this part.

Special Considerations for Institutions of Higher Education

§ 200.418 Costs incurred by states and local governments.

Costs incurred or paid by a State or local government on behalf of and in direct benefit to its IHEs are allowable. These costs include but are not limited to fringe benefit programs such as pension costs and Federal Insurance Contributions Act (FICA) costs. These costs are allowable regardless of whether they are recorded in the accounting records of the institutions, subject to the following conditions:

(a) The costs meet the requirements of § 200.402-200.411;

(b) The costs are properly supported by approved cost allocation plans in accordance with the applicable cost accounting principles of this part; and

(c) The costs are not otherwise borne directly or indirectly by the Federal Government.

§ 200.419 Cost accounting standards.

An IHE that receive an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in § 200.101) in its most recently completed fiscal year must comply with the Cost Accounting Standards Board's cost accounting standards located at 48 CFR 9905.501, 9905.502, 9905.505, and 9905.506. CAS-covered contracts and subcontracts awarded to the IHEs are subject to the broader range of CAS requirements at 48 CFR 9900 through 9999 and 48 CFR part 30 (FAR Part 30).

GENERAL PROVISIONS FOR SELECTED ITEMS OF COST

§ 200.420 Considerations for selected items of cost.

(a) This section provides principles to be applied in establishing the allowability of certain items involved in determining cost, in addition to other requirements of this subpart. These principles apply whether or not a particular cost item is properly treated as a direct or indirect cost.

(b) The following sections are not intended to be a comprehensive list of potential items of cost encountered under Federal awards. Failure to mention a particular item of cost, including as an example in certain sections, is not intended to imply that it is either allowable or unallowable. When determining the allowability for an item of cost, each case should be based on the treatment provided for similar or related items of cost and based on the principles described in §§ 200.402 through 200.411. In case of a discrepancy between the provisions of a specific Federal award and the provisions below, the Federal award governs. Criteria outlined in § 200.403 must be applied in determining allowability.

§ 200.421 Advertising and public relations.

(a) The term advertising costs means the costs of advertising media and corollary administrative costs. Advertising media includes, but is not limited to, magazines, newspapers, radio and television, direct mail, exhibits, and electronic or computer transmittals.

(b) The only allowable advertising costs are those which are solely for:

(1) The recruitment of personnel required by the recipient or subrecipient for the performance of a Federal award (See also § 200.463);

(2) The procurement of goods and services for the performance of a Federal award;

(3) The disposal of scrap or surplus materials acquired in the performance of a Federal award except when the recipient or subrecipient is reimbursed for disposal costs at a predetermined amount; or

(4) Program outreach (for example, recruiting project participants) and other specific purposes necessary to meet the Federal award requirements.

(c) The term “public relations” includes community relations and means those activities dedicated to maintaining the recipient's or subrecipient's image or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.

(d) The only allowable public relations costs are:

(1) Costs specifically required by the Federal award;

(2) Costs of communicating with the public and press about specific activities or accomplishments which result from the performance of the Federal award (these costs are considered necessary as part of the outreach effort for the Federal award); or

(3) Costs of conducting general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed on matters of public concern, such as notices of funding opportunities or financial matters.

(e) Unallowable advertising and public relations costs include the following:

(1) All advertising and public relations costs other than as specified in paragraphs (b) and (d) of this section;

(2) Costs of meetings, conventions, conferences, or other events related to other activities of the entity (see also § 200.432), including:

(i) Costs of displays, demonstrations, and exhibits;

(ii) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(iii) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings;

(3) Costs of promotional items and memorabilia;

(4) Costs of advertising and public relations designed solely to promote the recipient or subrecipient.

§ 200.422 Advisory councils.

An advisory council or committee is a body that provides advice to the management of such entities as corporations, organizations, or foundations. Costs incurred by both internal and external advisory councils or committees are allowable if authorized by statute, the Federal agency, or as an indirect cost where allocable to Federal awards. See § 200.444, which applies to States, local governments, and Indian Tribes.

§ 200.423 Alcoholic beverages.

The cost of alcoholic beverages is unallowable.

§ 200.424 Alumni activities.

Costs incurred by IHEs for, or in support of, alumni activities are unallowable.

§ 200.425 Audit services.

(a) A reasonably proportionate share of the costs of audits required by and performed in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507), and the requirements of this part are allowable. However, the following audit costs are unallowable:

(1) Any costs when audits required by the Single Audit Act and subpart F of this part have not been conducted, or have been conducted but not in accordance with the requirements; and

(2) Except as provided for in paragraph (c) of this section, any costs of auditing a non-Federal entity that is exempted from having an audit conducted under the Single Audit Act and subpart F of this part because its expenditures under Federal awards are less than $1,000,000 during its fiscal year."

(b) The costs of a financial statement audit of a recipient or subrecipient that does not currently have a Federal award may be included in the indirect cost pool for a cost allocation plan or indirect cost proposal.

(c) Pass-through entities may charge Federal awards for the cost of agreed-upon procedures engagements to monitor subrecipients (in accordance with §§ 200.331-333) exempt from having an audit conducted under the Single Audit Act and the *requirements of this part.* This cost is allowable only if the agreed-upon procedures engagements are:

(1) Conducted in accordance with GAGAS or applicable international attestation standards, as appropriate;

(2) Paid for and arranged by the pass-through entity; and

(3) Limited in scope to one or more of the following types of compliance requirements: activities allowed or unallowed; allowable costs/cost principles; eligibility; and reporting.

§ 200.426 Bad debts.

Bad debts (debts determined to be uncollectable), including losses (whether actual or estimated) arising from uncollectable accounts and other claims, are unallowable. Related collection costs, and related legal costs, arising from such debts are also unallowable. See § 200.428.

§ 200.427 Bonding costs.

(a) Bonding costs arise when the Federal agency requires assurance against financial loss to itself or others because of an act or default of the recipient or subrecipient. They also arise when the recipient or subrecipient requires similar assurance, including bonds as bid, performance, payment, advance payment, infringement, and fidelity bonds for employees and officials.

(b) Costs of bonding required under the Federal award's terms and conditions are allowable.

(c) Costs of bonding required by the recipient or subrecipient in the general conduct of its operations are allowable as an indirect cost to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

§ 200.428 Collections of improper payments.

The costs incurred by a recipient or subrecipient to recover improper payments, including improper overpayments, are allowable as either direct or indirect costs, as appropriate. The recipient or subrecipient may use the amounts collected in accordance with cash management standards described in § 200.305.

§ 200.429 Commencement and convocation costs.

For IHEs, costs incurred for commencements and convocations are unallowable, except as activity costs provided for in Appendix III, (B)(9) Student Administration and Services.

§ 200.430 Compensation—personal services.

(a) ***General.*** Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the Federal award, including but not necessarily limited to wages and salaries. Compensation for personal services may also include fringe benefits addressed in § 200.431. Costs of compensation are allowable to the extent that they satisfy the specific requirements of this part and that the total compensation for individual employees:

(1) Is reasonable for the services rendered and conforms to the established written policy of the recipient or subrecipient consistently applied to both Federal and non-Federal activities;

(2) Follows an appointment made in accordance with the recipient's or subrecipient's laws, rules, or written policies and meets the requirements of Federal statute, where applicable; and

(3) Is determined and supported as provided in paragraph (g) of this section, when applicable.

(b) ***Reasonableness.*** Compensation for employees engaged in work on Federal awards will be reasonable to the extent that it is consistent with that paid for similar work in other activities of the recipient or subrecipient. In cases where the kinds of employees required for Federal awards are not found in the other activities of the recipient or subrecipient, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the recipient or subrecipient competes for the kind of employees involved.

(c) ***Professional activities outside the recipient or subrecipient.*** Unless the Federal agency expressly authorizes an arrangement, a recipient or subrecipient must follow its written policies and procedures concerning the permissible extent of professional services that can be provided outside the recipient or subrecipient for non-organizational compensation. Where the recipient or subrecipient does not have written policies or procedures, or they do not adequately define the permissible extent of consulting or other non-organizational activities undertaken for extra outside pay, the Federal Government may require the recipient or subrecipient to allocate the effort of professional staff working on Federal awards between:

(1) Recipient or subrecipient activities, and

(2) Non-organizational professional activities. Appropriate arrangements governing compensation must be negotiated on a case-by-case basis if the Federal agency considers the extent of non-organizational professional effort excessive or inconsistent with the conflicts-of-interest terms and conditions of the Federal award.

(d) ***Unallowable costs.***

(1) Costs unallowable under other sections of these principles must not be allowable under this section solely because they constitute personnel compensation.

(2) The allowable compensation for certain employees is subject to a ceiling in accordance with Federal statute. See 10 U.S.C. 3744(a)(16), 41 U.S.C. 1127, and 41 U.S.C. 4304(a)(16) for the ceiling amount, covered compensation subject to the ceiling, covered employees, and other relevant provisions for cost-reimbursement contracts. For other types of Federal awards, other statutory ceilings may apply.

(e) ***Special considerations.*** Special considerations in determining the allowability of compensation will be given to any change in a recipient's or subrecipient's compensation policy resulting in a substantial increase in its employees' level of compensation (particularly when the change was concurrent with an increase in the ratio of Federal awards to other activities) or any change in the treatment of allowability of specific types of compensation due to changes in Federal policy.

(f) ***Incentive compensation.*** Incentive compensation to employees based on cost reduction, efficient performance, suggestion awards, or safety awards is allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued according to an agreement entered into in good faith between the recipient or subrecipient and the employees before the services were rendered, or according to an established plan followed by the recipient or subrecipient so consistently as to imply, in effect, an agreement to make such payment.

(g) ***Standards for Documentation of Personnel Expenses.***

(1) Charges to Federal awards for salaries and wages must be based on records that accurately reflect the work performed. These records must:

(i) Be supported by a system of internal control that provides reasonable assurance that the charges are accurate, allowable, and properly allocated;

(ii) Be incorporated into the official records of the recipient or subrecipient;

(iii) Reasonably reflect the total activity for which the employee is compensated by the recipient or subrecipient, not exceeding 100 percent of compensated activities (for IHEs, this is the IBS);

(iv) Encompass federally-assisted and all other activities compensated by the recipient or subrecipient on an integrated basis but may include the use of subsidiary records as defined in the recipient's or subrecipient's written policy;

(v) Comply with the established accounting policies and procedures of the recipient or subrecipient (See paragraph (i)(1)(ii) of this section for treatment of incidental work for IHEs.); and

(vi) Support the distribution of the employee's salary or wages among specific activities or cost objectives if the employee works on more than one Federal award; a Federal award and non-Federal award; an indirect cost activity and a direct cost activity; two or more indirect activities allocated using different allocation bases; or an unallowable activity and a direct or indirect cost activity.

(vii) Budget estimates (meaning, estimates determined before the services are performed) alone do not qualify as support for charges to Federal awards, but may be used for interim accounting purposes, provided that:

(A) The system for establishing the estimates produces reasonable approximations of the activity performed;

(B) Significant changes in the related work activity (as defined by the recipient's or subrecipient's written policies) are promptly identified and entered into the records. Short-term (such as one or two months) fluctuations between workload categories do not need to be considered as long as the distribution of salaries and wages is reasonable over the longer term; and

(C) The recipient's or subrecipient's system of internal controls includes processes to perform periodic after-the-fact reviews of interim charges made to a Federal award based on budget estimates. All necessary adjustments must be made so that the final amount charged to the Federal award is accurate, allowable, and properly allocated.

(viii) Because practices vary as to the activity constituting a full workload (for example, the Institutional Base Salary (IBS) for IHEs), records may reflect categories of activities expressed as a percentage distribution of total activities.

(ix) It is recognized that teaching, research, service, and administration are often inextricably intermingled in an academic setting. Therefore, a precise assessment of factors contributing to costs is not required when IHEs record salaries and wages charged to Federal awards.

(2) For records that meet the standards required in paragraph (g)(1) of this section, the recipient or subrecipient is not required to provide additional support or documentation for the work performed other than that referenced in paragraph (g)(3) of this section.

(3) In accordance with Department of Labor regulations implementing the Fair Labor Standards Act (FLSA) (29 CFR part 516), charges for the salaries and wages of nonexempt employees, in addition to the supporting documentation described in this section, must also be supported by records indicating the total number of hours worked each day.

(4) Salaries and wages of employees used in meeting cost sharing requirements on Federal awards must be supported in the same manner as salaries and wages claimed for reimbursement from Federal awards.

(5) States, local governments, and Indian Tribes may use substitute processes or systems for allocating salaries and wages to Federal awards either in place of or in addition to the records described in paragraph (g)(1) of this section if approved by the cognizant agency for indirect cost. Such systems may include, but are not limited to, random moment sampling, “rolling” time studies, case counts, or other quantifiable measures of work performed.

(i) Substitute systems that use sampling methods (primarily for Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards, including:

(A) The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in paragraph (g)(5)(iii);

(B) The sample must cover the entire period involved; and

(C) The results must be statistically valid and applied to the period being sampled.

(ii) Allocating charges for the sampled employees' supervisors and clerical and support staff, based on the results of the sampled employees, will be acceptable.

(iii) Less than full compliance with the statistical sampling standards noted in paragraph (5)(i) may be accepted by the cognizant agency for indirect costs if it concludes that the amounts allocated to Federal awards will be minimal or if it concludes that the system proposed by the recipient or subrecipient will result in lower costs to Federal awards than a system which complies with the standards.

(6) Cognizant agencies for indirect costs are encouraged to approve alternative proposals based on outcomes and milestones for program performance when these are clearly documented. These plans are acceptable as an alternative to requirements in paragraph (g)(1) of this section when approved by the cognizant agency for indirect costs.

(7) For Federal awards of similar purpose activity or instances of approved blended funding, a recipient or subrecipient may submit performance plans that incorporate funds from multiple Federal awards and account for their combined use based on performance-oriented metrics, provided the plans are approved in advance by all involved Federal agencies. In these instances, the recipient or subrecipient must submit a request for waiver of the requirements based on documentation that describes the method of charging costs, relates the charging of costs to the specific activity that is applicable to all fund sources, and is based on quantifiable measures of the activity in relation to time charged.

(8) For a recipient or subrecipient whose records do not meet the standards described in this section, the Federal Government may require personnel activity reports, including prescribed certifications, or equivalent documentation supporting the records as required in this section.

(h) ***Nonprofit organizations.*** This paragraph (h) provides guidance specific to only nonprofit organizations. For compensation to members of nonprofit organizations, trustees, directors, associates, officers, or the immediate families thereof, a determination must be made that the compensation is reasonable for the actual personal services rendered rather than a distribution of earnings above actual costs. Compensation may include director's and executive committee member's fees, incentive awards, off-site or incentive pay, location allowances, hardship pay, and cost-of-living differentials.

(i) ***Institutions of Higher Education (IHEs).*** This paragraph provides guidance specific to only IHEs.

(1) ***Determining allowable personnel costs.*** Certain conditions require special consideration and possible limitations in determining allowable personnel compensation costs under Federal awards. Among such conditions are the following:

(i) Allowable activities. Charges to Federal awards may include reasonable amounts for activities contributing and directly related to work under an agreement, such as delivering special lectures about specific aspects of the ongoing activity, writing reports and articles, developing and maintaining protocols (human, animals, etcetera), managing substances/chemicals, managing and securing project-specific data, coordinating research subjects, participating in appropriate seminars, consulting with colleagues and graduate students, and attending meetings and conferences.

(ii) Incidental activities. Incidental activities for which supplemental compensation is allowable under the written institutional policy (at a rate not to exceed institutional base salary) do not need to be included in the records described in paragraph (g). To charge payments of incidental activities directly, such activities must either be expressly authorized in the Federal award budget or receive prior written approval by the Federal agency.

(2) ***Salary basis.*** Charges for work performed on Federal awards by faculty members during the academic year are allowable at the institutional base salary (IBS) rate. Except as noted in paragraph (i)(1)(ii), in no event will charges to Federal awards, irrespective of the basis of computation, exceed the proportionate share of the IBS for that period. This principle applies to all members of the faculty at an institution. IBS is the annual compensation paid by an IHE for an individual's appointment, whether that individual's time is spent on research, instruction, administration, or other activities. IBS excludes any income an individual earns outside of duties performed for the IHE. Unless there is

prior approval by the Federal agency, charges of a faculty member's salary to a Federal award may not exceed the proportionate share of the IBS for the period during which the faculty member worked on the Federal award.

(3) ***Intra-Institution of Higher Education (IHE) consulting.*** Intra-IHE consulting by faculty should be undertaken as an IHE responsibility requiring no compensation in addition to IBS. However, in unusual cases where consultation is across departmental lines or involves a separate or remote operation, and the work performed by the faculty members is in addition to their regular responsibilities, any charges for such work representing additional compensation above IBS are allowable provided that such consulting arrangements are expressly authorized in the Federal award or approved in writing by the Federal agency.

(4) ***Extra service pay.*** Extra service pay typically represents overload compensation, subject to institutional compensation policies for services above and beyond IBS. Where extra service pay results from Intra-IHE consulting, it is subject to the same requirements of paragraph (b) of this section. It is allowable if all of the following conditions are met:

(i) The IHE establishes consistent written policies which apply uniformly to all faculty members, not just those working on Federal awards.

(ii) The IHE establishes a consistent written definition of work covered by IBS, which is specific enough to determine conclusively when work beyond that level has occurred. This definition may be described in appointment letters or other documentation.

(iii) The supplementation amount paid is commensurate with the IBS pay rate and additional work performed. See paragraph (i)(2) of this section.

(iv) The salaries, as supplemented, fall within the salary structure and pay ranges established by and documented in writing or otherwise applicable to the IHE.

(v) The total salaries charged to Federal awards, including extra service payments, are subject to the standards of documentation as described in paragraph (g).

(5) ***Periods outside the academic year.***

(i) Except as specified for teaching activity in paragraph (i)(5)(ii) of this section, charges for work performed by faculty members on Federal awards during periods not included in the base salary period must be at a rate not more than the IBS.

(ii) Charges for teaching activities performed by faculty members on Federal awards during periods not included in IBS period must be based on the written policy of the IHE governing compensation to faculty members for teaching assignments during such periods.

(6) ***Part-time faculty.*** Charges for work performed on Federal awards by faculty members having only part-time appointments must be determined at a rate not more than that regularly paid for part-time assignments.

(7) ***Sabbatical leave costs.*** Rules for sabbatical leave are as follows:

(i) Costs of leaves of absence by employees for performance of graduate work or sabbatical study, travel, or research are allowable, provided the IHE has a uniform written policy on sabbatical leave for persons engaged in instruction and persons engaged in research. These costs must be allocated equitably among all related activities of the IHE.

(ii) Where sabbatical leave is included in fringe benefits for which a cost is determined for assessment as a direct charge, the aggregate amount of such assessments applicable to all work of the institution during the base period must be reasonable in relation to the IHE's actual experience under its sabbatical leave policy.

(8) ***Salary rates for non-faculty members.*** Non-faculty full-time professional personnel may also earn "extra service pay" in accordance with the IHE's written policy and paragraph (i)(1)(i).

§ 200.431 Compensation—fringe benefits.

(a) ***General.*** Fringe benefits are allowances and services employers provide to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave, employee insurance, pensions, and unemployment benefits. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable provided that the benefits are reasonable and are required by law, an organization-employee agreement, or an established policy of the recipient or subrecipient.

(b) ***Leave.*** The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, family-related leave, sick leave, holidays, court leave, military leave, administrative leave, and other similar benefits, are allowable if all of the following criteria are met:

(1) They are provided under established written leave policies;

(2) The costs are equitably allocated to all related activities, including Federal awards; and,

(3) The accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the recipient or subrecipient or a specified grouping of employees.

(i) When a recipient or subrecipient uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment and should be allocated as a general administrative expense to all activities or included in the fringe benefit rate.

(ii) The accrual basis may be only used for those types of leave for which a liability as defined by GAAP exists when the leave is earned. When a recipient or subrecipient uses the accrual basis of accounting, allowable leave costs are the lesser of the amount accrued or funded.

(c) ***Fringe benefits.*** The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in § 200.447); pension plan costs; and other similar benefits are allowable, provided such benefits are permitted under established written policies. The recipient or subrecipient must allocate fringe benefits to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities, and charged as direct or indirect costs following the recipient's or subrecipient's accounting practices.

(d) ***Cost objectives.*** The recipient or subrecipient may assign fringe benefits to cost objectives by identifying specific benefits to specific individual employees or by allocating them based on entity-wide salaries and wages of the employees receiving the benefits. When the allocation method is used, separate allocations must be made to selective groupings of employees unless the recipient or subrecipient demonstrates that costs in relationship to salaries and wages do not differ significantly for different groups of employees.

(e) ***Insurance.*** See also § 200.447(d)(1) and (2).

(1) Provisions for a reserve under a self-insurance program for unemployment compensation or workers' compensation are allowable to the extent that the provisions represent reasonable estimates of the liabilities for such compensation and the types of coverage, the extent of coverage, and rates and premiums would have been allowable had insurance been purchased to cover the risks. However, provisions for self-insured liabilities which do not become payable for more than one year after the provision is made must not exceed the present value of the liability.

(2) Insurance costs on the lives of trustees, officers, or other employees holding positions of similar responsibility are allowable only to the extent that the insurance represents additional compensation. The cost of such insurance is unallowable when the recipient or subrecipient is named as beneficiary.

(3) Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (*for example,* post-retirement health benefits) are allowable in the year of payment provided that the recipient or subrecipient follows a consistent costing policy.

(f) ***Automobiles.*** That portion of automobile costs furnished by the recipient or subrecipient that relates to personal use by employees (including transportation to and from work) is unallowable as a fringe benefit or indirect costs regardless of whether the cost is reported as taxable income to the employees.

(g) ***Pension plan costs.*** Pension plan costs incurred in accordance with the established written policies of the recipient or subrecipient are allowable, provided that:

(1) Such policies meet the test of reasonableness.

(2) The methods of cost allocation are not discriminatory.

(3) The cost assigned to each fiscal year should be determined in accordance with GAAP, except for State and local governments.

(4) The costs assigned to a given fiscal year are funded for all plan participants within six months after the end of that year. However, increases to normal and past service pension costs caused by a delay in funding the actuarial liability beyond 30 calendar days after each quarter of the year to which such costs are assignable are unallowable. The recipient or subrecipient may follow the “Cost Accounting Standard for Composition and Measurement of Pension Costs” (48 CFR 9904.412).

(5) Premiums for pension plan termination insurance that are paid according to the Employee Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. 1301-1461) are allowable. Late payment charges on such premiums are unallowable. Excise taxes on accumulated funding deficiencies and other penalties imposed under ERISA are unallowable.

(6) Pension plan costs may be computed using a pay-as-you-go method or an actuarial cost method recognized by GAAP and following the recipient's or subrecipient's established written policies.

(i) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(ii) Pension costs calculated using an actuarial cost method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after six months (or a later period agreed to by the cognizant agency for indirect costs) are allowable in the year funded. The cognizant agency for indirect costs may agree to

(5) Payments for unfunded PRHP costs must be charged in accordance with the allocation principles of this subpart. Specifically, the recipient or subrecipient may not charge unfunded PRHP costs directly to a Federal award if those unfunded PRHP costs are not allocable to that award.

(6) To be allowable in the current year, the PRHP costs must be paid either to:

(i) An insurer or other benefit provider as current year costs or premiums; or

(ii) An insurer or trustee that will maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries.

(7) The recipient or subrecipient must provide the Federal Government an equitable share of any previously allowed post-retirement benefit costs (including subsequent earnings) that revert or inure to the recipient or subrecipient through a refund, withdrawal, or other credit.

(i) *Severance pay.*

(1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by recipients and subrecipients to workers whose employment is being terminated. Severance pay is allowable only to the extent that, in each case, it is required by:

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes, in effect, an implied agreement on the recipient's or subrecipient's part; or

(iv) Circumstances of the particular employment.

(2) Costs of severance payments are divided into two categories as follows:

(i) Actual severance payments for normal turnover must be allocated to all activities; or, where the recipient or subrecipient provides for a reserve for normal severances, such method is acceptable if the charge to current operations is reasonable in light of payments made for normal severances over a representative past period, and if amounts charged are allocated to all activities of the recipient or subrecipient.

(ii) Measuring the costs of abnormal or mass severance pay by means of an accrual method will not achieve equity for both parties. Therefore, accruals are not allowable. However, the Federal Government recognizes its responsibility to contribute its fair share toward a specific payment. Prior approval by the Federal agency or cognizant agency for indirect cost, as appropriate, is required.

(3) Costs incurred in severance pay packages that are in excess of the standard severance pay provided by the recipient or subrecipient to an employee upon termination of employment and that are paid to the employee contingent upon a change in management control over, or ownership of, the recipient's or subrecipient's assets, are unallowable.

(4) Severance payments to foreign nationals employed by the recipient or subrecipient outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the recipient or subrecipient in the United States, are unallowable unless they are required by applicable foreign law or necessary for the performance of Federal programs and approved by the Federal agency.

(5) Severance payments to foreign nationals employed by the recipient or subrecipient outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the recipient or subrecipient in that country, are unallowable unless they are either:

(i) Required by applicable foreign law; or

(ii) Necessary for the performance of Federal programs and approved by the Federal agency.

(j) ***For IHEs only.***

(1) Fringe benefits in the form of undergraduate and graduate tuition or tuition remission for individual employees are allowable, provided such benefits are granted in accordance with established written policies of the IHE and are distributed to all IHE activities on an equitable basis. Tuition benefits for family members other than the employee are unallowable.

(2) Fringe benefits in the form of undergraduate and graduate tuition or tuition remission for individual employees not employed by the IHE are limited to the tax-free amount allowed by the Internal Revenue Code as amended (26 U.S.C. 127).

(3) IHEs may offer employees tuition waivers or reductions, provided that the benefit does not discriminate in favor of highly compensated employees. Employees can exercise these benefits at other institutions according to institutional policy. See § 200.466, for treatment of tuition remission provided to students.

(k) ***Fringe benefit programs and other benefit costs.***

(1) For IHEs whose costs are paid by a State or local government, fringe benefit programs (such as pension costs and FICA) and any other benefits costs incurred specifically on behalf of, and in direct benefit to, the IHE, are allowable, subject to the following:

(i) The costs meet the requirements of Basic Considerations in §§ 200.402 through 200.411;

(ii) The costs are properly supported by approved cost allocation plans in accordance with applicable Federal cost accounting principles; and

(iii) The costs are not otherwise borne directly or indirectly by the Federal Government.

(2) The allowability of these costs for the IHE does not depend on whether they are recorded in the accounting records of the IHE.

[89 FR 30136, Apr. 22, 2024, as amended at 89 FR 79732, Oct. 1, 2024]

§ 200.432 Conferences.

A conference means an event whose primary purpose is to disseminate technical information beyond the recipient or subrecipient and is necessary and reasonable for successful performance under the Federal award. Allowable conference costs may include the rental of facilities, speakers' fees, attendance fees, costs of meals and refreshments, local transportation, and other items incidental to such conferences unless further restricted by the terms and conditions of the Federal award. The costs of identifying and providing locally available dependent-care resources for participants are allowable as needed. Conference hosts/sponsors must exercise discretion and judgment in ensuring that conference costs are appropriate, necessary, and managed to minimize costs to the Federal award. The Federal agency may authorize exceptions for programs including Indian Tribes, children, and the elderly. See also §§ 200.438, 200.456, and 200.475.

§ 200.433 Contingency provisions.

(a) Contingency provisions are part of a budget estimate of future costs (typically of large construction projects, IT systems, or other items approved by the Federal agency) which are associated with possible events or conditions arising from causes for which the precise outcome is indeterminable at the time of estimate and that are likely to result, in the aggregate, in additional costs for the approved activity or project. Contingency amounts for major project scope changes, unforeseen risks, or extraordinary events must not be included in the budget estimates for a Federal award.

(b) It is permissible for contingency amounts other than those excluded in paragraph (a) of this section to be explicitly included in budget estimates to the extent necessary to improve their precision. Contingency amounts must be estimated using broadly-accepted cost estimating methodologies, specified in the budget documentation of the Federal award, and accepted by the Federal agency. As such, contingency amounts are to be included in the Federal award. In order for actual costs incurred to be allowable, they must comply with the cost principles and other requirements of this part (see §§ 200.300 and 200.403), be necessary and reasonable for proper and efficient accomplishment of project or program objectives, and be verifiable from the recipient's or subrecipient's records.

(c) Payments to a recipient's or subrecipient's “contingency reserve” or any similar payment made for events the occurrence of which cannot be foretold with certainty as to the time or intensity, or with an assurance of their happening, are unallowable, except as noted in §§ 200.431 and 200.447.

§ 200.434 Contributions and donations.

(a) Costs of contributions and donations, including cash, property, and services, from the recipient or subrecipient to other entities are unallowable.

(b) The value of services and property donated (that is, in-kind donations) to the recipient or subrecipient may not be charged to the Federal award either as a direct or indirect cost. The value of donated services and property may be used to meet cost sharing requirements (see § 200.306). Depreciation on donated assets is permitted so long as the donated property is not counted towards meeting cost sharing requirements (see § 200.436).

(c) Services donated or volunteered to the recipient or subrecipient may be provided by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services may not be charged to the Federal award as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing requirements in accordance with the provisions of § 200.306.

(d) To the extent feasible, services donated to the recipient or subrecipient will be supported by the same methods used to support the allocability of regular personnel services.

(e) The following provisions apply to nonprofit organizations. The value of services donated to a nonprofit organization and used in the performance of a direct cost activity must be considered in the determination of the recipient's or subrecipient's indirect cost rate(s) and, accordingly, must be allocated a proportionate share of applicable indirect costs when the following circumstances exist:

(1) The aggregate value of the services is material;

(2) The services are supported by a significant amount of the indirect costs incurred by the recipient or subrecipient;

(i) In those instances where there is no basis for determining the fair market value of the services rendered, the recipient or subrecipient and the cognizant agency for indirect costs must negotiate an appropriate allocation of indirect cost to the services.

(ii) Where donated services directly benefit a project supported by the Federal award, the indirect costs allocated to the services will be considered as a part of the project's total costs. Such indirect costs may be reimbursed under the Federal award or used to meet cost sharing requirements.

(f) Fair market value of donated services must be computed as described in § 200.306.

(g) Personal property and use of space.

(1) Donated personal property and use of space may be furnished to a recipient or subrecipient. The value of the personal property and space may not be charged to the Federal award either as a direct or indirect cost.

(2) The value of the donations of personal property and use of space may be used to meet cost sharing requirements described in § 200.300. The recipient or subrecipient must value the donations in accordance with § 200.300. Where the recipient or subrecipient treats donations as indirect costs, indirect cost rates must separate the value of the donations so that reimbursement is not made.

§ 200.435 Defense and prosecution of criminal and civil proceedings, claims, appeals and patent infringements.

(a) ***Definitions for this section*** —

(1) ***Conviction*** means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon verdict or a plea, including a conviction due to a plea of nolo contendere.

(2) ***Costs*** include the services that bear a direct relationship to a judicial or administrative proceeding and provided by in-house or private counsel, accountants, consultants, or others engaged to assist the recipient or subrecipient before, during, or after the commencement of that proceeding.

(3) ***Fraud*** means:

(i) Acts of fraud or corruption or attempts to defraud the Federal Government or to corrupt its agents,

(ii) Acts that constitute a cause for debarment or suspension (as specified in agency regulations), and

(iii) Acts that violate the False Claims Act (31 U.S.C. 3729-3732) or the Anti-kickback Act (42 U.S.C. 1320a-7b(b)).

(4) ***Penalty*** does not include restitution, reimbursement, or compensatory damages.

(5) ***Proceeding*** includes an investigation.

(b) ***Costs.***

(1) Except as otherwise described herein, costs incurred in connection with any criminal, civil, or administrative proceeding (including the filing of a false certification) commenced by the Federal Government, a State, local government, or foreign government, or joined by the Federal Government

(including a proceeding under the False Claims Act), against the recipient or subrecipient, (or commented by third parties or a current or former employee of the recipient or subrecipient who submits a whistleblower complaint of reprisal in accordance with 10 U.S.C. 4701 or 41 U.S.C. 4712), are not allowable if the proceeding:

(i) Relates to a violation of, or failure to comply with, a Federal, State, local or foreign statute, regulation, or the terms and conditions of the Federal award by the recipient or subrecipient (including its agents and employees); and

(ii) Results in any of the following dispositions:

(A) In a criminal proceeding, a conviction.

(B) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of recipient or subrecipient liability.

(C) In the case of any civil or administrative proceeding, the disallowance of costs, the imposition of a monetary penalty, or an order issued by the Federal agency head or delegate to the recipient or subrecipient to take corrective action under 10 U.S.C. 4701 or 41 U.S.C. 4712.

(D) A final decision by an appropriate Federal official to debar or suspend the recipient or subrecipient, to rescind or void a Federal award, or to terminate a Federal award because of a violation or failure to comply with a statute, regulation, or the terms and conditions of the Federal award.

(E) A disposition by consent or compromise if the action could have resulted in any of the dispositions described in paragraphs (b)(1)(ii)(A) through (D) of this section.

(2) If more than one proceeding involves the same alleged misconduct, the costs of all such proceedings are unallowable if any results in one of the dispositions shown in paragraph (b) of this section.

(c) ***Allowability of costs for proceeding commenced by Federal Government.*** If a proceeding referred to in paragraph (b) of this section is commenced by the Federal Government and is resolved by consent or compromise pursuant to an agreement by the recipient or subrecipient and the Federal Government, then the costs incurred may be allowed to the extent expressly authorized in the agreement.

(d) ***Allowability of costs for proceeding commenced by State, local, or foreign government.*** If a proceeding referred to in paragraph (b) of this section is commenced by a State, local or foreign government, then the costs incurred may be allowed if the authorized Federal official determines that the costs were incurred as a result of:

(1) A specific term or condition of the Federal award, or

(2) Specific written direction of an authorized official of the Federal agency.

(e) ***Allowability of costs in general.*** Costs incurred in connection with proceedings described in paragraph (b), and not made unallowable by that paragraph, may be allowed to the extent that:

(1) The costs are reasonable and necessary for the administration of the Federal award and activities required to deal with the proceeding and the underlying cause of action;

(2) Payment of the reasonable, necessary, allocable and otherwise allowable costs incurred is not prohibited by any other provision(s) of the Federal award;

(3) The costs are not recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and,

(4) An authorized Federal official has determined the percentage of costs allowed considering the complexity of litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States, and other factors that may be appropriate. This percentage must not exceed 80 percent unless an agreement under paragraph (c) has explicitly considered this limitation and permitted a higher percentage. In that case, the total amount of costs incurred may be allowable.

(f) ***Major Fraud Act.*** Costs incurred by the recipient or subrecipient in connection with the defense of suits brought by its employees or ex-employees under section 2 of the Major Fraud Act of 1988 (18 U.S.C. 1031), including the cost of all relief necessary to make the employee whole, where the recipient or subrecipient was found liable or settled, are unallowable.

(g) ***Un-allowability of costs for prosecuting claims against Federal Government.*** Costs for prosecuting claims against the Federal Government, including appeals of final Federal agency decisions, are unallowable.

(h) ***Patent infringement litigation.*** Costs of legal, accounting, and consultant services, and related costs incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the Federal award.

(i) ***Potentially unallowable costs.*** Costs that may be unallowable under this section, including directly associated costs, must be segregated and accounted for separately. During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the Federal Government must generally withhold payment of such costs. However, if in its best interests, the Federal Government may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

§ 200.436 Depreciation.

(a) Depreciation is the method for allocating the cost of fixed assets to periods benefitting from asset use. The recipient or subrecipient may be compensated for the use of its buildings, capital improvements, equipment, and software projects capitalized in accordance with GAAP provided that they are needed and used in the recipient's or subrecipient's activities and correctly allocated to Federal awards. The compensation must be made by computing the proper depreciation.

(b) The allocation for depreciation must be made in accordance with Appendices III through IX of this part.

(c) Depreciation is computed applying the following rules. The computation of depreciation must be based on the acquisition cost of the assets involved. For an asset donated to the recipient or subrecipient by a third party, its fair market value at the time of the donation must be considered as the acquisition cost. Such assets may be depreciated or claimed as cost sharing but not both. When computing depreciation charges, the acquisition cost will exclude:

(1) The cost of land;

(2) Any portion of the cost of buildings and equipment borne by or donated by the Federal Government, irrespective of where the title was originally vested or is presently located;

(3) Any portion of the cost of buildings and equipment contributed by or for the recipient or subrecipient that is already claimed as cost sharing or where law or agreement prohibits recovery; and

(4) Any asset acquired solely for the performance of a non-Federal award.

(d) When computing depreciation charges, the following must be observed:

(1) The period of useful service or useful life established in each case for usable capital assets must take into consideration such factors as the type of construction, nature of the equipment, technological developments in the particular area, historical data, and the renewal and replacement policies followed for the individual items or classes of assets involved.

(2) The depreciation method used to charge the cost of an asset (or group of assets) to accounting periods must reflect the pattern of consumption of the asset during its useful life. In the absence of clear evidence indicating that the expected consumption of the asset will be significantly greater in the early portions than in the later portions of its useful life, the straight-line method must be presumed to be the appropriate method. Once used, depreciation methods may not be changed unless approved in advance by the cognizant agency for indirect costs. The depreciation methods used to calculate the depreciation amounts for indirect cost rate purposes must be the same methods used by the recipient or subrecipient for its financial statements.

(3) The entire building, including the shell and all components, may be treated as a single asset and depreciated over a single useful life. A building may also be divided into multiple components. Each component may be depreciated over its estimated useful life in this case. The building components must be grouped into three general components: building shell (including construction and design costs), building services systems (for example, elevators, HVAC, and plumbing system), and fixed equipment (for example, sterilizers, casework, fume hoods, cold rooms, and glassware/washers). A cognizant agency for indirect costs may authorize a recipient or subrecipient to use more than these three groupings in exceptional cases. When a recipient or subrecipient elects to depreciate its buildings by their components, the same depreciation method must be used for indirect and financial statements purposes, as described in paragraphs (d)(1) and (2).

(4) No depreciation may be allowed on assets that have outlived their depreciable lives.

(5) Where the depreciation method is introduced to replace the use allowance method, depreciation must be computed as if the asset had been depreciated over its entire life (meaning, from the date the asset was acquired and ready for use to the date of disposal or withdrawal from service). The total amount of use allowance and depreciation for an asset (including imputed depreciation applicable to periods before the conversion from the use allowance method and depreciation after the conversion) may not exceed the total acquisition cost of the asset.

(e) Adequate property records must support depreciation charges, and physical inventories must be taken at least once every two years to ensure that the assets exist and are usable, used, and needed. The recipient or subrecipient may use statistical sampling techniques when taking these inventories. In addition, the recipient or subrecipient must maintain adequate depreciation records showing the amount of depreciation.

§ 200.437 Employee health and welfare costs.

(a) Costs incurred in accordance with the recipient's or subrecipient's established written policies for improving working conditions, employer-employee relations, employee health, and employee performance are allowable.

(b) These costs must be equitably apportioned to all activities of the recipient or subrecipient. Income generated from these activities must be credited to the cost thereof unless such income has been irrevocably sent to employee welfare organizations.

(c) Losses resulting from operating food services are allowable only if the recipient's or subrecipient's objective is to operate food services on a break-even basis. Losses sustained because of operating objectives other than the above are allowable only when:

(1) The recipient or subrecipient can demonstrate unusual circumstances; and

(2) Approved by the cognizant agency for indirect costs.

§ 200.438 Entertainment and prizes.

(a) ***Entertainment costs.*** Costs of entertainment, including amusement, diversion, and social activities and any associated costs (such as gifts), are unallowable unless they have a specific and direct programmatic purpose and are included in a Federal award.

(b) ***Prizes.*** Costs of prizes or challenges are allowable if they have a specific and direct programmatic purpose and are included in the Federal award. Federal agencies should refer to OMB guidance in M-10-11 "Guidance on the Use of Challenges and Prizes to Promote Open Government," issued March 8, 2010, or its successor.

§ 200.439 Equipment and other capital expenditures.

(a) See § 200.1 for the definitions of *capital expenditures, equipment, special purpose equipment, general purpose equipment, acquisition cost, and capital assets*.

(b) The following rules of allowability must apply to equipment and other capital expenditures:

(1) Capital expenditures for general purpose equipment, buildings, and land are allowable as direct costs, but only with the prior written approval of the Federal agency or pass-through entity.

(2) Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost of $10,000 or more have the prior written approval of the Federal agency or pass-through entity.

(3) Capital expenditures for improvements to land, buildings, or equipment that materially increase their value or useful life are allowable as a direct cost, but only with the prior written approval of the Federal agency or pass-through entity. See § 200.436 on the allowability of depreciation on buildings, capital improvements, and equipment. See § 200.465 on the allowability of real property and equipment rental costs.

(4) When approved as a direct cost in accordance with paragraphs (b)(1) through (3), capital expenditures must be charged in the period in which the expenditure is incurred or as otherwise determined appropriate and negotiated with the Federal agency.

(5) The recipient or subrecipient may claim the unamortized portion of any equipment written off as a result of a change in capitalization levels by continuing to claim the otherwise allowable depreciation on the equipment or by amortizing the amount to be written off over a period of years negotiated with the cognizant agency for indirect cost.

(6) Cost of equipment disposal. If the Federal agency instructs the recipient or subrecipient to otherwise dispose of or transfer the equipment, the costs of disposal or transfer are allowable.

(7) Equipment and other capital expenditures are unallowable as indirect costs. See § 200.436.

§ 200.440 Exchange rates.

(a) Cost increases for fluctuations in exchange rates are allowable costs subject to the availability of funding. Prior approval of exchange rate fluctuations is required only when the change results in the need for additional Federal funding, or the increased costs result in the need to significantly reduce the scope of the project. Before providing approval, the Federal agency must ensure that adequate funds are available to cover currency fluctuations in order to avoid a violation of the Antideficiency Act.

(b) The recipient or subrecipient is required to make reviews of local currency gains to determine the need for additional Federal funding before the expiration date of the Federal award. Subsequent adjustments for currency increases may be allowable only when the recipient or subrecipient provides the Federal agency with adequate source documentation from a commonly used source in effect at the time the expense was made, and to the extent that sufficient Federal funds are available.

§ 200.441 Fines, penalties, damages and other settlements.

Costs resulting from recipient or subrecipient violations of, alleged violations of, or failure to comply with, Federal, State, local, tribal, or foreign laws and regulations are unallowable, except when incurred as a result of compliance with specific provisions of the Federal award, or with the prior written approval of the Federal agency. See § 200.435.

§ 200.442 Fundraising and investment management costs.

(a) Costs of organized fundraising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions, are unallowable. Fundraising costs for meeting the Federal program objectives are allowable with the prior written approval of the Federal agency.

(b) Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable except when associated with investments covering pension, self-insurance, or other funds, which include Federal participation allowed by this part.

(c) Costs related to the physical custody and control of monies and securities are allowable.

(d) Both allowable and unallowable fundraising and investment activities must be allocated an appropriate share of indirect costs in accordance with § 200.413.

§ 200.443 Gains and losses on the disposition of depreciable assets.

(a) The recipient or subrecipient must include gains and losses on the sale, retirement, or other disposition of depreciable property in the year they occur as credits or charges to the asset cost grouping(s) of the property. The amount of the gain or loss is the difference between the amount realized on the property and the undepreciated basis of the property.

(b) Gains and losses from the disposition of depreciable property must not be recognized as a separate credit or charge under the following conditions:

(1) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under §§ 200.436 and 200.439.

(2) The property is given in exchange as part of the purchase price of a similar item, and the gain or loss is taken into account in determining the depreciation cost basis of the new item.

(3) A loss results from failing to maintain proper insurance, except as provided in § 200.447.

(4) Compensation for the use of the property was provided through use allowances instead of depreciation.

(5) Gains and losses arising from extraordinary or bulk sales, retirements, or other dispositions must be considered on a case-by-case basis.

(c) Gains or losses of any nature arising from the sale or exchange of property other than the property covered in paragraph (a) of this section must be excluded in computing Federal award costs.

(d) When assets acquired with Federal funds, in part or wholly, are disposed of, the distribution of the proceeds must be made in accordance with §§ 200.310 through 200.316.

§ 200.444 General costs of government.

(a) For states, local governments, and Indian Tribes, the general costs of government are unallowable except as provided in § 200.475. Unallowable costs include:

(1) Salaries and expenses of the Office of the Governor of a State or the chief executive of a local government or the chief executive of an Indian Tribe;

(2) Salaries and other expenses of a State legislature, tribal council, or similar local governmental body, such as a county supervisor, city council, or school board, whether incurred for purposes of legislation or executive direction;

(3) Costs of the judicial branch of a government;

(4) Costs of prosecutorial activities unless treated as a direct cost to a specific program if authorized by statute or regulation. However, this does not preclude the allowability of other legal activities of the Attorney General as described in § 200.435; and

(5) Costs of other general types of government services normally provided to the general public, such as fire and police, unless provided as a direct cost under a program statute or regulation.

(b) Indian Tribes and Councils of Governments (COGs) (see definition for *Local government* in § 200.1) may include up to 50 percent of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and their staff in the indirect cost calculation without documentation.

§ 200.445 Goods or services for personal use.

(a) Costs of goods or services for the personal use of the recipient's or subrecipient's employees are unallowable regardless of whether the cost is reported as taxable income to the employees.

(b) Housing costs (for example, depreciation, maintenance, utilities, furnishings, rent), housing allowances, and personal living expenses for the recipient's or subrecipient's employees are only allowable as direct costs and must be approved in advance by the Federal agency.

§ 200.446 Idle facilities and idle capacity.

(a) Definitions for the purpose of this section:

(1) Facilities means land and buildings or any portion thereof, equipment individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the recipient or subrecipient.

(2) Idle facilities mean completely unused facilities that exceed the recipient's or subrecipient's current needs.

(3) Idle capacity means the unused capacity of partially used facilities. It is the difference between:

(i) That which a facility could achieve under 100 percent operating time on a one-shift basis less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays; and

(ii) The extent to which the facility was actually used to meet demands during the accounting period. A multi-shift basis should be used if it can be shown that this amount of usage would normally be expected for the type of facility involved.

(4) Cost of idle facilities or idle capacity means maintenance, repair, housing, rent, and other related costs (for example, insurance, interest, and depreciation). These costs could include the costs of idle public safety emergency facilities, telecommunications, or information technology system capacity that is built to withstand major fluctuations in load (for example, consolidated data centers).

(b) The costs of idle facilities are unallowable except to the extent that:

(1) They are necessary to meet workload requirements which may fluctuate, and are allocated appropriately to all benefiting programs; or

(2) Although not necessary to meet fluctuations in workload, they were necessary when acquired and are now idle because of changes in program requirements, efforts to achieve more economical operations, reorganization, termination, or other causes which could not have been reasonably foreseen. Under this exception, costs of idle facilities are allowable for a reasonable period, ordinarily not to exceed one year, depending on the initiative taken to use, lease, or dispose of such facilities.

(c) The costs of idle capacity are normal costs of doing business and are a factor in the normal fluctuations of usage or indirect cost rates from period to period. These costs are allowable, provided that the capacity is reasonably anticipated to be necessary to carry out the purpose of the Federal award or was originally reasonable and is not subject to reduction or elimination by use on other Federal awards, subletting, renting, or sale, in accordance with sound business, economic, or security practices. Widespread idle capacity throughout an entire facility or among a group of assets having substantially the same function may be considered idle facilities.

§ 200.447 Insurance and indemnification.

(a) Costs of insurance required or approved and maintained by the terms and conditions of the Federal award are allowable.

(b) Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(1) The types, extent, and cost of coverage are in accordance with the recipient's or subrecipient's established written policy and sound business practices.

(2) Costs of insurance or contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that the Federal agency has approved the costs.

(3) Costs allowed for business interruption or other similar insurance must exclude coverage of management fees.

(4) Insurance costs on the lives of trustees, officers, or other employees holding positions of similar responsibilities are allowable only when the insurance represents additional compensation (see § 200.431). This insurance is unallowable when the recipient or subrecipient is identified as the beneficiary.

(5) Insurance costs to correct defects in the recipient's or subrecipient's materials or workmanship are unallowable.

(6) Medical liability (malpractice) insurance is an allowable cost of a Federal research program only when the program involves human subjects or training of participants in research techniques. Medical liability insurance costs must be treated as a direct cost and assigned to individual projects based on how the insurer allocates the risk to the population covered by the insurance.

(c) Actual losses which could have been covered by permissible insurance (through a self-insurance program or otherwise) are unallowable unless expressly authorized in the Federal award. However, costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of operations, are allowable.

(d) Contributions to a reserve for a self-insurance program, including workers' compensation, unemployment compensation, and severance pay, are allowable subject to the following requirements:

(1) The type, extent, and cost of coverage and the rates and premiums would have been allowed had insurance (including reinsurance) been purchased to cover the risks. However, a provision for known or reasonably estimated self-insured liabilities, which do not become payable for more than one year after the provision is made, must not exceed the discounted present value of the liability. The rate used for discounting the liability must be determined by considering factors such as the recipient's or subrecipient's settlement rate for those liabilities and its investment rate of return.

(2) Earnings or investment income on reserves must be credited to those reserves.

(3)

(i) Contributions to reserves must be based on sound actuarial principles using historical experience and reasonable assumptions. Reserve levels must be analyzed and updated at least biennially for each major risk being insured and take into account any reinsurance, coinsurance, and other relevant factors or information. Reserve levels related to employee-related coverages must normally be limited to the value of claims:

(A) Submitted and adjudicated but not paid;

(B) Submitted but not adjudicated; and

(C) Incurred but not submitted.

(ii) Reserve exceeding the levels described in paragraph (d)(3)(i) of this section must be identified and justified in the cost allocation plan or indirect cost rate proposal.

(4) Accounting records, actuarial studies, and cost allocations (or billings) must recognize any significant differences due to the types of insured risk and losses generated by the various insured activities or agencies of the recipient or subrecipient. If individual departments or agencies of the recipient or subrecipient experience significantly different levels of claims for a particular risk, those differences must be recognized by using separate allocations or other techniques resulting in an equitable allocation.

(5) Whenever funds are transferred from a self-insurance reserve to other accounts (for example, general fund or unrestricted account), refunds must be made to the Federal Government for its share of funds transferred, including earned or imputed interest from the date of transfer and debt interest, if applicable, chargeable in accordance with the claims collection regulations of the cognizant agency for indirect cost.

(e) Insurance refunds must be credited against insurance costs in the year the refund is received.

(f) Indemnification includes securing the recipient or subrecipient against liabilities to third persons and other losses not compensated by insurance or otherwise. The Federal Government is obligated to indemnify the recipient or subrecipient only to the extent expressly provided for in the Federal award, except as provided in paragraph (c).

§ 200.448 Intellectual property.

(a) ***Patent and copyright costs.***

(1) The following costs related to securing patents and copyrights are allowable:

(i) Costs of preparing disclosures, reports, and other documents required by the Federal award and of searching the art to the extent necessary to make such disclosures;

(ii) Costs of preparing documents and any other patent costs in connection with the filing and prosecution of a United States patent application where the Federal Government requires that a title or a royalty-free license be conveyed to the Federal Government; and

(iii) General counseling services relating to patent and copyright matters, such as advice on patent and copyright laws, regulations, clauses, and employee intellectual property agreements (See § 200.459).

(2) The following costs related to securing patents and copyrights are unallowable:

(i) Costs of preparing disclosures, reports, and other documents and of searching the art to make disclosures not required by the Federal award;

(ii) Costs in connection with filing and prosecuting any foreign patent application, or any United States patent application, where the Federal award does not require conveying title or a royalty-free license to the Federal Government.

(b) ***Royalties and other costs for the use of patents and copyrights.***

(1) Royalties on a patent or copyright or amortization of the cost of acquiring by purchase a copyright, patent, or rights thereto, necessary for the proper performance of the Federal award are allowable unless:

(i) The Federal Government already has a license or the right to free use of the patent or copyright.

(ii) The patent or copyright has been adjudicated to be invalid or administratively determined to be invalid.

(iii) The patent or copyright is considered to be unenforceable.

(iv) The patent or copyright is expired.

(2) Special care should be exercised in determining reasonableness when the royalties may have been obtained as a result of less-than-arm's-length bargaining, such as:

(i) Royalties paid to persons, including corporations, affiliated with the recipient or subrecipient.

(ii) Royalties paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Federal award would be made.

(iii) Royalties paid under an agreement entered into after a Federal award is made to a recipient or subrecipient.

(3) In any case involving a patent or copyright formerly owned by the recipient or subrecipient, the amount of royalty allowed must not exceed the cost which would have been allowed had the recipient or subrecipient retained ownership.

§ 200.449 Interest.

(a) ***General.*** Costs incurred for interest on borrowed capital, temporary use of endowment funds, or the use of the recipient's or subrecipient's own funds are unallowable. Financing costs (including interest) to acquire, construct, or replace capital assets are allowable, subject to the requirements of this section.

(b) ***Capital assets.***

(1) Capital assets is defined in § 200.1. An asset cost includes (as applicable) acquisition costs, construction costs, and other costs capitalized in accordance with GAAP.

(2) For recipient or subrecipient fiscal years beginning on or after January 1, 2016, intangible assets include patents and computer software. For software development projects, only interest attributable to the portion of the project costs capitalized in accordance with GAAP is allowable.

(c) ***Requirements for all recipients and subrecipients.***

(1) The recipient or subrecipient uses the capital assets in support of Federal awards;

(2) The allowable asset costs to acquire facilities and equipment are limited to a fair market value available to the recipient or subrecipient from an unrelated (arm's length) third party.

(3) The recipient or subrecipient obtains the financing via an arm's-length transaction (meaning, a transaction with an unrelated third party); or claims reimbursement of actual interest cost at a rate available via such a transaction.

(4) The recipient or subrecipient limits claims for Federal reimbursement of interest costs to the least expensive alternative. For example, a lease contract that transfers ownership by the end of the contract may be determined less costly than purchasing through other types of debt financing, in which case reimbursement must be limited to the amount of interest determined if leasing had been used.

(5) The recipient or subrecipient expenses or capitalizes allowable interest cost in accordance with GAAP.

(6) Earnings generated by the investment of borrowed funds pending their disbursement for the asset costs are used to offset the current period's allowable interest cost, whether that cost is expensed or capitalized. Earnings subject to being reported to the Federal Internal Revenue Service under arbitrage requirements are excludable.

(7) The following conditions must apply to debt arrangements over $1 million to purchase or construct facilities unless the recipient or subrecipient makes an initial equity contribution to the purchase of 25 percent or more. For this purpose, "initial equity contribution" means the amount or value of contributions made by the recipient or subrecipient for the acquisition of facilities prior to occupancy.

(i) The recipient or subrecipient must reduce claims for reimbursement of interest cost by an amount equal to imputed interest earnings on excess cash flow attributable to the portion of the facility used for Federal awards.

(ii) The recipient or subrecipient must impute interest on excess cash flow as follows:

(A) Annually, the recipient or subrecipient must prepare a cumulative (from the project's inception) report of monthly cash inflows and outflows, regardless of the funding source. For this purpose, inflows consist of Federal reimbursement for depreciation, amortization of capitalized construction interest, and annual interest cost. Outflows consist of initial equity contributions, debt principal payments (less the pro-rata share attributable to the cost of land), and interest payments.

(B) To compute monthly cash inflows and outflows, the recipient or subrecipient must divide the above-mentioned annual amounts by the months in the year (usually 12) that the building is in service.

(C) For any month in which cumulative cash inflows exceed cumulative outflows, interest must be calculated on the excess inflows for that month and be treated as a reduction to allowable interest cost. The interest rate to be used must be the three-month Treasury bill closing rate as of the last business day of that month.

(8) Interest attributable to a fully depreciated asset is unallowable.

(d) ***Additional requirements for states, local governments and Indian Tribes.*** For interest costs to be allowable for states, local governments, and Indian Tribes, the recipient or subrecipient must have incurred the interest costs for buildings after October 1, 1980, or after September 1, 1995, for land and equipment.

(1) The requirement to offset the interest earned on borrowed funds against allowable interest cost (paragraph (c)(5) of this section) also applies to earnings on debt service reserve funds.

(2) The recipient or subrecipient must negotiate the amount of allowable interest cost related to the acquisition of facilities with asset costs of $1 million or more, as described in paragraph (c)(7) of this section. For this purpose, a recipient or subrecipient must consider only cash inflows and outflows attributable to that portion of the real property used for Federal awards.

(e) ***Additional requirements for IHEs.*** For interest costs to be allowable, the IHE must have incurred the interest costs after July 1, 1982, in connection with acquisitions of capital assets that occurred after that date.

(f) ***Additional requirements for nonprofit organizations.*** For interest costs to be allowable, the nonprofit organization must have incurred the interest costs after September 29, 1995, in connection with acquisitions of capital assets that occurred after that date.

(g) ***Requirements for nonprofit organizations subject to full coverage under CAS.*** The interest allowability provisions of this section do not apply to a nonprofit organization subject to "full coverage" under the Cost Accounting Standards (CAS), as defined at 48 CFR 9903.201-2(a). The nonprofit organization's Federal

awards are instead subject to CAS 414 (48 CFR 9904.414), "Cost of Money as an Element of the Cost of Facilities Capital," and CAS 417 (48 CFR 9904.417), "Cost of Money as an Element of the Cost of Capital Assets Under Construction."

§ 200.450 Lobbying.

(a) ***Lobbying costs associated with obtaining Federal assistance awards.*** The costs of certain influencing activities associated with obtaining grants, cooperative agreements, contracts, or loans are unallowable. Lobbying with respect to certain grants, cooperative agreements, contracts, and loans is governed by relevant statutes, including the provisions of 31 U.S.C. 1352, as well as the common rule, "New Restrictions on Lobbying," published on February 26, 1990, including definitions, and the Office of Management and Budget "Government-wide Guidance for New Restrictions on Lobbying" and notices published on December 20, 1989, June 15, 1990, January 15, 1992, and January 19, 1996.

(b) ***Executive lobbying costs.*** Costs incurred in attempting to improperly influence, either directly or indirectly, an employee or officer of the executive branch of the Federal Government to give consideration or to act regarding a Federal award or a regulatory matter are unallowable. Improper influence means any influence that induces or tends to induce a Federal employee or officer to give consideration or to act regarding a Federal award or regulatory matter on any basis other than the merit.

(c) ***Restrictions on nonprofit organizations and IHEs.*** In addition, the following restrictions apply to nonprofit organizations and IHEs:

(1) Costs associated with the following activities are unallowable:

(i) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure through in-kind or cash contributions, endorsements, publicity, or similar activity;

(ii) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established to influence the outcomes of elections in the United States;

(iii) Any attempt to influence:

(A) The introduction of Federal or State legislation;

(B) The enactment or modification of any pending Federal or State legislation through communication with any member or employee of the Congress or State legislature (including efforts to influence State or local officials to engage in similar lobbying activity);

(C) The enactment or modification of any pending Federal or State legislation by preparing, distributing, or using publicity or propaganda or by urging members of the general public, or any segment thereof, to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign; or

(D) Any government official or employee in connection with a decision to sign or veto enrolled legislation;

(iv) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable lobbying.

(2) The following activities are excepted from the coverage of paragraph (c)(1) of this section:

(i) Technical and factual presentations on topics directly related to the performance of a grant, contract, or other agreement (through hearing testimony, statements, or letters to the Congress or a State legislature, or subdivision, member, or cognizant staff member thereof), in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient's or subrecipient's member of congress, legislative body, subdivision, or a cognizant staff member thereof, provided such information is readily obtainable and can be readily put in deliverable form, and further provided that costs under this section for travel, lodging or meals are unallowable unless incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearings;

(ii) Any lobbying made unallowable by paragraph (c)(1)(iii) of this section to influence State legislation to directly reduce the cost, or to avoid material impairment of the recipient's or subrecipient's authority to perform the grant, contract, or other agreement;

(iii) Any activity specifically authorized by statute to be undertaken with funds from the Federal award; or

(iv) Any activity excepted from the definitions of “lobbying” or “influencing legislation” by the Internal Revenue Code provisions that require nonprofit organizations to limit their participation in direct and “grass roots” lobbying activities to retain their charitable deduction status and avoid punitive excise taxes, 26 U.S.C. (I.R.C.) 501(c)(3), 501(h), 4911(a), including:

(A) Nonpartisan analysis, study, or research reports;

(B) Examinations and discussions of broad social, economic, and similar problems; and

(C) Information provided upon request by a legislator for technical advice and assistance, as defined by I.R.C. 4911(d)(2) and 26 CFR 56.4911-2(c)(1) through (c)(3).

(3) When a recipient or subrecipient seeks reimbursement for indirect costs, total lobbying costs must be identified separately in the indirect cost rate proposal and thereafter be treated as other unallowable activity costs in accordance with § 200.413.

(4) The recipient or subrecipient must submit a certification that the requirements and standards of this section have been complied with as part of its annual indirect cost rate proposal. (See § 200.415.)

(5)

(i) Time logs, calendars, or similar records are not required to be created for purposes of complying with the record-keeping requirements in § 200.302 with respect to lobbying costs during a particular calendar month when:

(A) The employee engages in lobbying (as defined in paragraphs (c)(1) and (2) of this section) for 25 percent or less of the employee's compensated hours of employment during that calendar month; and

(B) Within the preceding five-year period, the recipient or subrecipient has not materially misstated allowable or unallowable costs of any nature, including legislative lobbying costs.

(ii) When conditions in paragraph (c)(5)(i)(A) and (B) of this section are met, recipients and subrecipients are not required to establish records to support the allowability of claimed costs in addition to records already required or maintained. Also, when conditions in paragraphs (c)(5)(i)(A) and (B) of this section are met, the absence of time logs, calendars, or similar records will not serve as a basis for disallowing costs by contesting estimates of lobbying time spent by employees during a calendar month.

(iii) In consultation with OMB, the Federal agency must establish procedures for resolving, in advance, any significant questions or disagreements concerning the interpretation or application of this section. Any such advance resolutions must be binding in any subsequent settlements, audits, or investigations with respect to that grant or contract for purposes of interpretation of this part, provided, however, that this must not be construed to prevent a contractor or recipient or subrecipient from contesting the lawfulness of such a determination.

§ 200.451 Losses on other awards or contracts.

Any excess costs over income under any other award or contract of any nature is unallowable. This includes, but is not limited to, the recipient's or subrecipient's contributed portion by reason of cost sharing agreements or any under-recoveries through negotiation of flat amounts for indirect costs. Also, any excess of costs over authorized funding levels transferred from any award or contract to another is unallowable. All losses are not allowable indirect costs and must be included in the appropriate indirect cost rate base for allocating indirect costs.

§ 200.452 Maintenance and repair costs.

Costs incurred for utilities, insurance, security, necessary maintenance, janitorial services, repair, or upkeep of buildings and equipment (including Federal property unless otherwise provided for) which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable. Costs incurred for improvements that add to the permanent value of the buildings and equipment or appreciably prolong their intended life must be treated as capital expenditures (see § 200.439). These costs are only allowable to the extent not paid through rental or other agreements.

§ 200.453 Materials and supplies costs, including costs of computing devices.

(a) Costs incurred for materials, supplies, and fabricated parts necessary for the performance of a Federal award are allowable.

(b) Purchased materials and supplies must be charged at their actual prices, net of applicable credits. Withdrawals from general stores or stockrooms must be charged at their actual net cost under any recognized method of pricing inventory withdrawals, consistently applied. Incoming transportation charges are an allowable part of materials and supplies costs.

(c) Materials and supplies used for the performance of a Federal award may be charged as direct costs. Charging computing devices as direct costs is allowable for devices that are essential and allocable, but not solely dedicated, to the performance of a Federal award.

(d) Where Federally-donated or furnished materials are used in performing the Federal award, the materials will be used without charge.

§ 200.454 Memberships, subscriptions, and professional activity costs.

(a) Costs of the recipient's or subrecipient's membership in business, technical, and professional organizations are allowable.

(b) Costs of the recipient's or subrecipient's subscriptions to business, professional, and technical periodicals are allowable.

(c) Costs of membership in any civic or community organization are allowable.

(d) Costs of membership in any country club or social or dining club or organization are unallowable.

(e) Costs of membership in organizations whose primary purpose is lobbying are unallowable. See § 200.450.

§ 200.455 Organization costs.

(a) Costs such as incorporation fees, brokers' fees, fees to promoters, organizers or management consultants, attorneys, accountants, or investment counselors, whether or not employees of the recipient or subrecipient in connection with the establishment or reorganization of an organization, are unallowable except with prior approval of the Federal agency.

(b) The costs of any of the following activities are unallowable: activities undertaken to persuade employees of the recipient or subrecipient, or any other entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing.

(c) The costs related to data and evaluation are allowable. Data costs include (but are not limited to) the expenditures needed to gather, store, track, manage, analyze, disaggregate, secure, share, publish, or otherwise use data to administer or improve the program, such as data systems, personnel, data dashboards, cybersecurity, and related items. Data costs may also include direct or indirect costs associated with building integrated data systems—data systems that link individual-level data from multiple State and local government agencies for purposes of management, research, and evaluation. Evaluation costs include (but are not limited to) evidence reviews, evaluation planning and feasibility assessment, conducting evaluations, sharing evaluation results, and other personnel or materials costs related to the effective building and use of evidence and evaluation for program design, administration, or improvement.

§ 200.456 Participant support costs.

Participant support costs are allowable (see § 200.1). The classification of items as participant support costs must be documented in the recipient's or subrecipient's written policies and procedures and treated consistently across all Federal awards.

§ 200.457 Plant and security costs.

Necessary and reasonable expenses incurred for the protection and security of facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; protective (non-military) gear, devices, and equipment; contractual security services; and consultants. Capital expenditures for plant security purposes are subject to § 200.439.

§ 200.458 Pre-award costs.

Pre-award costs are those incurred before the start date of the Federal award or subaward directly pursuant to the negotiation and in anticipation of the Federal award where such costs are necessary for efficient and timely performance of the scope of work. These costs are allowable only to the extent that they would have been allowed

if incurred after the start date of the Federal award and only with the written approval of the Federal agency. If approved, these costs must be charged to the initial budget period of the Federal award unless otherwise specified by the Federal agency or pass-through entity.

§ 200.459 Professional service costs.

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the recipient or subrecipient are allowable, subject to paragraphs (b) and (c) of this section when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government. In addition, legal and related services are limited under § 200.435.

(b) In determining the allowability of costs in a particular case, no single factor or any combination of factors is necessarily determinative. However, the following factors are relevant:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the recipient's or subrecipient's capability in the particular area.

(3) The past pattern of such costs, particularly in the years prior to receiving a Federal award(s).

(4) The impact of Federal awards on the recipient's or subrecipient's business (meaning, what new problems have arisen).

(5) Whether the proportion of Federal work to the recipient's or subrecipient's total business influences the recipient or subrecipient in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Federal awards.

(6) Whether the service can be performed more economically by direct employment rather than contracting.

(7) The qualifications of the individual or entity providing the service and the customary fees charged, especially on non-federally funded activities.

(8) Adequacy of the contractual agreement for the service (for example, description of the service, estimate of the time required, rate of compensation, and termination provisions).

(c) To be allowable, retainer fees must be supported by evidence of bona fide services available or rendered in addition to the factors in paragraph (b) of this section.

§ 200.460 Proposal costs.

Proposal costs are the costs of preparing bids, proposals, or applications on potential Federal and non-Federal awards or projects, including developing data necessary to support the recipient's or subrecipient's bids or proposals. Proposal costs of the current accounting period of both successful and unsuccessful bids and proposals normally should be treated as indirect costs and allocated to all current activities of the recipient or subrecipient. No proposal costs of past accounting periods may be allocated to the current period.

§ 200.461 Publication and printing costs.

(a) Publication costs for electronic and print media, including distribution, promotion, and general handling, are allowable. These costs should be allocated as indirect costs to all benefiting activities of the recipient or subrecipient if they are not identifiable with a particular cost objective.

(b) Page charges, article processing charges (APCs), or similar fees such as open access fees for professional journal publications and other peer-reviewed publications resulting from a Federal award are allowable where:

(1) The publications report work supported by the Federal Government; and

(2) The charges are levied impartially on all items published by the journal, whether or not under a Federal award.

(3) The recipient or subrecipient may charge the Federal award during closeout for the costs of publication or sharing of research results if the costs were not incurred during the period of performance of the Federal award. These costs must be charged to the final budget period of the award unless otherwise specified by the Federal agency.

§ 200.462 Rearrangement and reconversion costs.

(a) Costs incurred for ordinary and normal rearrangement and alteration of facilities are allowable as indirect costs. Special arrangements and alterations are allowable as a direct cost if the costs are incurred specifically for a Federal award and with the prior approval of the Federal agency or pass-through entity.

(b) Costs incurred in restoring or rehabilitating the recipient's or subrecipient's facilities to approximately the same condition existing immediately before the commencement of a Federal award(s), less costs related to normal wear and tear, are allowable.

§ 200.463 Recruiting costs.

(a) Subject to paragraphs (b) and (c) of this section, and provided that the size of the staff recruited and maintained is in keeping with workload requirements, costs of “help wanted” advertising, operating costs of an employment office necessary to secure and maintain adequate staff, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocation costs incurred incident to recruitment of new employees, are allowable to the extent that such costs are incurred pursuant to the recipient's or subrecipient's standard recruitment program. When the recipient or subrecipient uses employment agencies, costs not in excess of standard commercial rates for such services are allowable.

(b) Special emoluments, fringe benefits, and salary allowances incurred to attract professional personnel that do not meet the test of reasonableness or do not conform with the established practices of the recipient or subrecipient, are unallowable.

(c) If relocation costs incurred incident to recruitment of a new employee have been funded in whole or in part by a Federal award, and the newly hired employee resigns for reasons within the employee's control within 12 months after hire, the recipient or subrecipient must refund or credit the Federal Government for its share of those relocation costs. See § 200.464.

(d) Short-term visas (as opposed to longer-term immigration visas) are generally an allowable cost and they may be proposed as a direct cost because they are issued for a specific period and purpose and can be clearly identified as directly connected to work performed on a Federal award. For these costs to be directly charged to a Federal award, they must:

(1) Be critical and necessary for the conduct of the project;

(2) Be allowable under the applicable cost principles;

(3) Be consistent with the recipient's or subrecipient's cost accounting practices and established written policy; and

(4) Meet the definition of “direct cost” as described in the applicable cost principles.

§ 200.464 Relocation costs of employees.

(a) Relocation costs are costs incident to the permanent change of duty assignment (for an indefinite period or a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee. Relocation costs are allowable, subject to the limitations described in paragraphs (b), (c), and (d) of this section, provided that:

(1) The move is for the benefit of the employer.

(2) Reimbursement to the employee is in accordance with an established written policy consistently followed by the employer.

(3) The reimbursement does not exceed the employee's actual (or reasonably estimated) expenses.

(b) Allowable relocation costs for current employees are limited to the following:

(1) The costs of transportation of the employee, members of their immediate family and their household, and personal effects to the new location.

(2) The costs of finding a new home, such as advance trips by employees and spouses to locate living quarters and temporary lodging during the transition period, up to a maximum period of 30 calendar days.

(3) Closing costs, such as brokerage, legal, and appraisal fees, incidental to the disposition of the employee's former home. These costs, together with those described in paragraph (b)(4) of this section, are limited to eight percent of the sales price of the employee's former home.

(4) The continuing costs of ownership (for up to six months) of the vacant former home after the settlement or lease date of the employee's new permanent home, such as maintenance of buildings and grounds (exclusive of fixing-up expenses), utilities, taxes, and property insurance.

(5) Other necessary and reasonable expenses normally incident to relocation, such as canceling an unexpired lease, transportation of personal property, and purchasing insurance against loss of or damages to personal property. The cost of canceling an unexpired lease is limited to three times the monthly rental.

(c) Allowable relocation costs for new employees are limited to those described in paragraphs (b)(1) and (2) of this section. If relocation costs incurred incident to the recruitment of a new employee have been funded in whole or in part by a Federal award, and the newly hired employee resigns for reasons within the employee's control within 12 months after hire, the recipient or subrecipient must refund or credit the Federal Government for its share of the cost. If a new employee is relocating to an overseas location and dependents are not permitted for any reason, and the costs do not include transporting household goods, the costs must be considered travel costs in accordance with § 200.474*, not relocation costs under* this section.

(d) The following costs related to relocation are unallowable:

(1) Fees and other costs associated with acquiring a new home.

(2) A loss on the sale of a former home.

(3) Continuing mortgage principal and interest payments on a home being sold.

(4) Income taxes paid by an employee related to reimbursed relocation costs.

§ 200.465 Rental costs of real property and equipment.

(a) Subject to the limitations described in paragraphs (b) through (d) of this section, rental costs are allowable to the extent that the rates are reasonable in light of such factors as costs of comparable rental properties; market conditions in the area; alternatives available; and the type, life expectancy, condition, and value of the property leased. Rental arrangements should be reviewed periodically to determine if circumstances have changed and if other options are available.

(b) Rental costs under "sale and lease back" arrangements are allowable only up to the amount that would have been allowed if the recipient or subrecipient had continued to own the property. This amount would include expenses such as depreciation, maintenance, taxes, and insurance.

(c) Rental costs under "less-than-arm's-length" leases are allowable only up to the amount described in paragraph (b) of this section. For this purpose, a less-than-arm's-length lease is one under which one party to the lease agreement can control or substantially influence the actions of the other. Such leases include, but are not limited to, those between:

(1) Divisions of the recipient or subrecipient;

(2) The recipient or subrecipient and another entity under common control through common officers, directors, or members; and

(3) The recipient or subrecipient and a director, trustee, officer, or key employee of the recipient or subrecipient or an immediate family member, either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. For example, the recipient or subrecipient may establish a separate corporation to own property and lease it back to the recipient or subrecipient.

(4) Family members include one party with any of the following relationships to another party:

(i) Spouse and parents thereof;

(ii) Children and spouses thereof;

(iii) Parents and spouses thereof;

(iv) Siblings and spouses thereof;

(v) Grandparents and grandchildren and spouses thereof;

(vi) Domestic partner and parents thereof, including domestic partners of any individual in 2 through 5 of this definition; and

(vii) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

(d) Rental costs under leases which are required to be accounted for as a financed purchase under GASB standards or a finance lease under FASB standards are allowable only up to the amount (described in paragraph (b) of this section) that would have been allowed if the recipient or subrecipient had purchased the property on the date the lease agreement was executed. Interest costs related to these leases are

allowable if they meet the criteria in § 200.449. Unallowable costs include costs that would not have been incurred if the recipient or subrecipient had purchased the property, such as amounts paid for profit, management fees, and taxes.

(e) Rental or lease payments are allowable under lease contracts where the recipient or subrecipient is required to recognize an intangible right-to-use lease asset under GASB standards or right-of-use operating lease asset under FASB standards for purposes of financial reporting in accordance with GAAP.

(f) The rental of any property owned by any individuals or entities affiliated with the recipient or subrecipient, including commercial or residential real estate, for purposes such as the home office is unallowable.

§ 200.466 Scholarships, student aid costs, and tuition remission.

(a) Costs of scholarships, fellowships, and student aid programs at IHEs are allowable only when the purpose of the Federal award is to provide training to participants, and the Federal agency approves the cost.

(b) Tuition remission and other forms of compensation paid as, or instead of, wages to students performing necessary work are allowable provided that:

(1) The individual is conducting activities necessary to the Federal award;

(2) Tuition remission and other support are provided in accordance with the established written policy of the IHE and consistently provided in a like manner to students in return for similar activities conducted under Federal awards as well as other activities; and

(3) The student is enrolled in an advanced degree program at the IHE or an affiliated institution during the academic period and the student's activities under the Federal award are related to their degree program;

(4) The tuition or other payments are reasonable compensation for the work performed and are conditioned explicitly upon the performance of necessary work; and

(5) The IHE compensates students under Federal awards as well as other activities in similar manners.

(c) Charges for tuition remission and other forms of compensation paid to students as, or instead of, salaries and wages are subject to the reporting requirements in § 200.430. The charges must be treated as a direct or indirect cost in accordance with the actual work performed. Tuition remission may be charged on an average rate basis. See § 200.431.

§ 200.467 Selling and marketing costs.

Costs of selling and marketing any products or services of the recipient or subrecipient are unallowable unless they are allowed under § 200.421 *and are necessary to meet the requirements of the Federal award.*

§ 200.468 Specialized service facilities.

(a) The costs of services provided by highly complex or specialized facilities operated by the recipient or subrecipient are allowable provided the charges for the services meet the conditions of either paragraph (b) or (c) of this section *and* take into account any items of income or Federal financing that qualify as applicable credits under § 200.406. These costs include charges for facilities such as computing facilities, wind tunnels, and reactors.

(b) The costs of such services, when material, must be charged directly to the applicable Federal awards based on actual usage of the services on the basis of a schedule of rates or established methodology that:

(1) Does not discriminate between activities under Federal awards and other activities of the recipient or subrecipient, including usage by the recipient or subrecipient for internal purposes; and

(2) Is designed to recover only the aggregate costs of the services. Each service's costs must normally consist of its direct costs and an allocable share of all indirect costs. Rates must be adjusted at least biennially and must consider any over or under-applied costs of the previous period(s).

(c) Where the costs incurred for a service are not material, they may be allocated as indirect costs.

(d) Under extraordinary circumstances, the cognizant agency for indirect costs and the recipient or subrecipient may negotiate and establish an alternative costing arrangement if it is in the Federal Government's best interest.

§ 200.469 Student activity costs.

Costs incurred for intramural activities, student publications, student clubs, and other student activities are unallowable unless expressly authorized in the Federal award.

§ 200.470 Taxes (including Value Added Tax).

(a) ***For States, local governments, and Indian Tribes.***

(1) Taxes that a governmental unit is legally required to pay are allowable, except for self-assessed taxes that disproportionately affect Federal programs or changes in tax policies that disproportionately affect Federal programs.

(2) Gasoline taxes, motor vehicle fees, and other taxes that are, in effect, user fees for benefits provided to the Federal Government are allowable.

(3) This provision does not restrict the authority of the Federal agency to identify taxes where Federal participation is inappropriate. The cognizant agency for indirect costs may accept a reasonable approximation in circumstances where determining the amount of unallowable taxes would require an excessive amount of effort.

(b) ***For nonprofit organizations and IHEs.***

(1) Taxes that the recipient or subrecipient is required to pay and which are paid or accrued in accordance with GAAP are generally allowable. These costs include payments made to local governments instead of taxes and that are commensurate with the local government services received. The following taxes are unallowable:

(i) Taxes for which exemptions are available to the recipient or subrecipient directly or which are available to the recipient or subrecipient based on an exemption afforded the Federal Government and, in the latter case, when the Federal agency makes available the necessary exemption certificates;

(ii) Special assessments on land which represent capital improvements; and

(iii) Federal income taxes.

(2) Any refund of taxes and interest thereon, which were allowed as Federal award costs, must be credited to the Federal Government as a cost reduction or cash refund, as appropriate. However, any interest paid or credited to a recipient or subrecipient incident to a refund of tax, interest, and penalty will be paid or credited to the Federal Government only to the extent that such interest accrued over the period during which the Federal Government has reimbursed the recipient or subrecipient for the taxes, interest, and penalties.

(c) ***Value Added Tax (VAT).*** Foreign taxes charged for procurement transactions that a recipient or subrecipient is legally required to pay in a country are allowable. Foreign tax refunds or applicable credits under Federal awards refer to receipts or reduction of expenditures, which operate to offset or reduce expense items that are allocable to Federal awards as direct or indirect costs. To the extent that such credits accrued or received by the recipient or subrecipient relate to allowable cost, these costs must be credited to the Federal agency as a cost reduction or cash refunds, as appropriate. In cases where the costs are credited back to the Federal award, the recipient or subrecipient may reduce the Federal share of costs by the amount of the foreign tax reimbursement, or where Federal award has not expired, the Federal agency may allow the recipient or subrecipient to use the foreign government tax refund for approved activities under the Federal award.

§ 200.471 Telecommunication and video surveillance costs.

(a) Costs incurred for telecommunications and video surveillance services or equipment such as phones, internet, video surveillance, and cloud servers are allowable except for the following circumstances:

(b) Obligating or expending covered telecommunications and video surveillance services or equipment or services as described in § 200.216 to:

(1) Procure or obtain, extend or renew a contract to procure or obtain;

(2) Enter into a contract (or extend or renew a contract) to procure; or

(3) Obtain the equipment, services, or systems.

§ 200.472 Termination and standard closeout costs.

(a) ***Termination Costs.*** Termination of a Federal award generally gives rise to the incurrence of costs or the need for special treatment of costs, which would not have arisen had the Federal award not been terminated. Cost principles covering these items are set forth in this section. They must be used in conjunction with the other termination requirements of this part.

(1) The cost of items reasonably usable on the recipient's or subrecipient's other work is unallowable unless the recipient or subrecipient submits evidence that it would not retain such items without sustaining a loss. In deciding whether such items are reasonably usable on other work of the recipient or subrecipient, the Federal agency or pass-through entity should consider the recipient's or subrecipient's plans and orders for current and scheduled activity. Contemporaneous purchases of common items by the recipient or subrecipient must be considered evidence that the items are reasonably usable on the recipient's or subrecipient's other work. Any acceptance of common items as allocable to the terminated portion of the Federal award must be limited to the extent that the quantities of such items on hand, in transit, and on order do not exceed the reasonable quantitative requirements of other work.

(2) If the recipient or subrecipient cannot discontinue certain costs immediately after the effective termination date, despite making all reasonable efforts, then the costs are generally allowable within the limitations of this part. Any costs continuing after termination due to the negligent or willful failure of the recipient or subrecipient to immediately discontinue the costs are unallowable.

(3) Loss of useful value of special tooling, machinery, and equipment is generally allowable if:

(i) Such special tooling, special machinery, or equipment is not reasonably capable of use in the other work of the recipient or subrecipient;

(ii) The interest of the Federal Government is protected by transfer of title or by other means deemed appropriate by the Federal agency (see § 200.313 (d)); and

(iii) The loss of useful value for any one terminated Federal award is limited to the portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the Federal award bears to the entire terminated Federal award and other Federal awards for which the special tooling, machinery, or equipment was acquired.

(4) If paragraph (a)(4)(i) and (ii) below are satisfied, rental costs under unexpired leases (less the residual value of such leases) are generally allowable where clearly shown to have been reasonably necessary for the performance of the terminated Federal award. These rental costs may include the cost of alterations of the leased property and the cost of reasonable restoration required by the lease, provided the alterations were necessary for the performance of the Federal award.

(i) The amount of claimed rental costs does not exceed the reasonable use value of the property leased for the period of the Federal award and a further period as may be reasonable; and

(ii) The recipient or subrecipient makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of the lease.

(5) The following settlement expenses are generally allowable.

(i) Accounting, legal, clerical, and similar costs that are reasonably necessary for:

(A) The preparation and presentation to the Federal agency or pass-through entity of settlement claims and supporting data with respect to the terminated portion of the Federal award, unless the termination is for cause (see §§ 200.339-200.343); and

(B) The termination and settlement of subawards.

(ii) Reasonable costs for the storage, transportation, protection, and disposition of property provided by the Federal Government or acquired or produced for the Federal award.

(6) Claims under subawards, including the allocable portion of claims common to the Federal award and other work of the recipient or subrecipient, are generally allowable. An appropriate share of the recipient's or subrecipient's indirect costs may be allocated to the amount of settlements with contractors and subrecipients, provided that the amount allocated is consistent with the requirements of § 200.414. These allocated indirect costs must exclude the same and similar costs claimed directly or indirectly as settlement expenses.

(b) ***Closeout Costs.*** Administrative costs associated with the closeout activities of a Federal award are allowable. The recipient or subrecipient may charge the Federal award during the closeout for the necessary administrative costs of that Federal award (for example, salaries of personnel preparing final reports, publication and printing costs, costs associated with the disposition of equipment and property,

and related indirect costs). These costs may be incurred until the due date of the final report(s). If incurred, these costs must be liquidated prior to the due date of the final report(s) and charged to the final budget period of the award unless otherwise specified by the Federal agency.

§ 200.473 Training and education costs.

The cost of training and education provided for employee development is allowable.

§ 200.474 Transportation costs.

Costs incurred for freight, express, cartage, postage, and other transportation services relating to goods purchased, in process, or delivered, are allowable. When the costs can be readily identified with the items involved, they may be charged directly as transportation costs or added to the cost of such items. When identification with the materials received cannot be readily made, the inbound transportation cost may be charged to the appropriate indirect cost accounts if the recipient or subrecipient follows a consistent, equitable procedure in this respect. If reimbursable under the terms and conditions of the Federal award, outbound freight should be treated as a direct cost.

§ 200.475 Travel costs.

(a) ***General.*** Travel costs include the transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the recipient or subrecipient. These costs may be charged on an actual cost basis, on a per diem or mileage basis, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip. The method used must be consistent with those normally allowed in like circumstances in the recipient's or subrecipient's other activities and in accordance with the recipient's or subrecipient's established written policies. Notwithstanding the provisions of § 200.444, travel costs of officials covered by that section are allowable with the prior written approval of the Federal agency or pass-through entity when they are specifically related to the Federal award.

(b) ***Lodging and subsistence.*** Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, must be considered reasonable and otherwise allowable only to the extent such costs do not exceed charges normally allowed by the recipient or subrecipient in its regular operations as the result of the recipient's or subrecipient's established written policy. In addition, if these costs are charged directly to the Federal award documentation must justify that:

(1) Participation of the individual is necessary for the Federal award; and

(2) The costs are reasonable and consistent with the recipient's or subrecipient's established written policy.

(c) ***Dependents.***

(1) Temporary dependent care costs (dependent is defined in 26 U.S.C. 152) above and beyond regular dependent care are allowable provided that these costs:

(i) Are a direct result of the individual's travel to a conference for the Federal award;

(ii) Are consistent with the recipient's or subrecipient's established written policy for all travel; and

(iii) Are only temporary during the travel period.

(2) Travel costs for dependents are unallowable, except for travel of six months or more with prior approval of the Federal agency. See § 200.432.

(d) ***Establishing rates and amounts.*** In the absence of an established written policy regarding travel costs, the rates and amounts established under 5 U.S.C. 5701-11 ("Travel and Subsistence Expenses; Mileage Allowances"), by the Administrator of General Services, or by the President (or their designee) pursuant to any provisions of such subchapter must apply to travel under Federal awards (48 CFR 31.205-46(a)).

(e) ***Commercial air travel.***

(1) Airfare costs in excess of the basic least expensive unrestricted accommodations class offered by commercial airlines are unallowable except when such accommodations would:

(i) Require circuitous routing;

(ii) Require travel during unreasonable hours;

(iii) Excessively prolong travel;

(iv) Result in additional costs that would offset the transportation savings; or

(v) Offer accommodations not reasonably adequate for the traveler's medical needs. The recipient or subrecipient must justify and document these conditions on a case-by-case basis for the use of first-class or business-class airfare to be allowable in such cases.

(2) Unless a pattern of avoidance is detected, the Federal Government will generally not question a recipient's or subrecipient's determinations that customary standard airfare or other discount airfare is unavailable for specific trips if the recipient or subrecipient can demonstrate that such airfare was not available in the specific case.

(f) ***Air travel by other than commercial carrier.*** Travel costs by recipient or subrecipient-owned, -leased, or -chartered aircraft include the cost of the lease, charter, operation (including personnel costs), maintenance, depreciation, insurance, and other related costs. The portion of these costs that exceeds the cost of airfare, as provided for in paragraph (d), is unallowable.

§ 200.476 Trustees.

Travel and subsistence costs of trustees (or directors) at IHEs and nonprofit organizations are allowable. See § 200.475.

Subpart F—Audit Requirements

GENERAL

§ 200.500 Purpose.

This part sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards.

AUDITS

§ 200.501 Audit requirements.

(a) ***Audit required.*** A non-Federal entity that expends $1,000,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single or program-specific audit conducted for that year in accordance with the provisions of this part.

(b) ***Single audit.*** A non-Federal entity that expends $1,000,000 or more in Federal awards during the non-Federal entity's fiscal year must have a single audit conducted in accordance with § 200.514 except when it elects to have a program-specific audit conducted in accordance with paragraph (c) or (d) of this section.

(c) ***Program-specific audit election (in general).*** A non-Federal entity may elect to have a program-specific audit conducted in accordance with § 200.507 if the following conditions are met:

(1) The non-Federal entity expends Federal awards under only one Federal program (excluding research and development); and

(2) The Federal program's statutes or regulations, or terms and conditions of the Federal award, do not require a financial statement audit of the non-Federal entity.

(d) ***Program-specific audit election for research and development.*** A non-Federal entity may elect to have a program-specific audit for research and development conducted in accordance with § 200.507, but only if all of the following conditions are met:

(1) The non-Federal entity expends Federal awards only from the same Federal agency, or the same Federal agency and the same pass-through entity; and

(2) The Federal agency, or pass-through entity in the case of a subrecipient, approves a program-specific audit in advance.

(e) ***Exemption when Federal awards expended are less than $1,000,000.*** A non-Federal entity that expends less than $1,000,000 in Federal awards during its fiscal year is exempt from Federal audit requirements for that year, except as noted in § 200.503. However, in all instances, the records of the non-Federal entity must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and the Government Accountability Office (GAO).

(f) ***Federally Funded Research and Development Centers (FFRDC).*** Management of an auditee that owns or operates a FFRDC may elect to treat the FFRDC as a separate entity for purposes of this part.

(g) ***Subrecipients and contractors.*** An auditee may simultaneously be a recipient, a subrecipient, and a contractor. Unless a program is exempt by Federal statute, Federal awards expended as a recipient or a subrecipient are subject to audit under this part. Payments received for goods or services provided as a contractor under a Federal award (see § 200.331) are not subject to audit under this part.

(h) ***Compliance responsibility for contractors.*** In most cases, the auditee's compliance responsibility for contractors is to ensure that the procurement, receipt, and payment for goods and services comply with Federal statutes, regulations, and the terms and conditions of a Federal award. Federal award compliance requirements normally do not flow down to contractors. However, for procurement transactions in which the contractor is made responsible for meeting program requirements, the auditee must ensure those requirements are met, including by clearly stating the contractor's responsibilities within the contract and reviewing the contractor's records to determine compliance. Also, when these procurement transactions relate to a major program, the scope of the audit must include a determination of whether these transactions comply with Federal statutes, regulations, and the terms and conditions of a Federal award. See also § 200.318(b).

(i) ***For-profit subrecipient.*** This subpart does not apply to for-profit organizations. As necessary, the pass-through entity is responsible for establishing requirements to ensure compliance by for-profit subrecipients. The subaward with a for-profit subrecipient must describe applicable compliance

requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring throughout the performance of the subaward, and post-award audits (see § 200.332).

§ 200.502 Basis for determining Federal awards expended.

(a) ***Determining Federal awards expended.*** The determination of when a Federal award is expended must be based on when the activity related to the Federal award occurs. Generally, the activity related to the Federal award pertains to events that require the non-Federal entity to comply with Federal statutes, regulations, and the terms and conditions of Federal awards, such as:

(1) Expenditure/expense transactions associated with grants, cooperative agreements, cost-reimbursement contracts under the FAR, compacts with Indian Tribes, and direct appropriations;

(2) The disbursement of funds to subrecipients;

(3) The use of loan proceeds under loan and loan guarantee programs;

(4) The receipt of property (including surplus property);

(5) The receipt or use of program income;

(6) The distribution or use of food commodities;

(7) The disbursement of amounts entitling the non-Federal entity to an interest subsidy; and

(8) The period when insurance is in force.

(b) ***Loan and loan guarantees (loans).*** The Federal Government is at risk for loans until the debt is repaid. Therefore, the following guidelines must be used to calculate the value of Federal awards expended under loan programs (except as noted in paragraphs (c) and (d)):

(1) The value of new loans made or received during the audit period; plus

(2) The balance of loans from previous years at the beginning of the audit period for which the Federal Government imposes continuing compliance requirements; plus

(3) Any interest subsidy, cash, or administrative cost allowance received.

(c) ***Loan and loan guarantees (loans) at Institutions of Higher Education (IHE).*** When loans are made to students of an IHE, but the IHE itself does not have continuing compliance requirements for the loans, then only the value of loans made during the audit period are considered Federal awards expended in that audit period. The balance of loans for previous audit periods is not included as Federal awards expended because the lender accounts for the prior balances.

(d) ***Prior loan and loan guarantees (loans).*** Loans, the proceeds of which were received and expended in prior years, are not considered Federal awards expended under this part when Federal statutes, regulations, and the terms and conditions of Federal awards pertaining to such loans impose no continuing compliance requirements other than to repay the loans.

(e) ***Endowment funds.*** The cumulative balance of Federal awards for endowment funds that are federally restricted is considered Federal awards expended in each audit period in which the funds are still restricted.

(f) ***Free rent.*** Free rent received by itself is not considered a Federal award expended under this part. However, free rent received as part of a Federal award to carry out a Federal program must be included in determining Federal awards expended and is subject to audit under this part.

(g) ***Valuing non-cash assistance.*** Federal non-cash assistance (such as free rent, food commodities, donated property, or donated surplus property that is received as part of a Federal award to carry out a Federal program) must be valued at fair market value at the time of receipt or the assessed value provided by the Federal agency and must be included in determining Federal awards expended under this part.

(h) ***Medicare.*** Medicare payments to a non-Federal entity for providing patient care services to Medicare-eligible individuals are not considered Federal awards expended under this part.

(i) ***Medicaid.*** Medicaid payments to a subrecipient for providing patient care services to Medicaid-eligible individuals are not considered Federal awards expended under this part unless a State requires the funds to be treated as Federal awards expended because reimbursement is on a cost-reimbursement basis.

(j) ***Certain loans provided by the National Credit Union Administration.*** For purposes of this part, loans from the National Credit Union Share Insurance Fund and the Central Liquidity Facility funded by contributions from insured non-Federal entities are not considered Federal awards expended.

§ 200.503 Relation to other audit requirements.

(a) ***Other financial audits.*** An audit conducted in accordance with this part must be in lieu of any financial audit of Federal awards which a non-Federal entity is required to undergo under any other Federal statute or regulation. To the extent that such an audit provides a Federal agency with the information it requires to carry out its responsibilities under Federal statute or regulation, a Federal agency must rely upon and use that information.

(b) ***Conducting additional audits.*** Notwithstanding paragraph (a) of this section, a Federal agency, Inspectors General, or GAO may conduct or arrange additional audits to carry out its responsibilities under Federal statute or regulation. The provisions of this part do not authorize any non-Federal entity to constrain, in any manner, such Federal agency from carrying out or arranging for such additional audits, except that the Federal agency must plan such audits not to be duplicative of other audits of Federal awards. Prior to commencing such an audit, the Federal agency or pass-through entity must review the FAC for recent audits submitted by the non-Federal entity, and to the extent such audits meet a Federal agency or pass-through entity's needs, the Federal agency or pass-through entity must rely upon and use such audits. Any additional audits must be planned and performed in such a way as to build upon work performed, including the audit documentation, sampling, and testing already performed by other auditors.

(c) ***Authority to conduct additional audits.*** The provisions of this part do not limit the authority of Federal agencies to conduct, or arrange for the conduct of, audits and evaluations of Federal awards, nor limit the authority of any Federal agency Inspector General or other Federal officials. For example, requirements that may be applicable under the FAR or CAS and the terms and conditions of a cost-reimbursement contract may include additional applicable audits to be conducted or arranged for by Federal agencies.

(d) ***Federal agency to pay for additional audits.*** A Federal agency that conducts or arranges for additional audits must, consistent with other applicable Federal statutes and regulations, arrange for funding the full cost of such additional audits.

(e) ***Request for a program to be audited as a major program.*** A Federal agency may request that an auditee have a particular Federal program audited as a major program in lieu of the Federal agency conducting or arranging for the additional audits. Such requests should be made at least 180 calendar days prior to the

end of the fiscal year to be audited to allow for planning. After consultation with its auditor, the auditee should promptly respond to such a request by informing the Federal agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in § 200.518 and, if not, the estimated incremental cost. The Federal agency must then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal agency request, and the Federal agency agrees to pay the full incremental costs, then the auditee must have the program audited as a major program. With approval of the Federal agency, a pass-through entity may use the provisions of this paragraph for a subrecipient.

§ 200.504 Frequency of audits.

Audits required by this part must be performed annually unless biennial audits are permitted under paragraph (a) or (b) of this section. Biennial audits must cover both fiscal years within the biennial period.

(a) A State, local government, or Indian Tribe that is required by constitution or statute, in effect on January 1, 1987, to undergo its audits less frequently than annually, is permitted to undergo biennial (every other year) audits pursuant to this part. This requirement must still be in effect for the biennial period.

(b) Any nonprofit organization that had biennial audits for all biennial periods ending between July 1, 1992, and January 1, 1995, is permitted to undergo biennial audits pursuant to this part.

§ 200.505 Remedies for audit noncompliance.

In cases of continued inability or unwillingness of a non-federal entity to have an audit conducted in accordance with this part, Federal agencies or pass-through entities must take appropriate action as provided in § 200.339.

§ 200.506 Audit costs.

See § 200.425.

§ 200.507 Program-specific audits.

(a) ***Program-specific audit guide available.*** In some cases, a program-specific audit guide will be available to provide specific guidance to the auditor concerning internal controls, compliance requirements, suggested audit procedures, and audit reporting requirements. A listing of current program-specific audit guides can be found in the compliance supplement (Appendix VI, Program-Specific Audit Guides). When a current program-specific audit guide is available, the auditor must follow Generally Accepted Government Auditing Standards (GAGAS) and the guide when performing a program-specific audit.

(b) ***Program-specific audit guide not available.***

(1) When a current program-specific audit guide is not available, the auditee and auditor must have basically the same responsibilities for the Federal program as they would have for an audit of a major program in a single audit.

(2) The auditee must prepare the financial statement(s) for the Federal program that includes a schedule of expenditures of Federal awards for the program and notes that describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of § 200.511(b), and a corrective action plan consistent with the requirements of § 200.511(c).

(3) The auditor must:

(i) Perform an audit of the financial statement(s) for the Federal program in accordance with GAGAS;

(ii) Obtain an understanding of internal controls and perform tests of internal controls over the Federal program consistent with the requirements for a major program in accordance with§ 200.514(c);

(iii) Determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that could have a direct and material effect on the Federal program consistent with the requirements for a major program under § 200.514(d);

(iv) Follow up on prior audit findings and perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of § 200.511 When the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding, the auditor must report this condition as a current-year audit finding.; and

(v) Report any audit findings consistent with the requirements of § 200.516.

(4) The auditor's report(s) may be in the form of either combined or separate reports. It may be organized differently from the manner presented in this section. The auditor's report(s) must state that the audit was conducted in accordance with this part and include the following:

(i) An opinion (or disclaimer of opinion) as to whether the financial statement(s) of the Federal program is presented fairly in all material respects in accordance with the stated accounting policies;

(ii) A report on internal control related to the Federal program, which must describe the scope of testing of internal control and the results of the tests;

(iii) A report on compliance that includes an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the terms and conditions of Federal awards which could have a direct and material effect on the Federal program; and

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with § 200.515(d)(1) and findings and questioned costs consistent with the requirements of § 200.515(d)(3).

(c) ***Report submission for program-specific audits.***

(1) ***Submission deadline and public availability.*** The audit must be completed and submitted in accordance with paragraph (c)(2) or (c)(3) of this section. Unless a different period is specified in the program-specific audit guide, the audit must be submitted within 30 calendar days after the auditee receives the auditor's report(s) or nine months after the end of the audit period (whichever is earlier). The submission is due the next business day when the due date falls on a Saturday, Sunday, or Federal holiday. Unless restricted by Federal law or regulation, the auditee must make copies of the reporting package available for public inspection. Auditees and auditors must ensure that their respective parts of the reporting package do not include protected personally identifiable information.

(2) ***Program-specific audit guide available.*** When a program-specific audit guide is available, the auditee must electronically submit the data collection form prepared in accordance with § 200.512(b), as applicable to the program-specific audit, to the Federal Audit Clearinghouse (FAC). The submission must also include the reporting required by the program-specific audit guide.

(3) ***Program-specific audit guide not available.*** When a program-specific audit guide is not available, the auditee must electronically submit the data collection form prepared in accordance with § 200.512(b) to the FAC. The submission must also include the financial statement(s) of the Federal program, summary schedule of prior audit findings, and corrective action plan as described in paragraph § 200.507(b)(2) and the auditor's report(s) described in paragraph § 200.507(b)(4).

(d) ***Other sections of this part may apply.*** Program-specific audits are subject to:

(1) 200.500 Purpose through 200.503 Relation to other audit requirements, paragraph (d);

(2) 200.504 Frequency of audits through 200.506 Audit costs;

(3) 200.508 Auditee responsibilities through 200.509 Auditor selection;

(4) 200.511 Audit findings follow-up;

(5) 200.512 Report submission, paragraphs (e) through (h);

(6) 200.513 Responsibilities;

(7) 200.516 Audit findings through 200.517 Audit documentation;

(8) 200.521 Management decision; and

(9) Other referenced provisions of this part unless contrary to the provisions of this section, a program-specific audit guide, or program statutes and regulations.

AUDITEES

§ 200.508 Auditee responsibilities.

The auditee must:

(a) Arrange for the audit required by this part in accordance with § 200.509, and ensure it is properly performed and submitted in accordance with § 200.512.

(b) Prepare financial statements, including the schedule of expenditures of Federal awards in accordance with § 200.510.

(c) Promptly follow up and take corrective action on audit findings. This includes preparing a summary schedule of prior audit findings and a corrective action plan in accordance with § 200.511(b) and (c), respectively.

(d) Provide the auditor access to personnel, accounts, books, records, supporting documentation, and any other information needed for the auditor to perform the audit required by this part.

§ 200.509 Auditor selection.

(a) ***Auditor procurement.*** When procuring audit services, the auditee must follow the procurement standards in §§ 200.317 through 200.327 of subpart D or the FAR (48 CFR part 42), as applicable. When requesting proposals for audit services, the objectives and scope of the audit must be made clear, and the non-Federal entity must request a copy of the audit organization's peer review report, which the auditor must provide under GAGAS. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of peer and external quality control reviews, and price. Whenever possible, the auditee must make efforts to contract with businesses as stated in § 200.321 or the FAR (48 CFR part 42), as applicable.

(b) ***Restriction on auditor preparing indirect cost proposals.*** An auditor who prepares the indirect cost proposal or cost allocation plan may not be selected to perform the audit required by this part when the indirect costs recovered by the auditee during the prior year exceed $1 million. This restriction applies to the base year used to prepare the indirect cost proposal or cost allocation plan and any subsequent years in which the resulting indirect cost agreement or cost allocation plan is used to recover costs.

(c) ***Use of Federal auditors.*** Federal auditors may perform all or part of the work required under this part if they fully comply with the requirements of this part.

§ 200.510 Financial statements.

(a) ***Financial statements.*** The auditee must prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements must be for the same organizational unit and fiscal year chosen to meet this part's requirements. However, organization-wide financial statements of the non-Federal entity may also include departments, agencies, and other organizational units that have separate audits in accordance with § 200.514(a) and prepare separate financial statements.

(b) ***Schedule of expenditures of Federal awards.*** The auditee must also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements. The schedule must include the total Federal awards expended as determined in accordance with § 200.502. The auditee may choose to provide information requested by Federal agencies or pass-through entities to make the schedule easier to use. For example, when a Federal program has multiple Federal award years, the auditee may separately list the amount of Federal awards expended for each year of a Federal award. The schedule must:

(1) List individual Federal programs by Federal agency using the applicable Assistance Listing number(s). For a cluster of programs, the non-Federal entity must provide the cluster name, a list of individual Federal programs within the cluster, and provide the Federal agency name and the applicable Assistance Listing number(s). For research and development, total Federal awards expended must be shown either by individual Federal award or by Federal agency and major subdivision within the Federal agency. For example, the National Institutes of Health is a major subdivision within the Department of Health and Human Services.

(2) For Federal awards received as a subrecipient, the name of the pass-through entity and identifying number assigned by the pass-through entity must be included.

(3) Provide total Federal awards expended for each individual Federal program and the Assistance Listings number or other identifying number when the Assistance Listings information is unavailable. For a cluster of programs, the auditee must also provide the total for the cluster.

(4) Include the total amount provided to subrecipients from each Federal program.

(5) For loan or loan guarantee programs described in § 200.502(b), identify in the notes to the schedule the balances outstanding at the end of the audit period. This requirement is in addition to including the total Federal awards expended for loan or loan guarantee programs in the schedule.

(6) Include notes describing the significant accounting policies used in preparing the schedule and whether the auditee elected to use the de minimis indirect cost rate of up to 15 percent (see § 200.414).

§ 200.511 Audit findings follow-up.

(a) ***General.*** The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee must prepare a summary schedule of prior audit findings. The auditee must also prepare a corrective action plan for current year audit findings. The summary schedule of prior audit findings and the corrective action plan must include the reference numbers the auditor assigns to audit findings under § 200.516(c). Since the summary schedule may include audit findings from multiple years, it must include the fiscal year in which the finding initially occurred. The corrective action plan and summary schedule of prior audit findings must include financial statement findings that the auditor was required to report in accordance with GAGAS.

(b) ***Summary schedule of prior audit findings.*** The summary schedule of prior audit findings must report the status of all audit findings included in the prior audit's schedule of findings and questioned costs. The summary schedule must also include audit findings reported in the prior audit's summary schedule of prior audit findings except audit findings listed as corrected in accordance with paragraph (b)(1) of this section or no longer valid or not warranting further action in accordance with paragraph (b)(3) of this section.

(1) When audit findings were fully corrected, the summary schedule need only list the audit findings and state that corrective action was taken.

(2) When audit findings were not corrected or only partially corrected, the summary schedule must describe the reasons for the finding's recurrence, planned corrective action, and any partial corrective action taken. When the corrective action taken significantly differs from the corrective action previously reported in a corrective action plan or the Federal agency's or pass-through entity's management decision, the summary schedule must provide an explanation.

(3) When the auditee believes the audit findings are no longer valid or do not warrant further action, the reasons for this position must be described in the summary schedule. A valid reason for considering an audit finding as not warranting further action is that all of the following have occurred:

(i) Two years have passed since the audit report in which the finding occurred was submitted to the FAC;

(ii) The Federal agency or pass-through entity is not currently following up with the auditee on the audit finding; and

(iii) A management decision was not issued.

(c) ***Corrective action plan.*** At the completion of the audit, the auditee must prepare a corrective action plan to address each audit finding included in the auditor's report for the current year. The corrective action plan must be a document separate from the auditor's findings described in § 200.516. The corrective action plan must also provide the name(s) of the contact person(s) responsible for the corrective action, the

corrective action to be taken, and the anticipated completion date. When the auditee does not agree with the audit findings or believes corrective action is not required, the corrective action plan must include a detailed explanation of the reasons.

§ 200.512 Report submission.

(a) ***General.***

(1) The audit, the data collection form, and the reporting package must be submitted within 30 calendar days after the auditee receives the auditor's report(s) or nine months after the end of the audit period (whichever is earlier). The cognizant agency for audit or oversight agency for audit (in the absence of a cognizant agency for audit) may authorize an extension when the nine-month timeframe would place an undue burden on the auditee. If the due date falls on a Saturday, Sunday, or Federal holiday, the reporting package is due the next business day.

(2) The auditee must make copies available for public inspection unless restricted by Federal statute or regulation. Auditees and auditors must ensure that their respective parts of the reporting package do not include protected personally identifiable information.

(b) ***Data collection.*** The FAC is the repository of record for subpart F reporting packages and the data collection form. All Federal agencies, pass-through entities and others interested in a reporting package and data collection form must obtain it by accessing the FAC.

(1) The auditee must submit the required data collection form described in Appendix X of this part. This form provides information about the auditee, its Federal programs, the results of the audit, and whether the audit was completed in accordance with this part. The form must include all information required by this part that is necessary for Federal agencies to use the audit to ensure the integrity of Federal programs. The form includes data elements and a format that OMB must approve, is available from the FAC, and include collections of information from the reporting package described in paragraph (c).

(2) A senior-level representative of the auditee (for example, a State controller, director of finance, chief executive officer, or chief financial officer) must sign a statement to be included as part of the data collection form stating that the auditee complied with the requirements of this part, including that:

(i) The data collection form was prepared in accordance with this part (and the instructions accompanying the form);

(ii) The reporting package does not include protected personally identifiable information;

(iii) The information included in its entirety is accurate and complete; and

(iv) The FAC is authorized to make the reporting package and the form publicly available on a website.

(3) An auditee that is an Indian Tribe or a tribal organization (as defined in the Indian Self-Determination, Education and Assistance Act (ISDEAA), 25 U.S.C. 450b(l)) may opt not to authorize the FAC to make the reporting package publicly available on a website. To opt-out, an Indian Tribe or tribal organization must exclude the authorization described in paragraph (b)(2)(iv) of this section. In these instances, the Indian Tribe is responsible for submitting the reporting package directly to any pass-through entities through which it has received a Federal award and to pass-through entities for which the summary schedule of prior audit findings reported the status of any findings related to

those Federal awards that the pass-through entity provided. Unless restricted by Federal statute or regulation, if the Indian Tribe opts not to authorize publication, it must make copies of the reporting package available for public inspection.

(4) The auditor must complete the applicable data elements of the data collection form using the information included in the reporting package described in paragraph (c) of this section. The auditor must sign a statement to be included as part of the data collection form stating:

(i) The source of information included in the data collection form;

(ii) The auditor's responsibility for the information;

(iii) The data collection form is not a substitute for the reporting package described in paragraph (c); and

(iv) The content of the form is limited to the collection of information prescribed by OMB.

(c) ***Reporting package.*** The reporting package must include the following:

(1) Financial statements and schedule of expenditures of Federal awards discussed in § 200.510(a) and (b), respectively;

(2) Summary schedule of prior audit findings discussed in § 200.511(b);

(3) Auditor's report(s) discussed in § 200.515; and

(4) Corrective action plan discussed in § 200.511(c).

(d) ***Submission to FAC.*** The auditee must electronically submit the data collection form described in paragraph (b) of this section and the reporting package described in paragraph (c) of this section to the FAC.

(e) ***Requests for management letters issued by the auditor.*** Auditees must submit, when requested by a Federal agency or pass-through entity, a copy of any management letters issued by the auditor.

(f) ***Report retention requirements.*** Auditees must keep a copy of the data collection form described in paragraph (b) of this section and a copy of the reporting package described in paragraph (c) on file for three years from the date of submission to the FAC. Copies of audit records must be maintained in accordance with § 200.336.

(g) ***FAC responsibilities.*** The FAC must make available the reporting packages received in accordance with paragraph (c) of this section and § 200.507(c) to the public, except for Indian Tribes exercising the option in paragraph (b)(3) of this section, and maintain a database of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees that have not submitted the required data collection forms and reporting packages.

(h) ***Electronic filing.*** Nothing in this part must preclude electronic submissions to the FAC in such a manner as may be approved by OMB.

FEDERAL AGENCIES

§ 200.513 Responsibilities.

(a) ***Cognizant agency for audit responsibilities.***

(1) A non-Federal entity expending more than $50 million a year in Federal awards must have a cognizant agency for audit. The cognizant agency for audit must be the Federal agency that provides the largest amount of direct funding (as listed on the non-Federal entity's Schedule of expenditures of Federal awards, see § 200.510(b)) unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total expenditures (as direct and subawards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit.

(2) To provide for continuity of cognizance, the determination of the predominant amount of direct funding must be based upon direct Federal awards expended in the non-Federal entity's fiscal years ending in 2019 and every fifth year after that.

(3) Notwithstanding how audit cognizance is determined, a Federal agency may reassign cognizance to another Federal agency that provides substantial funding to an auditee if it agrees to be the cognizant agency for audit. Within 30 calendar days after any reassignment, both the old and the new cognizant agency for audit must notify the FAC, the auditee, and the auditor (if known) of the change.

(4) The cognizant agency for audit must:

(i) Provide technical audit advice and liaison assistance to auditees and auditors.

(ii) Obtain or conduct quality control reviews on selected audits made by non-Federal auditors and provide the results to other interested organizations.

(iii) Cooperate and support the Federal agency designated by OMB to lead a government-wide analysis to assess the quality of single audits. The government-wide analysis may rely on the current and ongoing quality control review work performed by Federal agencies, State auditors, and professional audit associations. This government-wide audit analysis must be performed at an interval determined by OMB, and the results must be posted publicly. In providing support to the government-wide analysis, a Federal agency must provide the following:

(A) An assessment of the extent to which single audits conform to the requirements, standards, and procedures of this part; and

(B) Recommendations to address audit quality issues, including recommendations for any changes to this part's requirements, standards, and procedures.

(iv) Promptly inform the appropriate Federal law enforcement officials and impacted Federal agencies of any direct reporting by the auditee or its auditor required by GAGAS, Federal statute, or regulation.

(v) Advise the community of independent auditors of any noteworthy or important factual trends related to the quality of audits stemming from quality control reviews. Significant problems or quality issues consistently identified through quality control reviews of audit reports must be referred to appropriate State licensing agencies and professional bodies.

(vi) Advise the auditor, Federal awarding agencies, and, where appropriate, the auditee of any deficiencies found in the audits when the deficiencies require corrective action by the auditor. When advised of deficiencies, the auditee must work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency for audit must notify the auditor, the auditee, and applicable Federal awarding agencies and pass-through entities of the facts and

make recommendations for follow-up action. Major inadequacies or repetitive substandard performance by auditors must be referred to appropriate State licensing agencies and professional bodies for disciplinary action.

(vii) Coordinate, to the extent practical, audits or reviews made by or for Federal agencies that are in addition to the audits made pursuant to this part, so that the additional audits or reviews build upon, rather than duplicate, audits performed in accordance with this part.

(viii) Coordinate a management decision for cross-cutting audit findings that affect the Federal programs of more than one agency when requested by any Federal agency whose awards are included in the audit finding of the auditee. Cross-cutting audit finding means an audit finding where the same underlying condition or issue affects all Federal awards (including Federal awards of more than one Federal agency or pass-through entity); for example, a cross-cutting audit finding may include an issue related to the recipient's accounting system.

(ix) Coordinate the audit work and reporting responsibilities among auditors to achieve the most cost-effective audit.

(x) Provide advice to auditees as to how to handle changes in fiscal year.

(b) ***Oversight agency for audit responsibilities.*** An auditee who does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with § 200.1 *oversight agency for audit.* A Federal agency with oversight for an auditee may reassign oversight to another Federal agency that agrees to be the oversight agency for audit. Within 30 calendar days after any reassignment, both the old and the new oversight agency for audit must provide notice of the change to the FAC, the auditee, and, if known, the auditor. The oversight agency for audit:

(1) Must provide technical advice and assistance to auditees and auditors.

(2) May assume all or some of the responsibilities normally performed by a cognizant agency for audit.

(c) ***Awarding Federal agency responsibilities.*** In addition to all other requirements of this part, the awarding Federal agency must:

(1) Ensure that audits are completed, and reports are received in a timely manner in accordance with the requirements of this part.

(2) Provide technical advice and assistance to auditees and auditors.

(3) Follow-up on audit findings to ensure that non-Federal entities take appropriate and timely corrective action. Follow-up includes:

(i) Issuing a management decision in accordance with § 200.521;

(ii) Monitoring the non-Federal entity's progress implementing a corrective action;

(iii) Using a cooperative audit resolution approach to improve Federal program outcomes through better audit resolution, follow-up, and corrective action, which means the use of audit follow-up techniques promoting prompt corrective action by improving communication, fostering collaboration, promoting trust, and developing an understanding between the Federal agency and the non-Federal entity. This approach is based upon:

(A) A strong commitment by Federal agency and non-Federal entity leadership to Federal program integrity;

(B) Federal agencies strengthening partnerships and working cooperatively with non-Federal entities and their auditors; non-Federal entities and their auditors working cooperatively with Federal agencies;

(C) A focus on current conditions and corrective action going forward;

(D) Federal agencies offering appropriate relief for past noncompliance when audits show prompt corrective action has occurred; and

(E) Federal agency leadership sending a clear message that continued failure to correct conditions identified by audits likely to cause improper payments, fraud, waste, or abuse is unacceptable and will result in sanctions.

(iv) Tracking the effectiveness of the Federal agency's follow-up processes, the effectiveness of single audits in improving non-Federal entity accountability, and the use of single audits in making Federal award decisions. The Federal agency should develop a baseline, metrics, and targets to track, over time, the effectiveness of the Federal agency's process to follow up on audit findings.

(4) Provide OMB with annual updates to the compliance supplement. These updates include working with OMB to ensure that the compliance supplement focuses the auditor on testing the compliance requirements most likely to cause improper payments, fraud, waste, abuse, or generate audit findings for which the Federal agency will take action in accordance with § 200.505. Prior to submitting compliance supplement drafts to OMB, Federal agencies should engage with external audit stakeholders, the Federal agency's Office of Inspector General, and the National Single Audit Coordinator (NSAC).

(5) Provide OMB with the name of a single audit accountable official from among the senior policy officials of the Federal agency. The accountable official must be:

(i) Responsible for ensuring that the Federal agency fulfills the requirements of this section and effectively uses the single audit process to reduce improper payments and improve Federal program outcomes.

(ii) Accountable for improving the effectiveness of the Federal agency's single audit processes in accordance with paragraph (c)(3)(iv).

(iii) Responsible for designating the Federal agency's key management single audit liaison.

(6) Provide OMB with the name of a key management single audit liaison. The liaison must:

(i) Serve as the Federal agency's point of contact for the single audit process within and outside the Federal Government.

(ii) Promote interagency coordination, consistency, and information sharing. This includes coordinating audit follow-up, identifying higher risk non-Federal entities, providing input on single audit and follow-up policy, enhancing the utility of the FAC, and identifying ways to use single audit results to improve Federal award accountability and best practices.

(iii) Oversee training for the Federal agency's program management personnel related to the single audit process.

(iv) Promote the Federal agency's use of a cooperative audit resolution approach as described in paragraph (c)(3)(iii) of this section.

(v) Coordinate the Federal agency's audit follow-up processes and ensure non-Federal entities implement corrective actions for audit findings.

(vi) Ensure the Federal agency fulfills its responsibility, as a cognizant agency for audit, to coordinate a management decision for cross-cutting audit findings under (a)(4)(viii) of this section. Cross-cutting audit findings means an audit finding where the same underlying condition or issue affects all Federal awards (including Federal awards of more than one Federal agency or pass-through entity). For example, this may include an issue related to the recipient's accounting system.

(vii) Ensure the Federal agency provides OMB with annual updates to the compliance supplement consistent with the compliance supplement preparation guide.

(viii) Support the mission of the Federal agency's single audit accountable official and coordinate with the Federal agency's Office of Inspector General and National Single Audit Coordinator (NSAC).

AUDITORS

§ 200.514 Standards and scope of audit.

(a) ***General.*** The audit must be conducted in accordance with GAGAS. The audit must also cover the entire operations of the auditee, or, at the option of the auditee, such audit must include a series of audits that cover departments, agencies, and other organizational units that expended or otherwise administered Federal awards during the audit period. In these instances, the audit must include the financial statements and schedule of expenditures of Federal awards for each such department, agency, and other organizational unit, which must be considered to be a non-Federal entity. The financial statements and schedule of expenditures of Federal awards must be for the same audit period.

(b) ***Financial statements.*** The auditor must determine whether the auditee's financial statements are presented fairly in all material respects in accordance with generally accepted accounting principles (or a special purpose framework such as cash, modified cash, or regulatory as required by State law). The auditor must also determine whether the schedule of expenditures of Federal awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

(c) ***Internal control.***

(1) The compliance supplement provides guidance on internal controls over Federal programs based upon the guidance in Standards for Internal Control in the Federal Government issued by the Comptroller General of the United States and the Internal Control-Integrated Framework, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(2) In addition to the requirements of GAGAS, the auditor must perform procedures to obtain an understanding of internal control over Federal programs sufficient to plan the audit to support a low assessed level of control risk of noncompliance for major programs.

(3) Except as provided in paragraph (c)(4) of this section, the auditor must:

(i) Plan the testing of internal control over compliance for major programs to support a low assessed level of control risk for assertions relevant to the compliance requirements for each major program; and

(ii) Perform testing of internal control as planned in paragraph (c)(3)(i) of this section.

(4) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(3) of this section are not required for those compliance requirements. However, the auditor must report a significant deficiency or material weakness in accordance with § 200.516, assess the related control risk at the maximum, and consider whether additional compliance tests are required because of ineffective internal control.

(d) ***Compliance.***

(1) In addition to the requirements of GAGAS, the auditor must determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that may have a direct and material effect on each of its major programs.

(2) The principal compliance requirements applicable to most Federal programs and the compliance requirements of the largest Federal programs are included in the compliance supplement.

(3) For the compliance requirements related to Federal programs contained in the compliance supplement, an audit of these compliance requirements will meet the requirements of this part. Where there have been changes to the compliance requirements, and the changes are not reflected in the compliance supplement, the auditor must determine the current compliance requirements and modify the audit procedures accordingly. For those Federal programs not covered in the compliance supplement, the auditor must follow the compliance supplement's guidance for programs not included.

(4) The compliance testing must include tests of transactions or other auditing procedures necessary to provide the auditor with sufficient appropriate audit evidence to support an opinion on compliance.

(e) ***Audit follow-up.*** The auditor must follow up on prior audit findings regardless of whether a prior audit finding is related to a major program in the current year. Audit follow-up includes performing procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of § 200.511. When the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding, the auditor must report this condition as a current-year audit finding.

(f) ***Data collection form.*** As required in § 200.512(b)(4), the auditor must complete and sign specified sections of the data collection form.

§ 200.515 Audit reporting.

The auditor's report(s) may be in the form of either combined or separate reports. It may be organized differently from the manner presented in this section. The auditor's report(s) must state that the audit was conducted in accordance with this part and include the following:

(a) An opinion (or disclaimer of opinion) on whether the financial statement(s) of the auditee is presented fairly in all material respects in accordance with generally accepted accounting principles (or a special purpose framework such as cash, modified cash, or regulatory as required by State law). The auditor must also decide whether the schedule of expenditures of Federal awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

(b) A report on internal control over financial reporting and compliance with provisions of laws, regulations, contracts, and award agreements, noncompliance with which could have a material effect on the financial statements. This report must describe the scope of internal control and compliance testing and the results of the tests. Where applicable, the report must refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(c) A report on compliance for each major program and a report on internal control over compliance. This report must describe the scope of testing of internal control over compliance and include an opinion (or disclaimer of opinion) as to whether the auditee complied with Federal statutes, regulations, and the terms and conditions of Federal awards that could have a direct and material effect on each major program and refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(d) A schedule of findings and questioned costs which must include the following three components:

(1) A summary of the auditor's results, which must include:

(i) The type of report the auditor issued (unmodified opinion, qualified opinion, adverse opinion, or disclaimer of opinion) on whether the audited financial statements were prepared in accordance with GAAP;

(ii) A statement about whether significant deficiencies or material weaknesses in internal control were disclosed by the audit of the financial statements;

(iii) A statement as to whether the audit disclosed any noncompliance that is material to the financial statements of the auditee;

(iv) A statement about whether significant deficiencies or material weaknesses in internal control over major programs were disclosed by the audit;

(v) The type of report the auditor issued (unmodified opinion, qualified opinion, adverse opinion, or disclaimer of opinion) on compliance for major programs;

(vi) A statement as to whether the audit disclosed any audit findings that the auditor is required to report under § 200.516(a);

(vii) An identification of major programs by listing each individual major program; however, in the case of a cluster of programs, only the cluster name as shown on the schedule of expenditures of Federal Awards is required;

(viii) The dollar threshold used to distinguish between Type A and Type B programs, as described in § 200.518(b)(1) or (3) when a recalculation of the Type A threshold is required for large loan or loan guarantees; and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under§ 200.520.

(2) Findings relating to the financial statements required to be reported in accordance with GAGAS.

(3) Findings and questioned costs for Federal awards which must include audit findings as defined in § 200.516(a) and be reported in the following manner:

(i) Audit findings (for example, internal control findings, compliance findings, questioned costs, or fraud) that relate to the same issue must be presented as a single audit finding. Where practical, audit findings should be organized by Federal agency or pass-through entity.

(ii) Audit findings that relate to both the financial statements (paragraph (d)(2) of this section) and Federal awards (this paragraph (d)(3)) must be reported in both sections of the schedule. However, the reporting in one section of the schedule may be in summary form and reference a detailed reporting in the other section.

(e) Nothing in this part precludes combining the reporting required by this section with the reporting required by § 200.512(b) when allowed by GAGAS and Appendix X of this part.

§ 200.516 Audit findings.

(a) ***Audit findings reported.*** The auditor must report the following as an audit finding in the schedule of findings and questioned costs:

(1) Significant deficiencies and material weaknesses in internal control over major programs. The auditor's determination of whether a deficiency in internal control is a significant deficiency or a material weakness for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the compliance supplement.

(2) Material noncompliance with the provisions of Federal statutes, regulations, or the terms and conditions of Federal awards related to a major program. The auditor's determination of whether noncompliance with the provisions of Federal statutes, regulations, or the terms and conditions of Federal awards is material for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the compliance supplement.

(3) Known questioned costs when either known or likely questioned costs are greater than $25,000 for a type of compliance requirement for a major program. When reporting questioned costs, the auditor must include information to provide proper perspective for evaluating the prevalence and consequences of the questioned costs.

(4) Known questioned costs greater than $25,000 for a Federal program that is not audited as a major program. Except for audit follow-up, the auditor is not required to perform audit procedures for such a Federal program; therefore, the auditor will normally not find questioned costs for a program that is not audited as a major program. However, if the auditor does become aware of questioned costs for a Federal program that is not audited as a major program (for example, as part of audit follow-up or other audit procedures) and the known questioned costs are greater than $25,000, the auditor must report this as an audit finding.

(5) The circumstances concerning why the auditor's report on compliance for each major program is other than an unmodified opinion. This must be included unless the circumstances are otherwise reported as audit findings in the schedule of findings and questioned costs.

(6) Known or likely fraud affecting a Federal award, unless the fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs. This paragraph does not require the auditor to publicly report information that could compromise investigative or legal proceedings or to make an additional reporting when the auditor confirms that the fraud was reported outside the auditor's reports under the direct reporting requirements of GAGAS.

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with § 200.511(b) materially misrepresents the status of any prior audit finding.

(b) ***Audit finding detail and clarity.*** Audit findings must be presented with sufficient detail and clarity for the auditee to prepare a corrective action plan and take corrective action and for Federal agencies or pass-through entities to arrive at a management decision. As applicable, the following information must be included in audit findings:

(1) The Federal program and specific Federal award identification, including the Assistance Listings title and number, Federal award identification number and year, the name of the Federal agency, and name of the applicable pass-through entity. When information, such as the Assistance Listings title and number or Federal award identification number, is unavailable, the auditor must provide the best information available to describe the Federal award.

(2) The criteria or specific requirement for the audit finding (for example, the specific Federal statute, regulation, or term and condition of the Federal award). The criteria or specific requirement provides a context for evaluating evidence and understanding findings. The criteria should generally identify the required or desired state or expectation with respect to the program or operation.

(3) The condition found, including facts that support the deficiency identified in the audit finding.

(4) A statement of cause that identifies the reason or explanation for the condition or the factors responsible for the difference between the situation that exists (condition) and the required or desired state (criteria), which may also serve as a basis for recommendations for corrective action

(5) The possible asserted effect to provide sufficient information to the auditee and Federal agency or pass-through entity to permit them to determine the cause and effect to facilitate prompt and proper corrective action. A statement of the effect or potential effect should provide a clear, logical link to establish the impact or potential impact of the difference between the condition and the criteria.

(6) The identification of known questioned costs, by applicable Assistance Listing number(s) and Federal award identification number(s), and how these questioned costs were computed.

(7) When there are known questioned costs but the dollar amount is undetermined or not reported, a description of why the dollar amount was undetermined or otherwise could not be reported.

(8) Information to provide proper perspective for evaluating the prevalence and consequences of the audit finding. For example, whether the audit finding represents an isolated instance or a systemic problem. Where appropriate, instances identified must be related to the universe and the number of cases examined and be quantified in terms of dollar value. In addition, the audit finding should indicate whether the sampling was a statistically valid sample.

(9) The identification of whether the audit finding is a repeat of a finding in the immediately prior audit. The audit finding must identify the applicable prior year audit finding reference numbers in these instances.

(10) Recommendations to prevent future occurrences of the deficiency identified in the audit finding.

(11) Views of responsible officials of the auditee.

(c) ***Reference numbers.*** Each audit finding in the schedule of findings and questioned costs must include a reference number in the format meeting the requirements of the data collection form submission (see § 200.512(b)).

§ 200.517 Audit documentation.

(a) ***Retention of audit documentation.*** The auditor must retain audit documentation and reports for a minimum of three years after the date of issuance of the auditor's report(s) to the auditee. The cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or pass-through entity may extend the retention period by providing written notification to the auditor. When the auditor is aware that the Federal agency, pass-through entity, or auditee is contesting an audit finding, the auditor must contact the parties contesting the audit finding for guidance prior to the destruction of the audit documentation and reports.

(b) ***Access to audit documentation.*** Audit documentation must be made available upon request to the cognizant or oversight agency for audit or its designee, cognizant agency for indirect cost, a Federal agency, or GAO at the completion of the audit, as part of a quality review, to resolve audit findings, or to carry out oversight responsibilities consistent with the purposes of this part. Access to audit documentation includes the right of Federal agencies to obtain copies of audit documentation as is reasonable and necessary.

§ 200.518 Major program determination.

(a) ***General.*** The auditor must use a risk-based approach to determine which Federal programs are major programs. This risk-based approach must consider current and prior audit experience, oversight by Federal agencies and pass-through entities, and the inherent risk of the Federal program. The process described in paragraphs (b) through (h) of this section must be followed.

(b) ***Step one.***

(1) The auditor must identify and label the larger Federal programs as Type A programs. Type A programs are defined as Federal programs with Federal awards expended during the audit period exceeding the levels outlined in table 1:

Table 1 to Paragraph (b)(1)

Total Federal awards expended	Type A threshold
Equal to or exceed $1,000,000 but less than or equal to $34 million	$1,000,000.
Exceed $34 million but less than or equal to $100 million	Total Federal awards expended times .03.
Exceed $100 million but less than or equal to $1 billion	$3 million.
Exceed $1 billion but less than or equal to $10 billion	Total Federal awards expended times .003.
Exceed $10 billion but less than or equal to $20 billion	$30 million.
Exceed $20 billion	Total Federal awards expended times .0015.

(2) Federal programs not labeled Type A under paragraph (b)(1) of this section must be labeled Type B programs.

(3) Including large loans and loan guarantees (loans) must not result in the exclusion of other programs as Type A programs. A Federal program providing loans is considered a large loan program when it exceeds four times the largest non-loan program. The auditor must identify each large loan program as a Type A program and exclude its values in determining other Type A programs. This recalculation of the Type A program is performed after removing the total of all large loan programs. For this paragraph, a program is only considered a Federal program providing loans if the value of Federal awards expended for loans within the program comprises 50 percent or more of the total Federal awards expended for the program. A cluster of programs is treated as one program, and the value of Federal awards expended under a loan program is determined as described in § 200.502.

(4) For biennial audits (see § 200.504), the determination of Type A and Type B programs must be based on the Federal awards expended during the two-year audit period.

(c) ***Step two.***

(1) The auditor must identify Type A programs that are low-risk. In making this determination, the auditor must consider whether the requirements in § 200.519(c), the results of audit follow-up, or any changes in personnel or systems affecting the program indicate significantly increased risk and preclude the program from being low-risk. For a Type A program to be considered low-risk, it must have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, the program must not have had:

(i) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control for major programs as required under § 200.515(c);

(ii) A modified opinion on the program in the auditor's report on major programs as required under § 200.515(c); or

(iii) Known or likely questioned costs that exceed five percent of the total Federal awards expended for the program.

(2) Notwithstanding paragraph (c)(1) of this section, OMB may approve a Federal agency request that a Type A program not be considered low-risk for a specific recipient. For example, it may be necessary for a large Type A program to be audited as a major program each year for a particular recipient for the Federal agency to comply with 31 U.S.C. 3515. The Federal agency must notify the auditee and, if known, the auditor of OMB's approval at least 180 calendar days prior to the end of the fiscal year to be audited.

(d) ***Step three.***

(1) The auditor must identify high-risk Type B programs using professional judgment and the criteria in § 200.519. However, the auditor is not required to identify more high-risk Type B programs than at least one-fourth of the number of low-risk Type A programs identified as low-risk under step two. Except for known material weakness in internal control or compliance problems as discussed in § 200.519(b)(1), (2), and (c)(1), a single criterion in risk would rarely cause a Type B program to be considered high-risk. When identifying which Type B programs to assess for risk, the auditor is encouraged to use an approach that provides an opportunity for different high-risk Type B programs to be audited as major programs over a period of time.

(2) The auditor is not expected to perform risk assessments on relatively small Federal programs. Therefore, the auditor is only required to perform risk assessments on Type B programs that exceed 25 percent (0.25) of the Type A threshold determined in step one.

(e) ***Step four.*** At a minimum, the auditor must audit all of the following as major programs:

(1) All Type A programs not identified as low-risk under step two.

(2) All Type B programs identified as high-risk under step three.

(3) Additional programs as necessary to comply with the percentage of coverage rule described in paragraph (f). This rule may require the auditor to audit more programs as major programs than the number of Type A programs.

(f) ***Percentage of coverage rule.*** When the auditee meets the criteria in § 200.520, the auditor only needs to audit the major programs identified in paragraphs (e)(1) and (2) of this section and such additional Federal programs with Federal awards expended that, in the aggregate, all major programs encompass at least 20 percent (0.20) of total Federal awards expended. Otherwise, the auditor must audit the major programs identified in paragraphs (e)(1) and (2) of this section and such additional Federal programs with Federal awards expended that, in the aggregate, all major programs encompass at least 40 percent (0.40) of total Federal awards expended.

(g) ***Documentation of risk.*** The auditor must include in the audit documentation the risk analysis used for determining major programs.

(h) ***Auditor's judgment.*** The auditor's judgment in applying the risk-based approach to determine major programs must be presumed correct when the determination was performed and documented in accordance with this part. Challenges by a Federal agency or pass-through entity must only be for clearly improper use of the requirements in this part. However, a Federal agency or pass-through entity may provide auditors guidance about the risk of a particular Federal program. The auditor must consider this guidance in determining major programs in audits not yet completed.

§ 200.519 Criteria for Federal program risk.

(a) ***General.*** The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring that could be material to the Federal program. The auditor must consider criteria, such as those described in paragraphs (b), (c), and (d) of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a particular Federal program with auditee management and the Federal agency or pass-through entity.

(b) ***Current and prior audit experience.***

(1) Weaknesses in internal control over Federal programs would indicate higher risk. Therefore, consideration should be given to the control environment over Federal programs. This includes considering factors such as the expectation of management's adherence to Federal statutes, regulations, and the terms and conditions of Federal awards, and the competence and experience of personnel who administer the Federal programs.

(i) A Federal program administered under multiple internal control structures may have higher risk. When assessing risk in a large single audit, the auditor must consider whether weaknesses are isolated in a single operating unit (for example, one college campus) or pervasive throughout the entity.

(ii) A weak system for monitoring subrecipients would indicate higher risk when significant parts of a Federal program are passed to subrecipients through subawards.

(2) Prior audit findings would indicate higher risk, especially when the situations identified in the audit findings could significantly impact a Federal program or have not been corrected.

(3) Federal programs not recently audited as major programs may be of higher risk than those recently audited as major programs without audit findings.

(c) ***Oversight exercised by Federal agencies and pass-through entities.***

(1) The oversight exercised by Federal agencies or pass-through entities may be used to assess risk. For example, recent monitoring or other reviews performed by an oversight entity that disclosed no significant problems would indicate lower risk, whereas monitoring that disclosed significant problems would indicate higher risk.

(2) With the concurrence of OMB, a Federal agency may identify Federal programs that are higher risk. OMB will identify these Federal programs in the compliance supplement.

(d) ***Inherent risk of the Federal program.***

(1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third-party contracts or have eligibility criteria may be higher risk. Federal programs primarily involving staff payroll costs may be at high risk for noncompliance with the requirements of § 200.430 but otherwise be at low risk.

(2) The phase of a Federal program in its lifecycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, statutes, regulations, or the terms and conditions of Federal awards may increase risk.

(3) The phase of a Federal program in its lifecycle at the auditee may indicate risk. For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to the start-up or closeout of program activities and staff.

(4) Type B programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

§ 200.520 Criteria for a low-risk auditee.

An auditee that meets all of the following conditions for each of the preceding two audit periods must qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with § 200.518.

(a) Single audits were performed on an annual basis in accordance with the provisions of this subpart, including submitting the data collection form and the reporting package to the FAC within the timeframe specified in § 200.512. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee.

(b) The auditor's opinion on whether the financial statements were prepared in accordance with generally accepted accounting principles (or a special purpose framework such as cash, modified cash, or regulatory as required by State law), and the auditor's in-relation-to opinion on the schedule of expenditures of Federal awards were unmodified.

(c) No internal control deficiencies were identified as material weaknesses under the requirements of GAGAS.

(d) The auditor did not report a substantial doubt about the auditee's ability to continue as a going concern.

(e) None of the Federal programs had audit findings from any of the following in either of the preceding two audit periods in which they were classified as Type A programs:

(1) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control for major programs as required under § 200.515(c);

(2) A modified opinion on a major program in the auditor's report on major programs as required under § 200.515(c); or

(3) Known or likely questioned costs that exceeded five percent (.05) of the total Federal awards expended for a Type A program during the audit period.

MANAGEMENT DECISIONS

§ 200.521 Management decisions.

(a) ***General.*** The management decision must clearly state whether or not the audit finding is sustained, the reasons for the decision, and the expected auditee action to repay disallowed costs, make financial adjustments or take other action. If the auditee has not completed corrective action, a timetable for follow-up should be given. Prior to issuing the management decision, the Federal agency or pass-through entity may request additional information or documentation from the auditee, including a request for auditor assurance related to the documentation, as a way of mitigating disallowed costs. The management decision should describe any appeal process available to the auditee. While not required, the Federal agency or pass-through entity may also issue a management decision on findings relating to the financial statements, which are required to be reported in accordance with GAGAS.

(b) ***Federal agency.*** The cognizant agency for audit is responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency (see § 200.513(a)(4)(viii)). The awarding Federal agency is responsible for issuing a management decision for audit findings that affect the Federal awards it makes to a non-Federal entity (see § 200.513(c)(3)(i)).

(c) ***Pass-through entity.*** The pass-through entity is responsible for issuing a management decision for audit findings that affect subawards it issues to subrecipients under a Federal award (see § 200.332(e)).

(d) ***Time requirements.*** The Federal agency or pass-through entity responsible for issuing a management decision must do so within six months of the FAC's acceptance of the audit report. The auditee must initiate and proceed with corrective action as rapidly as possible and corrective action should begin no later than upon receipt of the audit report.

(e) ***Reference numbers.*** Management decisions must include the reference numbers the auditor assigned to each audit finding in accordance with § 200.516(c).

Appendix I to Part 200—Full Text of Notice of Funding Opportunity

(a) ***General Requirements.***

(1) ***Requirements for developing NOFOs.*** In developing a notice of funding opportunity (NOFO), Federal agencies must:

(i) Be concise and use plain language per the guidance at *PlainLanguage.gov* wherever possible.

(ii) For electronic NOFOs and other information about them, comply with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d).

(2) ***Considerations for developing NOFOs.*** Federal agencies may:

(i) Link to standard content to include required information rather than including the full language in the NOFO. The NOFO should make clear if linked information is critical—for example, standard terms and conditions, administrative and national policy requirements, and standard templates.

(ii) Include links to relevant regulations and other sources.

(iii) Use cross-references between the sections, including hyperlinks in electronic versions.

(3) ***Required Consistency.*** Potential applicants must be able to find similar information across all Federal NOFOs. To that end, Federal agencies must include the same or similar section headings and a table of contents with at least these sections:

(i) Basic Information

(ii) Eligibility

(iii) Program Description

(iv) Application Contents and Format

(v) Submission Requirements and Deadlines

(vi) Application Review Information

(vii) Award Notices

(viii) Post-Award Requirements and Administration

(b) ***Required Sections and Information.***

As required below, the Federal agency must include the following sections and information in the text of a NOFO and a table of contents.

(1) ***Basic Information.***

This section provides sufficient information to help an applicant make an informed decision about whether to submit a proposal.

(i) This section must include the following:

(A) Federal Agency Name.

(B) Funding Opportunity Title.

(C) I Announcement Type (whether the funding opportunity is the initial announcement or a modification of a previously announced opportunity).

(D) Funding Opportunity Number (required, if the Federal agency has assigned a number to the funding opportunity announcement).

(E) Assistance Listing Number(s).

(F) Funding Details. The total amount of funding that the Federal agency expects to award, the anticipated number of awards, and the expected dollar values of individual awards, which may be a range.

(G) Key Dates. Key dates include due dates for submitting applications or Executive Order 12372 submissions, as well as for any letters of intent or preapplications. For any announcement issued before a program's application materials are available, key dates also include the date on which those materials will be released; and any other additional information, as deemed applicable by the Federal agency. If possible, the Federal agency should provide an anticipated award date. If the NOFO is evaluated on a "rolling" basis, the Federal agency should provide an estimate of the time needed to process an application and notify the applicant of the Federal agency's decision.

(H) Executive Summary. A brief description that is written in plain language and summarizes the goals and objectives of the program, the target audience, and eligible recipients. The text of the executive summary should not exceed 500 words

(I) Agency contact information.

(ii) This section could include the following:

(A) The amount of funding per Federal award, on average, experienced in previous years.

(B) Whether this is a new program or a one-time initiative.

(2) ***Eligibility.***

This section addresses the factors that determine applicant or application eligibility.

(i) ***Eligible Applicants.*** This subsection must identify the following:

(A) A complete and specific list of entity types eligible to apply.

(B) Any additional restrictions on eligibility beyond the type of entity.

(C) Eligibility factors for the principal investigator or project director, if any.

(D) Criteria that would make any particular projects ineligible.

(E) A reference to any funding restriction elsewhere in the NOFO that could affect an applicant's or project's eligibility.

(F) A reference or link to any other factors that would disqualify an applicant or application, such as the responsiveness criteria in 6a.

(G) Any limit on the number of applications an applicant may submit under the announcement. Make clear whether the limitation is on the submitting organization, individual investigator or program director, or both.

(ii) ***Cost Sharing.*** This subsection must state:

(A) Whether there is required cost sharing. This statement must be clear that not committing to the required cost sharing will make the application ineligible. If cost sharing is not required, the announcement must say so.

(B) An explanation of the calculation for the required cost sharing. Required cost sharing may be a certain percentage or amount or in the form of contributions of specified items or activities (*for example,* provision of equipment).

(C) Any restrictions on the types of cost, such as in-kind contributions, acceptable as cost sharing.

(D) Any requirement to commit to cost sharing. This section should refer to the appropriate portions of section (b)(4) stating any pre-award requirements for the submission of letters or other documentation to verify commitments to meet cost-sharing requirements if a Federal award is made.

(3) ***Program Description.*** This section contains the full program description of the funding opportunity.

(i) This section must include the following:

(A) The general purpose of the funding and what it is expected to achieve for the public good.

(B) The Federal agency's funding priorities or focus areas, if any.

(C) Program goals and objectives.

(D) A description of how the award will contribute to achieving the program's goals and objectives.

(E) The expected performance goals, indicators, targets, baseline data, data collection, and other outcomes the Federal agency expects recipients to achieve.

(F) For cooperative agreements, the “substantial involvement” that the Federal agency expects to have or should reference where the potential applicant can find that information.

(G) Information on program specific unallowable costs so that the applicant can develop an application and budget consistent with program requirements and any limits on indirect costs.

(H) Any eligibility criteria for beneficiaries or program participants other than Federal award recipients.

(I) Citations for authorizing statutes and regulations for the funding opportunity.

(ii) This section could also include the following:

(A) Any program history, such as whether it is a new program or a new or changed area of program emphasis.

(B) Examples of successful projects funded in the past.

(C) For infrastructure projects subject to Build America, Buy America requirements, information on key items anticipated to be purchased under the program, and any related domestic sourcing concerns based on market research.

(D) Other information the Federal agency finds necessary.

(4) ***Application Contents and Format.*** This section must identify the required content of an application and the forms or formats an applicant must use. If any requirements are stated elsewhere, this section should refer to where those requirements may be found. This section also should include required forms or formats as part of the announcement or state where the applicant may obtain them.

(i) This section must specifically address content and form or format requirements for:

(A) Whether pre-applications, letters of intent, or white papers are required or encouraged.

(B) The application as a whole.

(C) Component pieces of the application.

(D) Information that successful applicants must submit after notification of intent to make a Federal award but prior to a Federal award. For example, this could include evidence of compliance with requirements relating to human subjects or information needed to comply with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*).

(ii) Within each of the categories above, this subsection must include, where relevant:

(A) Limitations on page numbers.

(B) Formatting requirements, including font and font size, margins, paper size, and color limitations.

(C) Any requirements for file naming, file size limitations, or file format such as PDF.

(D) The number of copies required if paper submissions are allowed.

(E) The sequence required for application sections or components.

(F) Signature requirements, including those for electronic submissions.

(G) Any requirements for third-party information such as references, letters of support, or letters of commitment to the project or to contribute to cost sharing.

(H) A reference to any requirements to provide documentation to support an eligibility determination, such as proof of 501(c)(3) status or an authorizing tribal resolution.

(I) Instructions needed to develop the narrative portions of the application. Include any requirements for its order, format, or required headings.

(J) If applicable, the need to identify proprietary information. Include how to do so and how the Federal agency will handle it.

(5) ***Submission Requirements and Deadlines.***

(i) ***Address to Request Application Package.*** This section must include the following:

(A) How to get application forms, kits, or other materials needed to apply. If the announcement contains everything needed, this section needs only say so. If not, the guidance must include:

(*1*) An internet address where the materials can be accessed.

(*2*) An email address.

(3) A U.S. Postal Service mailing address.

(4) Telephone number.

(5) Telephone Device for the Deaf (TDD), Text Telephone (TTY) number, or other appropriate telecommunication relay service.

(ii) ***Unique entity identifier and System for Award Management (SAM.gov).*** This section must state the requirements for unique entity identifiers and registration in *SAM.gov*. It must include the following:

(A) Each applicant must:

(1) Be registered in *SAM.gov* before submitting its application;

(2) Provide a valid unique entity identifier in its application; and

(3) Continue to maintain an active registration in *SAM.gov* with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal agency.

(B) If individuals are eligible to apply, they are exempt from this requirement under 2 CFR 25.110(b).

(C) If the Federal agency exempts any applicants from this requirement under 2 CFR 25.110(c) or (d), a statement to that effect.

(iii) ***Submission Instructions.*** This section addresses how the applicant will submit the application. It must include the following:

(A) Actions needed prior to applying:

(1) Instructions on any registrations required to access electronic submission systems or links to them. Where possible, provide the expected time frames needed to complete the registration process.

(B) The methods for submitting the application:

(1) Whether the applicant must submit in electronic or paper form or whether the applicant has an option. Applicants should not be required to submit in more than one format.

(2) Instructions on how to submit electronically or links to them. Must include the URL to the electronic submission system and information on or links to information about the system or software requirements needed by the system.

(3) If the Federal agency allows paper submissions, the process used to approve this option if it is not automatically allowed.

(4) If the Federal agency allows paper submissions, the method for submitting the application. This information must include a postal address and “care of” information needed to route the application to the appropriate person, office, or email address, if the Federal agency allows such submissions.

(C) If applicable, this section also must say how applicants must submit pre-applications, letters of intent, third-party information, or other information required before the award. It must include the following:

(*1*) Instructions on how to submit electronically or links to them.

(*2*) Whether the applicant must submit in electronic or paper form or whether the applicant has an option.

(*3*) If the Federal agency allows paper submissions, the method for submitting the required information. This information must include a postal address and "care of" information needed to route the application to the appropriate person, office, or email address.

(D) This section must also include what to do in the event of system problems and a point of contact who will be available if the applicant experiences technical difficulties.

(iv) ***Submission Dates and Times.*** This section must include due dates and times for all submissions. If they are different for electronic and paper submissions, be clear about the differences. This includes the following:

(A) Full applications.

(B) Any preliminary submissions, such as letters of intent, white papers, or pre-applications.

(C) Any other submissions required before Federal award separate from the full application.

(D) If the funding opportunity is a general announcement that is open for a period of time with no specific due dates for applications, this section should say so.

(v) ***Intergovernmental Review.*** This section must include the following:

(A) Whether or not the funding opportunity is subject to Executive Order 12372, "Intergovernmental Review of Federal Programs".

(B) If it is applicable, include the following:

(*1*) A short description of this requirement.

(*2*) Where applicants can find their State's Single Point of Contact, learn whether their State has an intergovernmental review process, and if so, get information on their State's process. The list of SPOCs is on the Office of Management and Budget's website.

(6) ***Application Review Information.***

(i) ***Responsiveness Review.*** This section includes information on the criteria that make an application or project ineligible. These are sometimes referred to as "responsiveness" criteria, "go-no-go" criteria, or "threshold" criteria. Federal agencies may change the title of this section as appropriate. This section must include the following:

(A) A brief understanding of the Federal agency responsiveness review process.

(B) A list and enough detail to understand the criteria or disqualifying factors to be reviewed.

(C) A reference to the regulation or requirement that describes the restriction, if applicable. For example, if entities that have been found to be in violation of a particular Federal statute are ineligible, say so.

(ii) ***Review Criteria.*** This section must address the review criteria that the Federal agency will use to evaluate applications for merit. This information includes the merit and other review criteria evaluators will use to judge applications, including any statutory, regulatory, or other preferences that will be applied in the review process. These criteria are distinct from eligibility criteria that are addressed before an application is accepted for review and any program policy or other factors that are applied during the selection process, after the review process is completed.

The intent is to make the application process transparent so applicants can make informed decisions when preparing their applications to maximize the fairness of the process.

(A) This section must include the following:

(*1*) A clear description of each criterion and sub-criterion used.

(*2*) If criteria vary in importance, the relative percentages, weights, or other means used to distinguish between them.

(*3*) For statutory, regulatory, or other preferences, an explanation of those preferences with an explicit indication of their effect, for example, if they result in additional points being assigned.

(*4*) How an applicant's proposed cost sharing will be considered in the review process if it is not an eligibility criterion in Section 2b. For example, to assign a certain number of additional points to applicants who offer cost sharing or to break ties among applications with equivalent scores after evaluation against all other factors. If cost sharing will not be considered in the evaluation, the announcement should say so. Do not include statements that cost sharing is encouraged without providing clarity about what that means.

(*5*) The relevant information if the Federal agency permits applicants to nominate reviewers of their applications or suggest those they feel may be inappropriate due to a conflict of interest.

(B) This section could include the following:

(*1*) The types of people responsible for evaluation against the merit criteria. For example, peers external to the Federal agency or Federal agency personnel.

(*2*) The number of people on an evaluation panel and how it operates, how reviewers are selected, reviewer qualifications, and how conflicts of interest are avoided.

(iii) ***Review and Selection Process.*** This section may vary in the level of detail provided.

(A) It must include the following:

(*1*) Any program policy, factors, or elements that the selecting official may use in selecting applications for the award. For example, geographical dispersion, program balance, or diversity.

(2) A brief description of the merit review process, including how the Federal agency uses merit review outcomes in final decision-making. For example, whether they are advisory only.

(B) It could also include the following:

(1) Who makes the final selections for awards.

(2) Any multi-phase review methods. For example, an external panel that advises on, makes, or approves final recommendations to the deciding official.

(iv) ***Risk Review.***

(A) This section must include the following:

(1) A brief description of the factors used for the Federal agency's risk review as required by § 200.206.

(2) If the Federal agency expects that any award under the NOFO will be more than the simplified acquisition threshold during its period of performance, include the following information:

(*i*) That before making a Federal award with a total amount of Federal share greater than the simplified acquisition threshold, the Federal agency must review and consider any information about the applicant that is in the responsibility/qualification records available in *SAM.gov* (see 41 U.S.C. 2313).

(*ii*) That an applicant can review and comment on any information in the responsibility/qualification records available in *SAM.gov*.

(*iii*) That before making decisions in the risk review required by § 200.206 the Federal agency will consider any comments by the applicant, along with information available in the responsibility/qualification records in *SAM.gov*.

(7) ***Award Notices.*** This section must address what a successful applicant can expect to receive following selection.

(i) It must include the following:

(A) If the Federal agency's practice is to provide a separate notice stating that an application has been selected before it makes the Federal award, indicate that the letter is not an authorization to begin performance and that the Federal award is the authorizing document.

(B) If pre-award costs are allowed, beginning performance is at the applicant's own risk.

(C) This section should indicate that the notice of Federal award signed by the grants officer, or equivalent, is the official document that obligates funds, and whether it is provided through postal mail or by electronic means and to whom.

(D) The timing, form, and content of notifications to unsuccessful applicants. See also § 200.211.

(8) ***Post-Award Requirements and Administration.***

(i) Administrative and National Policy Requirements. Providing information on administrative and policy requirements lets a potential applicant identify any requirements with which it would have difficulty complying. This section must include the following:

(A) A statement related to the "general" terms and conditions of the award, including requirements that the Federal agency normally includes.

(B) Any relevant specific terms and conditions.

(C) Any special requirements that could apply to specific awards after the review of applications and other information based on the particular circumstances of the effort to be supported. For example, if human subjects were to be involved or if some situations may justify specific terms on intellectual property, data sharing, or security requirements.

(D) As in other sections, the announcement need not include all terms and conditions of the award but may refer to documents with details on terms and conditions.

(ii) ***Reporting.*** This section includes information needed to understand the post-award reporting requirements. Highlight any special reporting requirements for Federal awards under this funding opportunity that differ from what the Federal agency's Federal awards usually require. For example, differences in report type, frequency, form, format, or circumstances for use. This section must include the following:

(A) The type of reporting required, such as financial or performance.

(B) The reporting frequency.

(C) The means of submission, such as paper or electronic.

(D) References to all relevant requirements, such as those at 2 CFR 180.335 and 180.350.

(E) If the Federal share of any Federal award may include more than $500,000 over the period of performance, this section must inform potential applicants about the post-award reporting requirements reflected in appendix XII to this part.

(9) ***Other Information—Optional.*** This section may include any additional information to help potential applicants. For example, the section could include the following:

(i) Related programs or other upcoming or ongoing Federal agency funding opportunities for similar activities.

(ii) Current internet addresses for Federal agency websites that may be useful to an applicant in understanding the program.

(iii) Routine notices to applicants. For example, the Federal Government is not obligated to make any Federal award as a result of the announcement, or only grants officers can bind the Federal Government to the expenditure of funds.

[89 FR 30204, Apr. 22, 2024]

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of $10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction

work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(J) See § 200.323.

(K) See § 200.216.

(L) See § 200.322.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75888, Dec. 19, 2014; 85 FR 49577, Aug. 13, 2020]

Appendix III to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs)

A. General

This appendix provides criteria for identifying and computing indirect (or indirect (F&A)) rates at IHEs (institutions). Indirect (F&A) costs are those that are incurred for common or joint objectives and therefore cannot be identified readily and specifically with a particular sponsored project, an instructional activity, or any other institutional activity. See subsection B.1 for a discussion of the components of indirect (F&A) costs.

1. Major Functions/Activities of an IHE

Refers to instruction, organized research, other sponsored activities and other institutional activities as defined in this section:

a. ***Instruction*** means the teaching and training activities of an institution. Except for research training as provided in subsection b, this term includes all teaching and training activities, whether they are offered for credits toward a degree or certificate or on a non-credit basis, and whether they are offered through regular academic departments or separate divisions, such as a summer school division or an extension division. Also considered part of this major function are departmental research, and, where agreed to, university research.

(1) ***Sponsored instruction and training*** means specific instructional or training activity established by grant, contract, or cooperative agreement. For purposes of the cost principles, this activity may be considered a major function even though an institution's accounting treatment may include it in the instruction function.

(2) ***Departmental research*** means research, development and scholarly activities that are not organized research and, consequently, are not separately budgeted and accounted for. Departmental research, for purposes of this document, is not considered as a major function, but as a part of the instruction function of the institution.

(3) Only mandatory cost sharing or cost sharing specifically committed in the project budget must be included in the organized research base for computing the indirect (F&A) cost rate or reflected in any allocation of indirect costs. Salary costs above statutory limits are not considered cost sharing.

b. ***Organized research*** means all research and development activities of an institution that are separately budgeted and accounted for. It includes:

(1) ***Sponsored research*** means all research and development activities that are sponsored by Federal and non-Federal agencies and organizations. This term includes activities involving the training of individuals in research techniques (commonly called research training) where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(2) ***University research*** means all research and development activities that are separately budgeted and accounted for by the institution under an internal application of institutional funds. University research, for purposes of this document, must be combined with sponsored research under the function of organized research.

c. ***Other sponsored activities*** means programs and projects financed by Federal and non-Federal agencies and organizations which involve the performance of work other than instruction and organized research. Examples of such programs and projects are health service projects and community service programs. However, when any of these activities are undertaken by the institution without outside support, they may be classified as other institutional activities.

d. ***Other institutional activities*** means all activities of an institution except for instruction, departmental research, organized research, and other sponsored activities, as defined in this section; indirect (F&A) cost activities identified in this Appendix paragraph B, Identification and assignment of indirect (F&A) costs; and specialized services facilities described in § 200.468 of this part.

2. Criteria for Distribution

a. ***Base period.*** A base period for distribution of indirect (F&A) costs is the period during which the costs are incurred. The base period normally should coincide with the fiscal year established by the institution, but in any event the base period should be so selected as to avoid inequities in the distribution of costs.

b. ***Need for cost groupings.*** The overall objective of the indirect (F&A) cost allocation process is to distribute the indirect (F&A) costs described in Section B, Identification and assignment of indirect (F&A) costs, to the major functions of the institution in proportions reasonably consistent with the nature and extent of their use of the institution's resources. In order to achieve this objective, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the indirect (F&A) cost categories referred to in subsection B.1. In general, the cost groupings established within a category should constitute, in each case, a pool of those items of expense that are considered to be of like nature in terms of their relative contribution to (or degree of remoteness from) the particular cost objectives to which distribution is appropriate. Cost groupings should be established considering the general guides provided in subsection c of this section. Each such pool or cost grouping should then be distributed individually to the related cost objectives, using the distribution base or method most appropriate in light of the guidelines set forth in subsection d of this section.

c. ***General considerations on cost groupings.*** The extent to which separate cost groupings and selective distribution would be appropriate at an institution is a matter of judgment to be determined on a case-by-case basis. Typical situations which may warrant the establishment of two or more separate cost groupings (based on account classification or analysis) within an indirect (F&A) cost category include but are not limited to the following:

(1) If certain items or categories of expense relate solely to one of the major functions of the institution or to less than all functions, such expenses should be set aside as a separate cost grouping for direct assignment or selective allocation in accordance with the guides provided in subsections b and d.

(2) If any types of expense ordinarily treated as general administration or departmental administration are charged to Federal awards as direct costs, expenses applicable to other activities of the institution when incurred for the same purposes in like

circumstances must, through separate cost groupings, be excluded from the indirect (F&A) costs allocable to those Federal awards and included in the direct cost of other activities for cost allocation purposes.

(3) If it is determined that certain expenses are for the support of a service unit or facility whose output is susceptible of measurement on a workload or other quantitative basis, such expenses should be set aside as a separate cost grouping for distribution on such basis to organized research, instructional, and other activities at the institution or within the department.

(4) If activities provide their own purchasing, personnel administration, building maintenance or similar service, the distribution of general administration and general expenses, or operation and maintenance expenses to such activities should be accomplished through cost groupings which include only that portion of central indirect (F&A) costs (such as for overall management) which are properly allocable to such activities.

(5) If the institution elects to treat fringe benefits as indirect (F&A) charges, such costs should be set aside as a separate cost grouping for selective distribution to related cost objectives.

(6) The number of separate cost groupings within a category should be held within practical limits, after taking into consideration the materiality of the amounts involved and the degree of precision attainable through less selective methods of distribution.

d. Selection of distribution method.

(1) Actual conditions must be taken into account in selecting the method or base to be used in distributing individual cost groupings. The essential consideration in selecting a base is that it be the one best suited for assigning the pool of costs to cost objectives in accordance with benefits derived; with a traceable cause-and-effect relationship; or with logic and reason, where neither benefit nor a cause-and-effect relationship is determinable.

(2) If a cost grouping can be identified directly with the cost objective benefitted, it should be assigned to that cost objective.

(3) If the expenses in a cost grouping are more general in nature, the distribution may be based on a cost analysis study which results in an equitable distribution of the costs. Such cost analysis studies may take into consideration weighting factors, population, or space occupied if appropriate. Cost analysis studies, however, must

(a) be appropriately documented in sufficient detail for subsequent review by the cognizant agency for indirect costs,

(b) distribute the costs to the related cost objectives in accordance with the relative benefits derived,

(c) be statistically sound,

(d) be performed specifically at the institution at which the results are to be used, and

(e) be reviewed periodically, but not less frequently than rate negotiations, updated if necessary, and used consistently. Any assumptions made in the study must be stated and explained. The use of cost analysis studies and periodic changes in the method of cost distribution must be fully justified.

(4) If a cost analysis study is not performed, or if the study does not result in an equitable distribution of the costs, the distribution must be made in accordance with the appropriate base cited in Section B, unless one of the following conditions is met:

(a) It can be demonstrated that the use of a different base would result in a more equitable allocation of the costs, or that a more readily available base would not increase the costs charged to Federal awards, or

(b) The institution qualifies for, and elects to use, the simplified method for computing indirect (F&A) cost rates described in Section D.

(5) Notwithstanding subsection (3), effective July 1, 1998, a cost analysis or base other than that in Section B must not be used to distribute utility or student services costs. Instead, subsection B.4.c, may be used in the recovery of utility costs.

e. Order of distribution.

(1) Indirect (F&A) costs are the broad categories of costs discussed in Section B.1.

(2) Depreciation, interest expenses, operation and maintenance expenses, and general administrative and general expenses should be allocated in that order to the remaining indirect (F&A) cost categories as well as to the major functions and specialized service facilities of the institution. Other cost categories may be allocated in the order determined to be most appropriate by the institutions. When cross allocation of costs is made as provided in subsection (3), this order of allocation does not apply.

(3) Normally an indirect (F&A) cost category will be considered closed once it has been allocated to other cost objectives, and costs may not be subsequently allocated to it. However, a cross allocation of costs between two or more indirect (F&A) cost categories may be used if such allocation will result in a more equitable allocation of costs. If a cross allocation is used, an appropriate modification to the composition of the indirect (F&A) cost categories described in Section B is required.

B. Identification and Assignment of Indirect (F&A) Costs

1. Definition of Facilities and Administration

See § 200.414 which provides the basis for these indirect cost requirements.

2. Depreciation

a. The expenses under this heading are the portion of the costs of the institution's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with § 200.436.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated in the following manner:

(1) Depreciation on buildings used exclusively in the conduct of a single function, and on capital improvements and equipment used in such buildings, must be assigned to that function.

(2) Depreciation on buildings used for more than one function, and on capital improvements and equipment used in such buildings, must be allocated to the individual functions performed in each building on the basis of usable square feet of space, excluding common areas such as hallways, stairwells, and rest rooms.

(3) Depreciation on buildings, capital improvements and equipment related to space (e.g., individual rooms, laboratories) used jointly by more than one function (as determined by the users of the space) must be treated as follows. The cost of each jointly used unit of space must be allocated to benefitting functions on the basis of:

(a) The employee full-time equivalents (FTEs) or salaries and wages of those individual functions benefitting from the use of that space; or

(b) Institution-wide employee FTEs or salaries and wages applicable to the benefitting major functions (see Section A.1) of the institution.

(4) Depreciation on certain capital improvements to land, such as paved parking areas, fences, sidewalks, and the like, not included in the cost of buildings, must be allocated to user categories of students and employees on a full-time equivalent basis. The amount allocated to the student category must be assigned to the instruction function of the institution. The amount allocated to the employee category must be further allocated to the major functions of the institution in proportion to the salaries and wages of all employees applicable to those functions.

3. Interest

Interest on debt associated with certain buildings, equipment and capital improvements, as defined in § 200.449, must be classified as an expenditure under the category Facilities. These costs must be allocated in the same manner as the depreciation on the buildings, equipment and capital improvements to which the interest relates.

4. Operation and Maintenance Expenses

a. The expenses under this heading are those that have been incurred for the administration, supervision, operation, maintenance, preservation, and protection of the institution's physical plant. They include expenses normally incurred for such items as janitorial and utility services; repairs and ordinary or normal alterations of buildings, furniture and equipment; care of grounds; maintenance and operation of buildings and other plant facilities; security; earthquake and disaster preparedness; environmental safety; hazardous waste disposal; property, liability and all other insurance relating to property; space and capital leasing; facility planning and management; and central receiving. The operation and maintenance expense category should also include its allocable share of fringe benefit costs, depreciation, and interest costs.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated in the same manner as described in subsection 2.b for depreciation.

c. A utility cost adjustment of up to 1.3 percentage points may be included in the negotiated indirect cost rate of the IHE for organized research, per the computation alternatives in paragraphs (c)(1) and (2) of this section:

(1) Where space is devoted to a single function and metering allows unambiguous measurement of usage related to that space, costs must be assigned to the function located in that space.

(2) Where space is allocated to different functions and metering does not allow unambiguous measurement of usage by function, costs must be allocated as follows:

(i) Utilities costs should be apportioned to functions in the same manner as depreciation, based on the calculated difference between the site or building actual square footage for monitored research laboratory space (site, building, floor, or room), and a separate calculation prepared by the IHE using the "effective square footage" described in subsection (c)(2)(ii) of this section.

(ii) ***"Effective square footage"*** allocated to research laboratory space must be calculated as the actual square footage times the relative energy utilization index (REUI) posted on the OMB Web site at the time of a rate determination.

A. This index is the ratio of a laboratory energy use index (lab EUI) to the corresponding index for overall average college or university space (college EUI).

B. In July 2012, values for these two indices (taken respectively from the Lawrence Berkeley Laboratory "Labs for the 21st Century" benchmarking tool and the US Department of Energy "Buildings Energy Databook" and were 310 kBtu/sq ft-yr. and 155 kBtu/sq ft-yr., so that the adjustment ratio is 2.0 by this methodology. To retain currency, OMB will adjust the EUI numbers from time to time (no more often than annually nor less often than every 5 years), using reliable and publicly disclosed data. Current values of both the EUIs and the REUI will be posted on the OMB website.

5. General Administration and General Expenses

a. The expenses under this heading are those that have been incurred for the general executive and administrative offices of educational institutions and other expenses of a general character which do not relate solely to any major function of the institution; *i.e.,* solely to

(1) instruction,

(2) organized research,

(3) other sponsored activities, or

(4) other institutional activities. The general administration and general expense category should also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of general administration and general expenses include: Those expenses incurred by administrative offices that serve the entire university system of which the institution is a part; central offices of the institution such as the President's or Chancellor's office, the offices for institution-wide financial management, business services, budget and planning, personnel management, and safety and risk management; the office of the General Counsel; and the operations of the central administrative management information

systems. General administration and general expenses must not include expenses incurred within non-university-wide deans' offices, academic departments, organized research units, or similar organizational units. (See subsection 6.)

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be grouped first according to common major functions of the institution to which they render services or provide benefits. The aggregate expenses of each group must then be allocated to serviced or benefitted functions on the modified total cost basis. Modified total costs consist of the same elements as those in Section C.2. When an activity included in this indirect (F&A) cost category provides a service or product to another institution or organization, an appropriate adjustment must be made to either the expenses or the basis of allocation or both, to assure a proper allocation of costs.

6. Departmental Administration Expenses

a. The expenses under this heading are those that have been incurred for administrative and supporting services that benefit common or joint departmental activities or objectives in academic deans' offices, academic departments and divisions, and organized research units. Organized research units include such units as institutes, study centers, and research centers. Departmental administration expenses are subject to the following limitations.

(1) Academic deans' offices. Salaries and operating expenses are limited to those attributable to administrative functions.

(2) Academic departments:

(a) Salaries and fringe benefits attributable to the administrative work (including bid and proposal preparation) of faculty (including department heads) and other professional personnel conducting research and/or instruction, must be allowed at a rate of 3.6 percent of modified total direct costs. This category does not include professional business or professional administrative officers. This allowance must be added to the computation of the indirect (F&A) cost rate for major functions in Section C; the expenses covered by the allowance must be excluded from the departmental administration cost pool. No documentation is required to support this allowance.

(b) Other administrative and supporting expenses incurred within academic departments are allowable provided they are treated consistently in like circumstances. This would include expenses such as the salaries of secretarial and clerical staffs, the salaries of administrative officers and assistants, travel, office supplies, stockrooms, and the like.

(3) Other fringe benefit costs applicable to the salaries and wages included in subsections (1) and (2) are allowable, as well as an appropriate share of general administration and general expenses, operation and maintenance expenses, and depreciation.

(4) Federal agencies may authorize reimbursement of additional costs for department heads and faculty only in exceptional cases where an institution can demonstrate undue hardship or detriment to project performance.

b. The following guidelines apply to the determination of departmental administrative costs as direct or indirect (F&A) costs.

(1) In developing the departmental administration cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect (F&A) costs. For example, salaries of technical staff, laboratory supplies (*e.g.,* chemicals), telephone toll charges, animals, animal care costs, computer costs, travel costs, and specialized shop costs must be treated as direct costs wherever identifiable to a particular cost objective. Direct charging of these costs may be accomplished through specific identification of individual costs to benefitting cost objectives, or through recharge centers or specialized service facilities, as appropriate under the circumstances. See §§ 200.413(c) and 200.468.

(2) Items such as office supplies, postage, local telephone costs, and memberships must normally be treated as indirect (F&A) costs.

c. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated as follows:

(1) The administrative expenses of the dean's office of each college and school must be allocated to the academic departments within that college or school on the modified total cost basis.

(2) The administrative expenses of each academic department, and the department's share of the expenses allocated in subsection (1) must be allocated to the appropriate functions of the department on the modified total cost basis.

7. Sponsored Projects Administration

a. The expenses under this heading are limited to those incurred by a separate organization(s) established primarily to administer sponsored projects, including such functions as grant and contract administration (Federal and non-Federal), special security, purchasing, personnel, administration, and editing and publishing of research and other reports. They include the salaries and expenses of the head of such organization, assistants, and immediate staff, together with the salaries and expenses of personnel engaged in supporting activities maintained by the organization, such as stock rooms, print shops, and the like. This category also includes an allocable share of fringe benefit costs, general administration and general expenses, operation and maintenance expenses, and depreciation. Appropriate adjustments will be made for services provided to other functions or organizations.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated to the major functions of the institution under which the sponsored projects are conducted on the basis of the modified total cost of sponsored projects.

c. An appropriate adjustment must be made to eliminate any duplicate charges to Federal awards when this category includes similar or identical activities as those included in the general administration and general expense category or other indirect (F&A) cost items, such as accounting, procurement, or personnel administration.

8. Library Expenses

a. The expenses under this heading are those that have been incurred for the operation of the library, including the cost of books and library materials purchased for the library, less any items of library income that qualify as applicable credits under § 200.406. The library expense category should also include the fringe benefits applicable to the salaries and wages included therein, an appropriate

share of general administration and general expense, operation and maintenance expense, and depreciation. Costs incurred in the purchases of rare books (museum-type books) with no value to Federal awards should not be allocated to them.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated first on the basis of primary categories of users, including students, professional employees, and other users.

(1) The student category must consist of full-time equivalent students enrolled at the institution, regardless of whether they earn credits toward a degree or certificate.

(2) The professional employee category must consist of all faculty members and other professional employees of the institution, on a full-time equivalent basis. This category may also include post-doctorate fellows and graduate students.

(3) The other users category must consist of a reasonable factor as determined by institutional records to account for all other users of library facilities.

c. Amount allocated in paragraph b of this section must be assigned further as follows:

(1) The amount in the student category must be assigned to the instruction function of the institution.

(2) The amount in the professional employee category must be assigned to the major functions of the institution in proportion to the salaries and wages of all faculty members and other professional employees applicable to those functions.

(3) The amount in the other users category must be assigned to the other institutional activities function of the institution.

9. Student Administration and Services

a. The expenses under this heading are those that have been incurred for the administration of student affairs and for services to students, including expenses of such activities as deans of students, admissions, registrar, counseling and placement services, student advisers, student health and infirmary services, catalogs, and commencements and convocations. The salaries of members of the academic staff whose responsibilities to the institution require administrative work that benefits sponsored projects may also be included to the extent that the portion charged to student administration is determined in accordance with subpart E of this Part. This expense category also includes the fringe benefit costs applicable to the salaries and wages included therein, an appropriate share of general administration and general expenses, operation and maintenance, interest expense, and depreciation.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses in this category must be allocated to the instruction function, and subsequently to Federal awards in that function.

10. Offset for Indirect (F&A) Expenses Otherwise Provided for by the Federal Government

a. The items to be accumulated under this heading are the reimbursements and other payments from the Federal Government which are made to the institution to support solely, specifically, and directly, in whole or in part, any of the administrative or service activities described in subsections 2 through 9.

b. The items in this group must be treated as a credit to the affected individual indirect (F&A) cost category before that category is allocated to benefitting functions.

C. Determination and Application of Indirect (F&A) Cost Rate or Rates

1. Indirect (F&A) Cost Pools

a.

(1) Subject to subsection b, the separate categories of indirect (F&A) costs allocated to each major function of the institution as prescribed in Section B, must be aggregated and treated as a common pool for that function. The amount in each pool must be divided by the distribution base described in subsection 2 to arrive at a single indirect (F&A) cost rate for each function.

(2) The rate for each function is used to distribute indirect (F&A) costs to individual Federal awards of that function. Since a common pool is established for each major function of the institution, a separate indirect (F&A) cost rate would be established for each of the major functions described in Section A.1 under which Federal awards are carried out.

(3) Each institution's indirect (F&A) cost rate process must be appropriately designed to ensure that Federal sponsors do not in any way subsidize the indirect (F&A) costs of other sponsors, specifically activities sponsored by industry and foreign governments. Accordingly, each allocation method used to identify and allocate the indirect (F&A) cost pools, as described in Sections A.2 and B.2 through B.9, must contain the full amount of the institution's modified total costs or other appropriate units of measurement used to make the computations. In addition, the final rate distribution base (as defined in subsection 2) for each major function (organized research, instruction, etc., as described in Section A.1 functions of an institution) must contain all the programs or activities which utilize the indirect (F&A) costs allocated to that major function. At the time an indirect (F&A) cost proposal is submitted to a cognizant agency for indirect costs, each institution must describe the process it uses to ensure that Federal funds are not used to subsidize industry and foreign government funded programs.

2. The Distribution Basis

Indirect (F&A) costs must be distributed to applicable Federal awards and other benefitting activities within each major function (see section A.1) on the basis of modified total direct costs (MTDC), consisting of all salaries and wages, fringe benefits, materials and supplies, services, travel, and up to the first $50,000 of each subaward (regardless of the period covered by the subaward). MTDC is defined in § 200.1. For this purpose, an indirect (F&A) cost rate should be determined for each of the separate indirect (F&A) cost pools developed pursuant to subsection 1. The rate in each case should be stated as the percentage which the amount of the particular indirect (F&A) cost pool is of the modified total direct costs identified with such pool.

3. Negotiated Lump Sum for Indirect (F&A) Costs

A negotiated fixed amount in lieu of indirect (F&A) costs may be appropriate for self-contained, off-campus, or primarily subcontracted activities where the benefits derived from an institution's indirect (F&A) services cannot be readily determined. Such negotiated indirect (F&A) costs will be treated as an

offset before allocation to instruction, organized research, other sponsored activities, and other institutional activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

4. Predetermined Rates for Indirect (F&A) Costs

Public Law 87-638 (76 Stat. 437) as amended (41 U.S.C. 4708) authorizes the use of predetermined rates in determining the "indirect costs" (indirect (F&A) costs) applicable under research agreements with educational institutions. The stated objectives of the law are to simplify the administration of cost-type research and development contracts (including grants) with educational institutions, to facilitate the preparation of their budgets, and to permit more expeditious closeout of such contracts when the work is completed. In view of the potential advantages offered by this procedure, negotiation of predetermined rates for indirect (F&A) costs for a period of two to four years should be the norm in those situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties involved to reach an informed judgment as to the probable level of indirect (F&A) costs during the ensuing accounting periods.

5. Negotiated Fixed Rates and Carry-Forward Provisions

When a fixed rate is negotiated in advance for a fiscal year (or other time period), the over- or under-recovery for that year may be included as an adjustment to the indirect (F&A) cost for the next rate negotiation. When the rate is negotiated before the carry-forward adjustment is determined, the carry-forward amount may be applied to the next subsequent rate negotiation. When such adjustments are to be made, each fixed rate negotiated in advance for a given period will be computed by applying the expected indirect (F&A) costs allocable to Federal awards for the forecast period plus or minus the carry-forward adjustment (over- or under-recovery) from the prior period, to the forecast distribution base. Unrecovered amounts under lump-sum agreements or cost-sharing provisions of prior years must not be carried forward for consideration in the new rate negotiation. There must, however, be an advance understanding in each case between the institution and the cognizant agency for indirect costs as to whether these differences will be considered in the rate negotiation rather than making the determination after the differences are known. Further, institutions electing to use this carry-forward provision may not subsequently change without prior approval of the cognizant agency for indirect costs. In the event that an institution returns to a post-determined rate, any over- or under-recovery during the period in which negotiated fixed rates and carry-forward provisions were followed will be included in the subsequent post-determined rates. Where multiple rates are used, the same procedure will be applicable for determining each rate.

6. Provisional and Final Rates for Indirect (F&A) Costs

Where the cognizant agency for indirect costs determines that cost experience and other pertinent facts do not justify the use of predetermined rates, or a fixed rate with a carry-forward, or if the parties cannot agree on an equitable rate, a provisional rate must be established. To prevent substantial overpayment or underpayment, the provisional rate may be adjusted by the cognizant agency for indirect costs during the institution's fiscal year. Predetermined or fixed rates may replace provisional rates at any time prior to the

close of the institution's fiscal year. If a provisional rate is not replaced by a predetermined or fixed rate prior to the end of the institution's fiscal year, a final rate will be established and upward or downward adjustments will be made based on the actual allowable costs incurred for the period involved.

7. Fixed Rates for the Life of the Sponsored Agreement

a. Except as provided in paragraph (c)(1) of § 200.414, Federal agencies must use the negotiated rates in effect at the time of the initial award throughout the life of the Federal award. Award levels for Federal awards may not be adjusted in future years as a result of changes in negotiated rates. “Negotiated rates” per the rate agreement include final, fixed, and predetermined rates and exclude provisional rates. “Life” for the purpose of this subsection means each competitive segment of a project. A competitive segment is a period of years approved by the Federal awarding agency at the time of the Federal award. If negotiated rate agreements do not extend through the life of the Federal award at the time of the initial award, then the negotiated rate for the last year of the Federal award must be extended through the end of the life of the Federal award.

b. Except as provided in § 200.414, when an educational institution does not have a negotiated rate with the Federal Government at the time of an award (because the educational institution is a new recipient or the parties cannot reach agreement on a rate), the provisional rate used at the time of the award must be adjusted once a rate is negotiated and approved by the cognizant agency for indirect costs.

8. Limitation on Reimbursement of Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, the administrative costs charged to Federal awards awarded or amended (including continuation and renewal awards) with effective dates beginning on or after the start of the institution's first fiscal year which begins on or after October 1, 1991, must be limited to 26% of modified total direct costs (as defined in subsection 2) for the total of General Administration and General Expenses, Departmental Administration, Sponsored Projects Administration, and Student Administration and Services (including their allocable share of depreciation, interest costs, operation and maintenance expenses, and fringe benefits costs, as provided by Section B, and all other types of expenditures not listed specifically under one of the subcategories of facilities in Section B.

b. Institutions should not change their accounting or cost allocation methods if the effect is to change the charging of a particular type of cost from F&A to direct, or to reclassify costs, or increase allocations from the administrative pools identified in paragraph B.1 of this Appendix to the other F&A cost pools or fringe benefits. Cognizant agencies for indirect cost are authorized to allow changes where an institution's charging practices are at variance with acceptable practices followed by a substantial majority of other institutions.

9. Alternative Method for Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, an institution may elect to claim a fixed allowance for the “Administration” portion of indirect (F&A) costs. The allowance could be either 24% of modified total direct costs or a percentage equal to 95% of the most recently negotiated fixed or predetermined rate for the cost pools included under “Administration” as defined in Section B.1, whichever is less. Under this alternative, no cost proposal need be prepared for the “Administration”

portion of the indirect (F&A) cost rate nor is further identification or documentation of these costs required (see subsection c). Where a negotiated indirect (F&A) cost agreement includes this alternative, an institution must make no further charges for the expenditure categories described in Section B.5, Section B.6, Section B.7, and Section B.9.

b. In negotiations of rates for subsequent periods, an institution that has elected the option of subsection a may continue to exercise it at the same rate without further identification or documentation of costs.

c. If an institution elects to accept a threshold rate as defined in subsection a of this section, it is not required to perform a detailed analysis of its administrative costs. However, in order to compute the facilities components of its indirect (F&A) cost rate, the institution must reconcile its indirect (F&A) cost proposal to its financial statements and make appropriate adjustments and reclassifications to identify the costs of each major function as defined in Section A.1, as well as to identify and allocate the facilities components. Administrative costs that are not identified as such by the institution's accounting system (such as those incurred in academic departments) will be classified as instructional costs for purposes of reconciling indirect (F&A) cost proposals to financial statements and allocating facilities costs.

10. Individual Rate Components

In order to provide mutually agreed-upon information for management purposes, each indirect (F&A) cost rate negotiation or determination must include development of a rate for each indirect (F&A) cost pool as well as the overall indirect (F&A) cost rate.

11. Negotiation and Approval of Indirect (F&A) Rate

a. Cognizant agency for indirect costs is defined in Subpart A.

(1) Cost negotiation cognizance is assigned to the Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD), normally depending on which of the two agencies (HHS or DOD) provides more funds directly to the educational institution for the most recent three years. Information on funding must be derived from relevant data gathered by the National Science Foundation. In cases where neither HHS nor DOD provides Federal funding directly to an educational institution, the cognizant agency for indirect costs assignment must default to HHS. Notwithstanding the method for cognizance determination described in this section, other arrangements for cognizance of a particular educational institution may also be based in part on the types of research performed at the educational institution and must be decided based on mutual agreement between HHS and DOD. Where a non-Federal entity only receives funds as a subrecipient, see § 200.332.

(2) After cognizance is established, it must continue for a five-year period.

b. Acceptance of rates. See § 200.414.

c. Correcting deficiencies. The cognizant agency for indirect costs must negotiate changes needed to correct systems deficiencies relating to accountability for Federal awards. Cognizant agencies for indirect costs must address the concerns of other affected agencies, as appropriate, and must negotiate special rates for Federal agencies that are required to limit recovery of indirect costs by statute.

d. Resolving questioned costs. The cognizant agency for indirect costs must conduct any necessary negotiations with an educational institution regarding amounts questioned by audit that are due the Federal Government related to costs covered by a negotiated agreement.

e. Reimbursement. Reimbursement to cognizant agencies for indirect costs for work performed under this Part may be made by reimbursement billing under the Economy Act, 31 U.S.C. 1535.

f. Procedure for establishing facilities and administrative rates must be established by one of the following methods:

(1) Formal negotiation. The cognizant agency for indirect costs is responsible for negotiating and approving rates for an educational institution on behalf of all Federal agencies. Federal awarding agencies that do not have cognizance for indirect costs must notify the cognizant agency for indirect costs of specific concerns (i.e., a need to establish special cost rates) which could affect the negotiation process. The cognizant agency for indirect costs must address the concerns of all interested agencies, as appropriate. A pre-negotiation conference may be scheduled among all interested agencies, if necessary. The cognizant agency for indirect costs must then arrange a negotiation conference with the educational institution.

(2) Other than formal negotiation. The cognizant agency for indirect costs and educational institution may reach an agreement on rates without a formal negotiation conference; for example, through correspondence or use of the simplified method described in this section D of this Appendix.

g. Formalizing determinations and agreements. The cognizant agency for indirect costs must formalize all determinations or agreements reached with an educational institution and provide copies to other agencies having an interest. Determinations should include a description of any adjustments, the actual amount, both dollar and percentage adjusted, and the reason for making adjustments.

h. Disputes and disagreements. Where the cognizant agency for indirect costs is unable to reach agreement with an educational institution with regard to rates or audit resolution, the appeal system of the cognizant agency for indirect costs must be followed for resolution of the disagreement.

12. Standard Format for Submission

For facilities and administrative (indirect (F&A)) rate proposals, educational institutions must use the standard format, shown in section E of this appendix, to submit their indirect (F&A) rate proposal to the cognizant agency for indirect costs. The cognizant agency for indirect costs may, on an institution-by-institution basis, grant exceptions from all or portions of Part II of the standard format requirement. This requirement does not apply to educational institutions that use the simplified method for calculating indirect (F&A) rates, as described in Section D of this Appendix.

As provided in section C.10 of this appendix, each F&A cost rate negotiation or determination must include development of a rate for each F&A cost pool as well as the overall F&A rate.

D. Simplified Method for Small Institutions

1. General

a. Where the total direct cost of work covered by this Part at an institution does not exceed $10 million in a fiscal year, the simplified procedure described in subsections 2 or 3 may be used in determining allowable indirect (F&A) costs. Under this simplified procedure, the institution's most recent annual financial report and immediately available supporting information must be utilized as a basis for determining the indirect (F&A) cost rate applicable to all Federal awards. The institution may use either the salaries and wages (see subsection 2) or modified total direct costs (see subsection 3) as the distribution basis.

b. The simplified procedure should not be used where it produces results which appear inequitable to the Federal Government or the institution. In any such case, indirect (F&A) costs should be determined through use of the regular procedure.

2. Simplified Procedure—Salaries and Wages Base

a. Establish the total amount of salaries and wages paid to all employees of the institution.

b. Establish an indirect (F&A) cost pool consisting of the expenditures (exclusive of capital items and other costs specifically identified as unallowable) which customarily are classified under the following titles or their equivalents:

(1) General administration and general expenses (exclusive of costs of student administration and services, student activities, student aid, and scholarships).

(2) Operation and maintenance of physical plant and depreciation (after appropriate adjustment for costs applicable to other institutional activities).

(3) Library.

(4) Department administration expenses, which will be computed as 20 percent of the salaries and expenses of deans and heads of departments.

In those cases where expenditures classified under subsection (1) have previously been allocated to other institutional activities, they may be included in the indirect (F&A) cost pool. The total amount of salaries and wages included in the indirect (F&A) cost pool must be separately identified.

c. Establish a salary and wage distribution base, determined by deducting from the total of salaries and wages as established in subsection a from the amount of salaries and wages included under subsection b.

d. Establish the indirect (F&A) cost rate, determined by dividing the amount in the indirect (F&A) cost pool, subsection b, by the amount of the distribution base, subsection c.

e. Apply the indirect (F&A) cost rate to direct salaries and wages for individual agreements to determine the amount of indirect (F&A) costs allocable to such agreements.

3. Simplified Procedure—Modified Total Direct Cost Base

a. Establish the total costs incurred by the institution for the base period.

b. Establish an indirect (F&A) cost pool consisting of the expenditures (exclusive of capital items and other costs specifically identified as unallowable) which customarily are classified under the following titles or their equivalents:

(1) General administration and general expenses (exclusive of costs of student administration and services, student activities, student aid, and scholarships).

(2) Operation and maintenance of physical plant and depreciation (after appropriate adjustment for costs applicable to other institutional activities).

(3) Library.

(4) Department administration expenses, which will be computed as 20 percent of the salaries and expenses of deans and heads of departments. In those cases where expenditures classified under subsection (1) have previously been allocated to other institutional activities, they may be included in the indirect (F&A) cost pool. The modified total direct costs amount included in the indirect (F&A) cost pool must be separately identified.

c. Establish a modified total direct cost distribution base, as defined in Section C.2, The distribution basis, that consists of all institution's direct functions.

d. Establish the indirect (F&A) cost rate, determined by dividing the amount in the indirect (F&A) cost pool, subsection b, by the amount of the distribution base, subsection c.

e. Apply the indirect (F&A) cost rate to the modified total direct costs for individual agreements to determine the amount of indirect (F&A) costs allocable to such agreements.

E. Documentation Requirements

The standard format for documentation requirements for indirect (indirect (F&A)) rate proposals for claiming costs under the regular method is available on the OMB website.

F. Certification

1. Certification of Charges

To assure that expenditures for Federal awards are proper and in accordance with the agreement documents and approved project budgets, the annual and/or final fiscal reports or vouchers requesting payment under the agreements will include a certification, signed by an authorized official of the university, which reads “By signing this report, I certify to the best of my knowledge and belief that the report is true, complete, and accurate, and the expenditures, disbursements and cash receipts are for the purposes and intent set forth in the award documents. I am aware that any false, fictitious, or fraudulent information, or the omission of any material fact, may subject me to criminal, civil or administrative penalties for fraud, false statements, false claims or otherwise. (U.S. Code, Title 18, Section 1001 and Title 31, Sections 3729-3733 and 3801-3812)”.

2. Certification of Indirect (F&A) Costs

a. ***Policy.*** Cognizant agencies must not accept a proposed indirect cost rate unless such costs have been certified by the educational institution using the Certificate of indirect (F&A) Costs set forth in subsection F.2.c

b. The certificate must be signed on behalf of the institution by the chief financial officer or an individual designated by an individual at a level no lower than vice president or chief financial officer.

An indirect (F&A) cost rate is not binding upon the Federal Government if the most recent required proposal from the institution has not been certified. Where it is necessary to establish indirect (F&A) cost rates, and the institution has not submitted a certified proposal for establishing such rates in accordance with the requirements of this section, the Federal Government must unilaterally establish such rates. Such rates may be based upon audited historical data or such other data that have been furnished to the cognizant agency for indirect costs and for which it can be demonstrated that all unallowable costs have been excluded. When indirect (F&A) cost rates are unilaterally established by the Federal Government because of failure of the institution to submit a certified proposal for establishing such rates in accordance with this section, the rates established will be set at a level low enough to ensure that potentially unallowable costs will not be reimbursed.

c. ***Certificate.*** The certificate required by this section must be in the following form:

Certificate of Indirect (F&A) Costs

This is to certify that to the best of my knowledge and belief:

(1) I have reviewed the indirect (F&A) cost proposal submitted herewith;

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal agreement(s) to which they apply and with the cost principles applicable to those agreements.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

(4) All costs included in this proposal are properly allocable to Federal agreements on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements.

I declare that the foregoing is true and correct.

Institution of Higher Education:

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75888, Dec. 19, 2014; 80 FR 54409, Sept. 10, 2015; 85 FR 49577, Aug. 13, 2020; 89 FR 30206, Apr. 22, 2024]

Appendix IV to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations

A. General

1. Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Direct cost of minor amounts may be treated as indirect costs under the conditions described in § 200.413(d). After direct costs have been determined and assigned directly to awards or other work as appropriate, indirect costs are those remaining to be allocated to benefitting cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. ***"Major nonprofit organizations"*** are defined in paragraph (a) of § 200.414. See indirect cost rate reporting requirements in sections B.2.e and B.3.g of this Appendix.

B. Allocation of Indirect Costs and Determination of Indirect Cost Rates

1. General

a. If a nonprofit organization has only one major function, or where all its major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs and the computation of an indirect cost rate may be accomplished through simplified allocation procedures, as described in section B.2 of this Appendix.

b. If an organization has several major functions which benefit from its indirect costs in varying degrees, allocation of indirect costs may require the accumulation of such costs into separate cost groupings which then are allocated individually to benefitting functions by means of a base which best measures the relative degree of benefit. The indirect costs allocated to each function are then distributed to individual Federal awards and other activities included in that function by means of an indirect cost rate(s).

c. The determination of what constitutes an organization's major functions will depend on its purpose in being; the types of services it renders to the public, its clients, and its members; and the amount of effort it devotes to such activities as fundraising, public information and membership activities.

d. Specific methods for allocating indirect costs and computing indirect cost rates along with the conditions under which each method should be used are described in section B.2 through B.5 of this Appendix.

e. The base period for the allocation of indirect costs is the period in which such costs are incurred and accumulated for allocation to work performed in that period. The base period normally should coincide with the organization's fiscal year but, in any event, must be so selected as to avoid inequities in the allocation of the costs.

2. Simplified Allocation Method

a. Where an organization's major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs may be accomplished by

(i) separating the organization's total costs for the base period as either direct or indirect, and

(ii) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to individual Federal awards. The rate should be expressed as the percentage which the total amount of allowable indirect costs bears to the base selected. This method should also be used where an organization has only one major function encompassing a number of individual projects or activities, and may be used where the level of Federal awards to an organization is relatively small.

b. Both the direct costs and the indirect costs must exclude capital expenditures and unallowable costs. However, unallowable costs which represent activities must be included in the direct costs under the conditions described in § 200.413(e).

c. The distribution base may be total direct costs (excluding capital expenditures and other distorting items, such as subawards for $50,000 or more), direct salaries and wages, or other base which results in an equitable distribution. The distribution base must exclude participant support costs as defined in § 200.1.

d. Except where a special rate(s) is required in accordance with section B.5 of this Appendix, the indirect cost rate developed under the above principles is applicable to all Federal awards of the organization. If a special rate(s) is required, appropriate modifications must be made in order to develop the special rate(s).

e. For an organization that receives more than $10 million in direct Federal funding in a fiscal year, a breakout of the indirect cost component into two broad categories, Facilities and Administration as defined in paragraph (a) of § 200.414, is required. The rate in each case must be stated as the percentage which the amount of the particular indirect cost category (*i.e.,* Facilities or Administration) is of the distribution base identified with that category.

3. Multiple Allocation Base Method

a. General. Where an organization's indirect costs benefit its major functions in varying degrees, indirect costs must be accumulated into separate cost groupings, as described in subparagraph b. Each grouping must then be allocated individually to benefitting functions by means of a base which best measures the relative benefits. The default allocation bases by cost pool are described in section B.3.c of this Appendix.

b. Identification of indirect costs. Cost groupings must be established so as to permit the allocation of each grouping on the basis of benefits provided to the major functions. Each grouping must constitute a pool of expenses that are of like character in terms of functions they benefit and in terms of the allocation base which best measures the relative benefits provided to each function. The groupings are classified within the two broad categories: “Facilities” and “Administration,” as described in section A.3 of this Appendix. The indirect cost pools are defined as follows:

(1) Depreciation. The expenses under this heading are the portion of the costs of the organization's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with § 200.436.

(2) Interest. Interest on debt associated with certain buildings, equipment and capital improvements are computed in accordance with § 200.449.

(3) Operation and maintenance expenses. The expenses under this heading are those that have been incurred for the administration, operation, maintenance, preservation, and protection of the organization's physical plant. They include expenses normally incurred for such items as: janitorial and utility services; repairs and ordinary or normal alterations of buildings, furniture and equipment; care of grounds; maintenance and operation of buildings and other plant facilities; security; earthquake and disaster preparedness; environmental safety; hazardous waste disposal; property, liability and other insurance relating to property; space and capital leasing; facility planning and management; and central receiving. The operation and maintenance expenses category must also include its allocable share of fringe benefit costs, depreciation, and interest costs.

(4) General administration and general expenses. The expenses under this heading are those that have been incurred for the overall general executive and administrative offices of the organization and other expenses of a general nature which do not relate solely to any major function of the organization. This category must also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of this category include central offices, such as the director's office, the office of finance, business services, budget and planning, personnel, safety and risk management, general counsel, management information systems, and library costs.

In developing this cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect costs. For example, salaries of technical staff, project supplies, project publication, telephone toll charges, computer costs, travel costs, and specialized services costs must be treated as direct costs wherever identifiable to a particular program. The salaries and wages of administrative and pooled clerical staff should normally be treated as indirect costs. Direct charging of these costs may be appropriate as described in § 200.413. Items such as office supplies, postage, local telephone costs, periodicals and memberships should normally be treated as indirect costs.

c. Allocation bases. Actual conditions must be taken into account in selecting the base to be used in allocating the expenses in each grouping to benefitting functions. The essential consideration in selecting a method or a base is that it is the one best suited for assigning the pool of costs to cost objectives in accordance with benefits derived; a traceable cause and effect relationship; or logic and reason, where neither the cause nor the effect of the relationship is determinable. When an allocation can be made by assignment of a cost grouping directly to the function benefitted, the allocation must be made in that manner. When the expenses in a cost grouping are more general in nature, the allocation must be made through the use of a selected base which produces results that are equitable to both the Federal Government and the organization. The distribution must be made in accordance with the bases described herein unless it can be demonstrated that the use of a different base would result in a more equitable allocation of the costs, or that a more readily available base

would not increase the costs charged to Federal awards. The results of special cost studies (such as an engineering utility study) must not be used to determine and allocate the indirect costs to Federal awards.

(1) Depreciation. Depreciation expenses must be allocated in the following manner:

(a) Depreciation on buildings used exclusively in the conduct of a single function, and on capital improvements and equipment used in such buildings, must be assigned to that function.

(b) Depreciation on buildings used for more than one function, and on capital improvements and equipment used in such buildings, must be allocated to the individual functions performed in each building on the basis of usable square feet of space, excluding common areas, such as hallways, stairwells, and restrooms.

(c) Depreciation on buildings, capital improvements and equipment related space (e.g., individual rooms, and laboratories) used jointly by more than one function (as determined by the users of the space) must be treated as follows. The cost of each jointly used unit of space must be allocated to the benefitting functions on the basis of:

(i) the employees and other users on a full-time equivalent (FTE) basis or salaries and wages of those individual functions benefitting from the use of that space; or

(ii) organization-wide employee FTEs or salaries and wages applicable to the benefitting functions of the organization.

(d) Depreciation on certain capital improvements to land, such as paved parking areas, fences, sidewalks, and the like, not included in the cost of buildings, must be allocated to user categories on a FTE basis and distributed to major functions in proportion to the salaries and wages of all employees applicable to the functions.

(2) Interest. Interest costs must be allocated in the same manner as the depreciation on the buildings, equipment and capital equipment to which the interest relates.

(3) Operation and maintenance expenses. Operation and maintenance expenses must be allocated in the same manner as the depreciation.

(4) General administration and general expenses. General administration and general expenses must be allocated to benefitting functions based on modified total costs (MTC). The MTC is the modified total direct costs (MTDC), as described in § 200.1, plus the allocated indirect cost proportion. The expenses included in this category could be grouped first according to major functions of the organization to which they render services or provide benefits. The aggregate expenses of each group must then be allocated to benefitting functions based on MTC.

d. Order of distribution.

(1) Indirect cost categories consisting of depreciation, interest, operation and maintenance, and general administration and general expenses must be allocated in that order to the remaining indirect cost categories as well as to the major functions of the organization.

Other cost categories should be allocated in the order determined to be most appropriate by the organization. This order of allocation does not apply if cross allocation of costs is made as provided in section B.3.d.2 of this Appendix.

(2) Normally, an indirect cost category will be considered closed once it has been allocated to other cost objectives, and costs must not be subsequently allocated to it. However, a cross allocation of costs between two or more indirect costs categories could be used if such allocation will result in a more equitable allocation of costs. If a cross allocation is used, an appropriate modification to the composition of the indirect cost categories is required.

e. Application of indirect cost rate or rates. Except where a special indirect cost rate(s) is required in accordance with section B.5 of this Appendix, the separate groupings of indirect costs allocated to each major function must be aggregated and treated as a common pool for that function. The costs in the common pool must then be distributed to individual Federal awards included in that function by use of a single indirect cost rate.

f. Distribution basis. Indirect costs must be distributed to applicable Federal awards and other benefitting activities within each major function on the basis of MTDC (see definition in § 200.1).

g. Individual Rate Components. An indirect cost rate must be determined for each separate indirect cost pool developed. The rate in each case must be stated as the percentage which the amount of the particular indirect cost pool is of the distribution base identified with that pool. Each indirect cost rate negotiation or determination agreement must include development of the rate for each indirect cost pool as well as the overall indirect cost rate. The indirect cost pools must be classified within two broad categories: “Facilities” and “Administration,” as described in § 200.414(a).

4. Direct Allocation Method

a. Some nonprofit organizations treat all costs as direct costs except general administration and general expenses. These organizations generally separate their costs into three basic categories:

(i) General administration and general expenses,

(ii) fundraising, and

(iii) other direct functions (including projects performed under Federal awards). Joint costs, such as depreciation, rental costs, operation and maintenance of facilities, telephone expenses, information technology, and the like are prorated individually as direct costs to each category and to each Federal award or other activity using a base most appropriate to the particular cost being prorated.

b. This method is acceptable, provided each joint cost is prorated using a base which accurately measures the benefits provided to each Federal award or other activity. The bases must be established in accordance with reasonable criteria and be supported by current data. This method is compatible with the Standards of Accounting and Financial Reporting for Voluntary

Health and Welfare Organizations issued jointly by the National Health Council, Inc., the National Assembly of Voluntary Health and Social Welfare Organizations, and the United Way of America.

c. Under this method, indirect costs consist exclusively of general administration and general expenses. In all other respects, the organization's indirect cost rates must be computed in the same manner as that described in section B.2 of this Appendix.

5. Special Indirect Cost Rates

In some instances, a single indirect cost rate for all activities of an organization or for each major function of the organization may not be appropriate, since it would not take into account those different factors which may substantially affect the indirect costs applicable to a particular segment of work. For this purpose, a particular segment of work may be that performed under a single Federal award or it may consist of work under a group of Federal awards performed in a common environment. These factors may include the physical location of the work, the level of administrative support required, the nature of the facilities or other resources employed, the scientific disciplines or technical skills involved, the organizational arrangements used, or any combination thereof. When a particular segment of work is performed in an environment which appears to generate a significantly different level of indirect costs, provisions should be made for a separate indirect cost pool applicable to such work. The separate indirect cost pool should be developed during the course of the regular allocation process, and the separate indirect cost rate resulting therefrom should be used, provided it is determined that (i) the rate differs significantly from that which would have been obtained under sections B.2, B.3, and B.4 of this Appendix, and (ii) the volume of work to which the rate would apply is material.

C. Negotiation and Approval of Indirect Cost Rates

1. Definitions

As used in this section, the following terms have the meanings set forth in this section:

a. ***Cognizant agency for indirect costs*** means the Federal agency responsible for negotiating and approving indirect cost rates for a nonprofit organization on behalf of all Federal agencies.

b. ***Predetermined rate*** means an indirect cost rate, applicable to a specified current or future period, usually the organization's fiscal year. The rate is based on an estimate of the costs to be incurred during the period. A predetermined rate is not subject to adjustment.

c. ***Fixed rate*** means an indirect cost rate which has the same characteristics as a predetermined rate, except that the difference between the estimated costs and the actual costs of the period covered by the rate is carried forward as an adjustment to the rate computation of a subsequent period.

d. ***Final rate*** means an indirect cost rate applicable to a specified past period which is based on the actual costs of the period. A final rate is not subject to adjustment.

e. ***Provisional rate or billing rate*** means a temporary indirect cost rate applicable to a specified period which is used for funding, interim reimbursement, and reporting indirect costs on Federal awards pending the establishment of a final rate for the period.

f. ***Indirect cost proposal*** means the documentation prepared by an organization to substantiate its claim for the reimbursement of indirect costs. This proposal provides the basis for the review and negotiation leading to the establishment of an organization's indirect cost rate.

g. ***Cost objective*** means a function, organizational subdivision, contract, Federal award, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, projects, jobs and capitalized projects.

2. Negotiation and Approval of Rates

a. Unless different arrangements are agreed to by the Federal agencies concerned, the Federal agency with the largest dollar value of Federal awards directly funded to an organization will be designated as the cognizant agency for indirect costs for the negotiation and approval of the indirect cost rates and, where necessary, other rates such as fringe benefit and computer charge-out rates. Once an agency is assigned cognizance for a particular nonprofit organization, the assignment will not be changed unless there is a shift in the dollar volume of the Federal awards directly funded to the organization for at least three years. All concerned Federal agencies must be given the opportunity to participate in the negotiation process but, after a rate has been agreed upon, it will be accepted by all Federal agencies. When a Federal agency has reason to believe that special operating factors affecting its Federal awards necessitate special indirect cost rates in accordance with section B.5 of this Appendix, it will, prior to the time the rates are negotiated, notify the cognizant agency for indirect costs. (See also § 200.414.) If the nonprofit does not receive any funding from any Federal agency, the pass-through entity is responsible for the negotiation of the indirect cost rates in accordance with § 200.332(a)(4).

b. Except as otherwise provided in § 200.414(f), a nonprofit organization which has not previously established an indirect cost rate with a Federal agency must submit its initial indirect cost proposal immediately after the organization is advised that a Federal award will be made and, in no event, later than three months after the effective date of the Federal award.

c. Unless approved by the cognizant agency for indirect costs in accordance with § 200.414(g), organizations that have previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency for indirect costs within six months after the close of each fiscal year.

d. A predetermined rate may be negotiated for use on Federal awards where there is reasonable assurance, based on past experience and reliable projection of the organization's costs, that the rate is not likely to exceed a rate based on the organization's actual costs.

e. Fixed rates may be negotiated where predetermined rates are not considered appropriate. A fixed rate, however, must not be negotiated if

(i) all or a substantial portion of the organization's Federal awards are expected to expire before the carry-forward adjustment can be made;

(ii) the mix of Federal and non-Federal work at the organization is too erratic to permit an equitable carry-forward adjustment; or

(iii) the organization's operations fluctuate significantly from year to year.

f. Provisional and final rates must be negotiated where neither predetermined nor fixed rates are appropriate. Predetermined or fixed rates may replace provisional rates at any time prior to the close of the organization's fiscal year. If that event does not occur, a final rate will be established and upward or downward adjustments will be made based on the actual allowable costs incurred for the period involved.

g. The results of each negotiation must be formalized in a written agreement between the cognizant agency for indirect costs and the nonprofit organization. The cognizant agency for indirect costs must make available copies of the agreement to all concerned Federal agencies.

h. If a dispute arises in a negotiation of an indirect cost rate between the cognizant agency for indirect costs and the nonprofit organization, the dispute must be resolved in accordance with the appeals procedures of the cognizant agency for indirect costs.

i. To the extent that problems are encountered among the Federal agencies in connection with the negotiation and approval process, OMB will lend assistance as required to resolve such problems in a timely manner.

D. Certification of Indirect (F&A) Costs

(1) Required Certification. No proposal to establish indirect (F&A) cost rates must be acceptable unless such costs have been certified by the nonprofit organization using the Certificate of Indirect (F&A) Costs set forth in section j. of this appendix. The certificate must be signed on behalf of the organization by an individual at a level no lower than vice president or chief financial officer for the organization.

(2) Each indirect cost rate proposal must be accompanied by a certification in the following form:

Certificate of Indirect (F&A) Costs

This is to certify that to the best of my knowledge and belief:

(1) I have reviewed the indirect (F&A) cost proposal submitted herewith;

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal awards to which they apply and with subpart E of this part.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

(4) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the Federal awards to which they are allocated in accordance with applicable requirements.

I declare that the foregoing is true and correct.

Nonprofit Organization: _____

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

[78 FR 78608, Dec. 26, 2013, as amended at 80 FR 54410, Sept. 10, 2015; 85 FR 49579, Aug. 13, 2020; 89 FR 30206, Apr. 22, 2024]

Appendix V to Part 200—State/Local Governmentwide Central Service Cost Allocation Plans

A. General

1. Most governmental units provide certain services, such as motor pools, computer centers, purchasing, accounting, etc., to operating agencies on a centralized basis. Since federally-supported awards are performed within the individual operating agencies, there needs to be a process whereby these central service costs can be identified and assigned to benefitted activities on a reasonable and consistent basis. The central service cost allocation plan provides that process. All costs and other data used to distribute the costs included in the plan should be supported by formal accounting and other records that will support the propriety of the costs assigned to Federal awards.

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled "*A Guide for State, Local and Indian Tribal Governments: Cost Principles and Procedures for Developing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government.*" A copy of this brochure may be obtained from the HHS Cost Allocation Services or at their website.

B. Definitions

1. ***Agency or operating agency*** means an organizational unit or sub-division within a governmental unit that is responsible for the performance or administration of Federal awards or activities of the governmental unit.

2. ***Allocated central services*** means central services that benefit operating agencies but are not billed to the agencies on a fee-for-service or similar basis. These costs are allocated to benefitted agencies on some reasonable basis. Examples of such services might include general accounting, personnel administration, purchasing, etc.

3. ***Billed central services*** means central services that are billed to benefitted agencies or programs on an individual fee-for-service or similar basis. Typical examples of billed central services include computer services, transportation services, insurance, and fringe benefits.

4. ***Cognizant agency for indirect costs*** is defined in § 200.1. The determination of cognizant agency for indirect costs for states and local governments is described in section F.1.

5. ***Major local government*** means local government that receives more than $100 million in direct Federal awards subject to this Part.

C. Scope of the Central Service Cost Allocation Plans

The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. omitted from the plan will not be reimbursed.

D. Submission Requirements

1. Each state will submit a plan to the Department of Health and Human Services for each year in which it claims central service costs under Federal awards. The plan should include
   (a) a projection of the next year's allocated central service cost (based either on actual costs for the most recently completed year or the budget projection for the coming year), and
   (b) a reconciliation of actual allocated central service costs to the estimated costs used for either the most recently completed year or the year immediately preceding the most recently completed year.
2. Each major local government is also required to submit a plan to its cognizant agency for indirect costs annually.
3. All other local governments claiming central service costs must develop a plan in accordance with the requirements described in this Part and maintain the plan and related supporting documentation for audit. These local governments are not required to submit their plans for Federal approval unless they are specifically requested to do so by the cognizant agency for indirect costs. Where a local government only receives funds as a subrecipient, the pass-through entity will be responsible for monitoring the subrecipient's plan.
4. All central service cost allocation plans will be prepared and, when required, submitted within six months prior to the beginning of each of the governmental unit's fiscal years in which it proposes to claim central service costs. Extensions may be granted by the cognizant agency for indirect costs on a case-by-case basis.

E. Documentation Requirements for Submitted Plans

The documentation requirements described in this section may be modified, expanded, or reduced by the cognizant agency for indirect costs on a case-by-case basis. For example, the requirements may be reduced for those central services which have little or no impact on Federal awards. Conversely, if a review of a plan indicates that certain additional information is needed, and will likely be needed in future years, it may be routinely requested in future plan submissions. Items marked with an asterisk (*) should be submitted only once; subsequent plans should merely indicate any changes since the last plan.

1. General

All proposed plans must be accompanied by the following: an organization chart sufficiently detailed to show operations including the central service activities of the state/local government whether or not they are shown as benefitting from central service functions; a copy of the Comprehensive Annual Financial Report (or a copy of the Executive Budget if budgeted costs are being proposed) to support the allowable costs of each central service activity included in the plan; and, a certification (see subsection 4.) that the plan was prepared in accordance with this Part, contains only allowable costs, and was prepared in a manner that treated similar costs consistently among the various Federal awards and between Federal and non-Federal awards/activities.

2. Allocated Central Services

For each allocated central service*, the plan must also include the following: a brief description of the service, an identification of the unit rendering the service and the operating agencies receiving the service, the items of expense included in the cost of the service, the method used to distribute the cost of the service to benefitted agencies, and a summary schedule showing the allocation of each service to the specific benefitted agencies. If any self-insurance funds or fringe benefits costs are treated as allocated (rather than billed) central services, documentation discussed in subsections 3.b. and c. must also be included.

3. Billed Services

a. ***General.*** The information described in this section must be provided for all billed central services, including internal service funds, self-insurance funds, and fringe benefit funds.

b. Internal service funds.

(1) For each internal service fund or similar activity with an operating budget of $5 million or more, the plan must include: A brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, *e.g.,* regular billings, interest earned, etc.; a listing of all non-operating transfers (as defined by GAAP) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this part, with an explanation of how variances will be handled.

(2) Revenues must consist of all revenues generated by the service, including unbilled and uncollected revenues. If some users were not billed for the services (or were not billed at the full rate for that class of users), a schedule showing the full imputed revenues associated with these users must be provided. Expenses must be broken out by object cost categories (e.g., salaries, supplies, etc.).

c. ***Self-insurance funds.*** For each self-insurance fund, the plan must include: the fund balance sheet; a statement of revenue and expenses including a summary of billings and claims paid by agency; a listing of all non-operating transfers into and out of the fund; the type(s) of risk(s) covered by the fund (e.g., automobile liability, workers' compensation, etc.); an explanation of how the level of fund contributions are determined, including a copy of the current actuarial

report (with the actuarial assumptions used) if the contributions are determined on an actuarial basis; and, a description of the procedures used to charge or allocate fund contributions to benefitted activities. Reserve levels in excess of claims

(1) submitted and adjudicated but not paid,

(2) submitted but not adjudicated, and

(3) incurred but not submitted must be identified and explained.

d. ***Fringe benefits.*** For fringe benefit costs, the plan must include: a listing of fringe benefits provided to covered employees, and the overall annual cost of each type of benefit; current fringe benefit policies; and procedures used to charge or allocate the costs of the benefits to benefitted activities. In addition, for pension and post-retirement health insurance plans, the following information must be provided: the governmental unit's funding policies, e.g., legislative bills, trust agreements, or state-mandated contribution rules, if different from actuarially determined rates; the pension plan's costs accrued for the year; the amount funded, and date(s) of funding; a copy of the current actuarial report (including the actuarial assumptions); the plan trustee's report; and, a schedule from the activity showing the value of the interest cost associated with late funding.

4. Required Certification

Each central service cost allocation plan will be accompanied by a certification in the following form:

CERTIFICATE OF COST ALLOCATION PLAN

This is to certify that I have reviewed the cost allocation plan submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish cost allocations or billings for [identify period covered by plan] are allowable in accordance with the requirements of this Part and the Federal award(s) to which they apply. Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the Federal awards to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently.

I declare that the foregoing is true and correct.

Governmental Unit: _____

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

F. Negotiation and Approval of Central Service Plans

1. Federal Cognizant Agency for Indirect Costs Assignments for Cost Negotiation

In general, unless different arrangements are agreed to by the concerned Federal agencies, for central service cost allocation plans, the cognizant agency responsible for review and approval is the Federal agency with the largest dollar value of total Federal awards with a governmental unit. For indirect cost rates and departmental indirect cost allocation plans, the cognizant agency is the Federal agency with the largest dollar value of direct Federal awards with a governmental unit or component, as appropriate. Once designated as the cognizant agency for indirect costs, the Federal agency must remain so for a period of five years. In addition, the following Federal agencies continue to be responsible for the indicated governmental entities:

Department of Health and Human Services —Public assistance and state-wide cost allocation plans for all states (including the District of Columbia and Puerto Rico), state and local hospitals, libraries and health districts.

Department of the Interior —Indian tribal governments, territorial governments, and state and local park and recreational districts.

Department of Labor —State and local labor departments.

Department of Education —School districts and state and local education agencies.

Department of Agriculture —State and local agriculture departments.

Department of Transportation —State and local airport and port authorities and transit districts.

Department of Commerce —State and local economic development districts.

Department of Housing and Urban Development —State and local housing and development districts.

Environmental Protection Agency —State and local water and sewer districts.

2. Review

All proposed central service cost allocation plans that are required to be submitted will be reviewed, negotiated, and approved by the cognizant agency for indirect costs on a timely basis. The cognizant agency for indirect costs will review the proposal within six months of receipt of the proposal and either negotiate/approve the proposal or advise the governmental unit of the additional documentation needed to support/evaluate the proposed plan or the changes required to make the proposal acceptable. Once an agreement with the governmental unit has been reached, the agreement will be accepted and used by all Federal agencies, unless prohibited or limited by statute. Where a Federal awarding agency has reason to believe that special operating factors affecting its Federal awards necessitate special consideration, the funding agency will, prior to the time the plans are negotiated, notify the cognizant agency for indirect costs.

3. Agreement

The results of each negotiation must be formalized in a written agreement between the cognizant agency for indirect costs and the governmental unit. This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The results of the negotiation must be made available to all Federal agencies for their use.

4. Adjustments

Negotiated cost allocation plans based on a proposal later found to have included costs that: (a) are unallowable (i) as specified by law or regulation, (ii) as identified in subpart F, General Provisions for selected Items of Cost of this Part, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards, must be adjusted, or a refund must be made at the option of the cognizant agency for indirect costs, including earned or imputed interest from the date of transfer and debt interest, if applicable, chargeable in accordance with applicable Federal cognizant agency for indirect costs regulations. Adjustments or cash refunds may include, at the option of the cognizant agency for indirect costs, earned or imputed interest from the date of expenditure and delinquent debt interest, if applicable, chargeable in accordance with applicable cognizant agency claims collection regulations. These adjustments or refunds are designed to correct the plans and do not constitute a reopening of the negotiation.

G. Other Policies

1. Billed Central Service Activities

Each billed central service activity must separately account for all revenues (including imputed revenues) generated by the service, expenses incurred to furnish the service, and profit/loss.

2. Working Capital Reserves

Internal service funds are dependent upon a reasonable level of working capital reserve to operate from one billing cycle to the next. Charges by an internal service activity to provide for the establishment and maintenance of a reasonable level of working capital reserve, in addition to the full recovery of costs, are allowable. A working capital reserve as part of retained earnings of up to 60 calendar days cash expenses for normal operating purposes is considered reasonable. A working capital reserve exceeding 60 calendar days may be approved by the cognizant agency for indirect costs in exceptional cases.

3. Carry-Forward Adjustments of Allocated Central Service Costs

Allocated central service costs are usually negotiated and approved for a future fiscal year on a "fixed with carry-forward" basis. Under this procedure, the fixed amounts for the future year covered by agreement are not subject to adjustment for that year. However, when the actual costs of the year involved become known, the differences between the fixed amounts previously approved and the

actual costs will be carried forward and used as an adjustment to the fixed amounts established for a later year. This "carry-forward" procedure applies to all central services whose costs were fixed in the approved plan. However, a carry-forward adjustment is not permitted, for a central service activity that was not included in the approved plan, or for unallowable costs that must be reimbursed immediately.

4. Adjustments of Billed Central Services

Billing rates used to charge Federal awards must be based on the estimated costs of providing the services, including an estimate of the allocable central service costs. A comparison of the revenue generated by each billed service (including total revenues whether or not billed or collected) to the actual allowable costs of the service will be made at least annually, and an adjustment will be made for the difference between the revenue and the allowable costs. These adjustments will be made through one of the following adjustment methods: (a) a cash refund including earned or imputed interest from the date of transfer and debt interest, if applicable, chargeable in accordance with applicable Federal cognizant agency for indirect costs regulations to the Federal Government for the Federal share of the adjustment, (b) credits to the amounts charged to the individual programs, (c) adjustments to future billing rates, or (d) adjustments to allocated central service costs. Adjustments to allocated central services will not be permitted where the total amount of the adjustment for a particular service (Federal share and non-Federal) share exceeds $500,000. Adjustment methods may include, at the option of the cognizant agency, earned or imputed interest from the date of expenditure and delinquent debt interest, if applicable, chargeable in accordance with applicable cognizant agency claims collection regulations.

5. Records Retention

All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in subpart D of this part.

6. Appeals

If a dispute arises in the negotiation of a plan between the cognizant agency for indirect costs and the governmental unit, the dispute must be resolved in accordance with the appeals procedures of the cognizant agency for indirect costs.

7. OMB Assistance

To the extent that problems are encountered among the Federal agencies or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

[78 FR 78608, Dec. 26, 2013, as amended at 80 FR 54410, Sept. 10, 2015; 85 FR 49581, Aug. 13, 2020]

Appendix VI to Part 200—Public Assistance Cost Allocation Plans

A. General

Federally-financed programs administered by state public assistance agencies are funded predominately by the Department of Health and Human Services (HHS). In support of its stewardship requirements, HHS has published requirements for the development, documentation, submission, negotiation, and approval of public assistance cost allocation plans in Subpart E of 45 CFR Part 95. All administrative costs (direct and indirect) are normally charged to Federal awards by implementing the public assistance cost allocation plan. This Appendix extends these requirements to all Federal awarding agencies whose programs are administered by a state public assistance agency. Major federally-financed programs typically administered by state public assistance agencies include: Temporary Aid to Needy Families (TANF), Medicaid, Food Stamps, Child Support Enforcement, Adoption Assistance and Foster Care, and Social Services Block Grant.

B. Definitions

1. ***State public assistance agency*** means a state agency administering or supervising the administration of one or more public assistance programs operated by the state as identified in Subpart E of 45 CFR Part 95. For the purpose of this Appendix, these programs include all programs administered by the state public assistance agency.

2. ***State public assistance agency costs*** means all costs incurred by, or allocable to, the state public assistance agency, except expenditures for financial assistance, medical contractor payments, food stamps, and payments for services and goods provided directly to program recipients.

C. Policy

State public assistance agencies will develop, document and implement, and the Federal Government will review, negotiate, and approve, public assistance cost allocation plans in accordance with Subpart E of 45 CFR Part 95. The plan will include all programs administered by the state public assistance agency. Where a letter of approval or disapproval is transmitted to a state public assistance agency in accordance with Subpart E, the letter will apply to all Federal agencies and programs. The remaining sections of this Appendix (except for the requirement for certification) summarize the provisions of Subpart E of 45 CFR Part 95.

D. Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans

1. State public assistance agencies are required to promptly submit amendments to the cost allocation plan to HHS for review and approval.

2. Under the coordination process outlined in section E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the calendar quarter following the event that required the amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency for indirect costs acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the state public assistance agency and will inform the state agency of the action taken on the plan or plan amendment.

E. Review of Implementation of Approved Plans

1. Since public assistance cost allocation plans are of a narrative nature, the review during the plan approval process consists of evaluating the appropriateness of the proposed groupings of costs (cost centers) and the related allocation bases. As such, the Federal Government needs some assurance that the cost allocation plan has been implemented as approved. This is accomplished by reviews by the Federal awarding agencies, single audits, or audits conducted by the cognizant agency for indirect costs.
2. Where inappropriate charges affecting more than one Federal awarding agency are identified, the cognizant HHS cost negotiation office will be advised and will take the lead in resolving the issue(s) as provided for in Subpart E of 45 CFR Part 95.
3. If a dispute arises in the negotiation of a plan or from a disallowance involving two or more Federal awarding agencies, the dispute must be resolved in accordance with the appeals procedures set out in 45 CFR Part 16. Disputes involving only one Federal awarding agency will be resolved in accordance with the Federal awarding agency's appeal process.
4. To the extent that problems are encountered among the Federal awarding agencies or governmental units in connection with the negotiation and approval process, the Office of Management and Budget will lend assistance, as required, to resolve such problems in a timely manner.

F. Unallowable Costs

Claims developed under approved cost allocation plans will be based on allowable costs as identified in this Part. Where unallowable costs have been claimed and reimbursed, they will be refunded to the program that reimbursed the unallowable cost using one of the following methods: (a) a cash refund, (b) offset to a subsequent claim, or (c) credits to the amounts charged to individual Federal awards. Cash refunds, offsets, and credits may include at the option of the cognizant agency for indirect cost, earned or imputed interest from the date of expenditure and delinquent debt interest, if applicable, chargeable in accordance with applicable cognizant agency for indirect cost claims collection regulations.

[78 FR 78608, Dec. 26, 2013, as amended at 85 FR 49581, Aug. 13, 2020]

Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposals

Link to an amendment published at 89 FR 30207, Apr. 22, 2024.

A. General

1. Indirect costs are those that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned directly to Federal awards and other activities as appropriate, indirect costs are those remaining to be allocated to benefitted cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. Indirect costs include

   (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and

   (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Appendix V to this part) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in a brochure published by the Department of Health and Human Services entitled "*A Guide for States and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.*" A copy of this brochure may be obtained from HHS Cost Allocation Services or at their website.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain state/local-wide central service costs, general administration of the non-Federal entity accounting and personnel services performed within the non-Federal entity, depreciation on buildings and equipment, the costs of operating and maintaining facilities.

5. This Appendix does not apply to state public assistance agencies. These agencies should refer instead to Appendix VI to this part.

B. Definitions

1. ***Base*** means the accumulated direct costs (normally either total direct salaries and wages or total direct costs exclusive of any extraordinary or distorting expenditures) used to distribute indirect costs to individual Federal awards. The direct cost base selected should result in each Federal award bearing a fair share of the indirect costs in reasonable relation to the benefits received from the costs.

2. ***Base period*** for the allocation of indirect costs is the period in which such costs are incurred and accumulated for allocation to activities performed in that period. The base period normally should coincide with the governmental unit's fiscal year, but in any event, must be so selected as to avoid inequities in the allocation of costs.

3. ***Cognizant agency for indirect costs*** means the Federal agency responsible for reviewing and approving the governmental unit's indirect cost rate(s) on the behalf of the Federal Government. The cognizant agency for indirect costs assignment is described in Appendix V, section F.

4. ***Final rate*** means an indirect cost rate applicable to a specified past period which is based on the actual allowable costs of the period. A final audited rate is not subject to adjustment.

5. ***Fixed rate*** means an indirect cost rate which has the same characteristics as a predetermined rate, except that the difference between the estimated costs and the actual, allowable costs of the period covered by the rate is carried forward as an adjustment to the rate computation of a subsequent period.

6. ***Indirect cost pool*** is the accumulated costs that jointly benefit two or more programs or other cost objectives.

7. ***Indirect cost rate*** is a device for determining in a reasonable manner the proportion of indirect costs each program should bear. It is the ratio (expressed as a percentage) of the indirect costs to a direct cost base.

8. ***Indirect cost rate proposal*** means the documentation prepared by a governmental unit or subdivision thereof to substantiate its request for the establishment of an indirect cost rate.

9. ***Predetermined rate*** means an indirect cost rate, applicable to a specified current or future period, usually the governmental unit's fiscal year. This rate is based on an estimate of the costs to be incurred during the period. Except under very unusual circumstances, a predetermined rate is not subject to adjustment. (Because of legal constraints, predetermined rates are not permitted for Federal contracts; they may, however, be used for grants or cooperative agreements.) Predetermined rates may not be used by governmental units that have not submitted and negotiated the rate with the cognizant agency for indirect costs. In view of the potential advantages offered by this procedure, negotiation of predetermined rates for indirect costs for a period of two to four years should be the norm in those situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties involved to reach an informed judgment as to the probable level of indirect costs during the ensuing accounting periods.

10. ***Provisional rate*** means a temporary indirect cost rate applicable to a specified period which is used for funding, interim reimbursement, and reporting indirect costs on Federal awards pending the establishment of a “final” rate for that period.

C. Allocation of Indirect Costs and Determination of Indirect Cost Rates

1. General

a. Where a governmental unit's department or agency has only one major function, or where all its major functions benefit from the indirect costs to approximately the same degree, the allocation of indirect costs and the computation of an indirect cost rate may be accomplished through simplified allocation procedures as described in subsection 2.

b. Where a governmental unit's department or agency has several major functions which benefit from its indirect costs in varying degrees, the allocation of indirect costs may require the accumulation of such costs into separate cost groupings which then are allocated individually to benefitted functions by means of a base which best measures the relative degree of benefit. The indirect costs allocated to each function are then distributed to individual Federal awards and other activities included in that function by means of an indirect cost rate(s).

c. Specific methods for allocating indirect costs and computing indirect cost rates along with the conditions under which each method should be used are described in subsections 2, 3 and 4.

2. Simplified Method

a. Where a non-Federal entity's major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs may be accomplished by

(1) classifying the non-Federal entity's total costs for the base period as either direct or indirect, and

(2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to individual Federal awards. The rate should be expressed as the percentage which the total amount of allowable indirect costs bears to the base selected. This method should also be used where a governmental unit's department or agency has only one major function encompassing a number of individual projects or activities, and may be used where the level of Federal awards to that department or agency is relatively small.

b. Both the direct costs and the indirect costs must exclude capital expenditures and unallowable costs. However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

c. The distribution base may be

(1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, subcontracts in excess of $50,000, and participant support costs),

(2) direct salaries and wages, or

(3) another base which results in an equitable distribution.

3. Multiple Allocation Base Method

a. Where a non-Federal entity's indirect costs benefit its major functions in varying degrees, such costs must be accumulated into separate cost groupings. Each grouping must then be allocated individually to benefitted functions by means of a base which best measures the relative benefits.

b. The cost groupings should be established so as to permit the allocation of each grouping on the basis of benefits provided to the major functions. Each grouping should constitute a pool of expenses that are of like character in terms of the functions they benefit and in terms of the allocation base which best measures the relative benefits provided to each function. The number of separate groupings should be held within practical limits, taking into consideration the materiality of the amounts involved and the degree of precision needed.

c. Actual conditions must be taken into account in selecting the base to be used in allocating the expenses in each grouping to benefitted functions. When an allocation can be made by assignment of a cost grouping directly to the function benefitted, the allocation must be made in that manner. When the expenses in a grouping are more general in nature, the allocation should be made through the use of a selected base which produces results that are equitable to both the Federal Government and the governmental unit. In general, any cost element or related factor associated with the governmental unit's activities is potentially adaptable for use as an allocation base provided that:

(1) it can readily be expressed in terms of dollars or other quantitative measures (total direct costs, direct salaries and wages, staff hours applied, square feet used, hours of usage, number of documents processed, population served, and the like), and

(2) it is common to the benefitted functions during the base period.

d. Except where a special indirect cost rate(s) is required in accordance with paragraph (C)(4) of this Appendix, the separate groupings of indirect costs allocated to each major function must be aggregated and treated as a common pool for that function. The costs in the common pool must then be distributed to individual Federal awards included in that function by use of a single indirect cost rate.

e. The distribution base used in computing the indirect cost rate for each function may be

(1) total direct costs (excluding capital expenditures and other distorting items such as pass-through funds, subawards in excess of $50,000, and participant support costs),

(2) direct salaries and wages, or

(3) another base which results in an equitable distribution. An indirect cost rate should be developed for each separate indirect cost pool developed. The rate in each case should be stated as the percentage relationship between the particular indirect cost pool and the distribution base identified with that pool.

4. Special Indirect Cost Rates

a. In some instances, a single indirect cost rate for all activities of a non-Federal entity or for each major function of the agency may not be appropriate. It may not take into account those different factors which may substantially affect the indirect costs applicable to a particular program or group of programs. The factors may include the physical location of the work, the level of administrative support required, the nature of the facilities or other resources employed, the organizational arrangements used, or any combination thereof. When a particular Federal award is carried out in an environment which appears to generate a significantly different level of indirect costs, provisions should be made for a separate indirect cost pool applicable to that Federal award. The separate indirect cost pool should be developed during the course of the regular allocation process, and the separate indirect cost rate resulting therefrom should be used, provided that:

(1) The rate differs significantly from the rate which would have been developed under paragraphs (C)(2) and (C)(3) of this Appendix, and

(2) the Federal award to which the rate would apply is material in amount.

b. Where Federal statutes restrict the reimbursement of certain indirect costs, it may be necessary to develop a special rate for the affected Federal award. Where a “restricted rate” is required, the same procedure for developing a non-restricted rate will be used except for the additional step of the elimination from the indirect cost pool those costs for which the law prohibits reimbursement.

D. Submission and Documentation of Proposals

1. Submission of Indirect Cost Rate Proposals

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in § 200.334.

b. A governmental department or agency (such as a state or local Department of Health, Department of Transportation, or Department of Housing) that receives more than $35 million in direct Federal funding during its fiscal year must submit its indirect cost rate proposal to its cognizant agency for indirect costs.

c. If a governmental department or agency (such as a state or local Department of Health, Department of Transportation, or Department of Housing) receives $35 million or less in direct Federal funding during its fiscal year, it must develop an indirect cost proposal in accordance with the requirements of this part and maintain the proposal and related supporting documentation for audit. This established rate must be accepted by any Federal agency to which the governmental department or agency applies for funding. Federal agencies must not compel the governmental department or agency to accept the de minimis rate or some other rate established by the Federal agency. These governmental departments or agencies are not required to submit their proposals unless they are specifically requested to do so by an awarding Federal agency. The Federal agency's review should be limited to ensuring the proposal is consistent with the principles of this part. Where a non-Federal entity only receives funds as a subrecipient, the pass-through entity will be responsible for negotiating and/or monitoring the subrecipient's indirect costs.

c. Each Indian tribal government desiring reimbursement of indirect costs must submit its indirect cost proposal to the Department of the Interior (its cognizant agency for indirect costs).

d. Indirect cost proposals must be developed (and, when required, submitted) within six months after the close of the governmental unit's fiscal year, unless an exception is approved by the cognizant agency for indirect costs. If the proposed central service cost allocation plan for the same period has not been approved by that time, the indirect cost proposal may be prepared including an amount for central services that is based on the latest federally approved central service cost allocation plan. The difference between these central service amounts and the amounts ultimately approved will be compensated for by an adjustment in a subsequent period.

2. Documentation of Proposals

The following must be included with each indirect cost proposal:

a. The rates proposed, including subsidiary work sheets and other relevant data, cross referenced and reconciled to the financial data noted in subsection b. Allocated central service costs will be supported by the summary table included in the approved central service cost allocation plan. This summary table is not required to be submitted with the indirect cost proposal if the central service cost allocation plan for the same fiscal year has been approved by the cognizant agency for indirect costs and is available to the funding agency.

b. A copy of the financial data (financial statements, comprehensive annual financial report, executive budgets, accounting reports, etc.) upon which the rate is based. Adjustments resulting from the use of unaudited data will be recognized, where appropriate, by the Federal cognizant agency for indirect costs in a subsequent proposal.

c. The approximate amount of direct base costs incurred under Federal awards. These costs should be broken out between salaries and wages and other direct costs.

d. A chart showing the organizational structure of the agency during the period for which the proposal applies, along with a functional statement(s) noting the duties and/or responsibilities of all units that comprise the agency. (Once this is submitted, only revisions need be submitted with subsequent proposals.)

3. Required certification.

Each indirect cost rate proposal must be accompanied by a certification in the following form:

Certificate of Indirect Costs

This is to certify that I have reviewed the indirect cost rate proposal submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish billing or final indirect costs rates for [identify period covered by rate] are allowable in accordance with the requirements of the Federal award(s) to which they apply and the provisions of this Part. Unallowable costs have been adjusted for in allocating costs as indicated in the indirect cost proposal

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently and the Federal Government will be notified of any accounting changes that would affect the predetermined rate.

I declare that the foregoing is true and correct.

Governmental Unit: _____

Signature: _____

Name of Official: _____

Title: _____

Date of Execution: _____

E. Negotiation and Approval of Rates

1. Indirect cost rates will be reviewed, negotiated, and approved by the cognizant agency on a timely basis. Once a rate has been agreed upon, it will be accepted and used by all Federal agencies unless prohibited or limited by statute. Where a Federal awarding agency has reason to believe that special operating factors affecting its Federal awards necessitate special indirect cost rates, the funding agency will, prior to the time the rates are negotiated, notify the cognizant agency for indirect costs.

2. The use of predetermined rates, if allowed, is encouraged where the cognizant agency for indirect costs has reasonable assurance based on past experience and reliable projection of the non-Federal entity's costs, that the rate is not likely to exceed a rate based on actual costs. Long-term agreements utilizing predetermined rates extending over two or more years are encouraged, where appropriate.

3. The results of each negotiation must be formalized in a written agreement between the cognizant agency for indirect costs and the governmental unit. This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The agreed upon rates must be made available to all Federal agencies for their use.

4. Refunds must be made if proposals are later found to have included costs that

(a) are unallowable

(i) as specified by law or regulation,

(ii) as identified in § 200.420, or

(iii) by the terms and conditions of Federal awards, or

(b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

F. Other Policies

1. Fringe Benefit Rates

If overall fringe benefit rates are not approved for the governmental unit as part of the central service cost allocation plan, these rates will be reviewed, negotiated and approved for individual recipient agencies during the indirect cost negotiation process. In these cases, a proposed fringe benefit rate computation should accompany the indirect cost proposal. If fringe benefit rates are not used at the recipient agency level (i.e., the agency specifically identifies fringe benefit costs to individual employees), the governmental unit should so advise the cognizant agency for indirect costs.

2. Billed Services Provided by the Recipient Agency

In some cases, governmental departments or agencies (components of the governmental unit) provide and bill for services similar to those covered by central service cost allocation plans (e.g., computer centers). Where this occurs, the governmental departments or agencies (components of the governmental unit)should be guided by the requirements in Appendix V relating to the development of billing rates and documentation requirements, and should advise the cognizant agency for indirect costs of any billed services. Reviews of these types of services (including reviews of costing/billing methodology, profits or losses, etc.) will be made on a case-by-case basis as warranted by the circumstances involved.

3. Indirect Cost Allocations Not Using Rates

In certain situations, governmental departments or agencies (components of the governmental unit), because of the nature of their Federal awards, may be required to develop a cost allocation plan that distributes indirect (and, in some cases, direct) costs to the specific funding sources. In these cases, a narrative cost allocation methodology should be developed, documented, maintained for audit, or submitted, as appropriate, to the cognizant agency for indirect costs for review, negotiation, and approval.

4. Appeals

If a dispute arises in a negotiation of an indirect cost rate (or other rate) between the cognizant agency for indirect costs and the governmental unit, the dispute must be resolved in accordance with the appeals procedures of the cognizant agency for indirect costs.

5. Collection of Unallowable Costs and Erroneous Payments

Costs specifically identified as unallowable and charged to Federal awards either directly or indirectly will be refunded (including interest chargeable in accordance with applicable Federal cognizant agency for indirect costs regulations).

6. OMB Assistance

To the extent that problems are encountered among the Federal agencies or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75889, Dec. 19, 2014; 85 FR 49581, Aug. 13, 2020; 89 FR 30207, Apr. 22, 2024]

Appendix VIII to Part 200—Nonprofit Organizations Exempted From Subpart E of Part 200

1. Advance Technology Institute (ATI), Charleston, South Carolina
2. Aerospace Corporation, El Segundo, California
3. American Institutes of Research (AIR), Washington, DC
4. Argonne National Laboratory, Chicago, Illinois
5. Atomic Casualty Commission, Washington, DC
6. Battelle Memorial Institute, Headquartered in Columbus, Ohio
7. Brookhaven National Laboratory, Upton, New York
8. Charles Stark Draper Laboratory, Incorporated, Cambridge, Massachusetts
9. CNA Corporation (CNAC), Alexandria, Virginia
10. Environmental Institute of Michigan, Ann Arbor, Michigan
11. Georgia Institute of Technology/Georgia Tech Applied Research Corporation/Georgia Tech Research Institute, Atlanta, Georgia
12. Hanford Environmental Health Foundation, Richland, Washington
13. IIT Research Institute, Chicago, Illinois
14. Institute of Gas Technology, Chicago, Illinois

15. Institute for Defense Analysis, Alexandria, Virginia
16. LMI, McLean, Virginia
17. Mitre Corporation, Bedford, Massachusetts
18. Noblis, Inc., Falls Church, Virginia
19. National Radiological Astronomy Observatory, Green Bank, West Virginia
20. National Renewable Energy Laboratory, Golden, Colorado
21. Oak Ridge Associated Universities, Oak Ridge, Tennessee
22. Rand Corporation, Santa Monica, California
23. Research Triangle Institute, Research Triangle Park, North Carolina
24. Riverside Research Institute, New York, New York
25. South Carolina Research Authority (SCRA), Charleston, South Carolina
26. Southern Research Institute, Birmingham, Alabama
27. Southwest Research Institute, San Antonio, Texas
28. SRI International, Menlo Park, California
29. Syracuse Research Corporation, Syracuse, New York
30. Universities Research Association, Incorporated (National Acceleration Lab), Argonne, Illinois
31. Urban Institute, Washington DC
32. Nonprofit insurance companies, such as Blue Cross and Blue Shield Organizations
33. Other nonprofit organizations as negotiated with Federal awarding agencies

[78 FR 78608, Dec. 26, 2013, as amended at 85 FR 49582, Aug. 13, 2020]

Appendix IX to Part 200—Hospital Cost Principles

Until such time as revised guidance is proposed and implemented for hospitals, the existing principles located at 45 CFR part 75 Appendix IX, entitled "Principles for Determining Cost Applicable to Research and Development Under Grants and Contracts with Hospitals," remain in effect.

[86 FR 10440, Feb. 22, 2021]

Appendix X to Part 200—Data Collection Form

The data collection form is available as a series of workbooks on the Federal Audit Clearinghouse (*FAC.gov*). The form and submission instructions can be found at *https://www.fac.gov/*.

[89 FR 30207, Apr. 22, 2024]

Appendix XI to Part 200—Compliance Supplement

The compliance supplement is available on the OMB website.

[85 FR 49582, Aug. 13, 2020]

Appendix XII to Part 200—Award Term and Condition for Recipient Integrity and Performance Matters

I. Reporting of Matters Related to Recipient Integrity and Performance

(a) *General Reporting Requirement.*

(1) If the total value of your active grants, cooperative agreements, and procurement contracts from all Federal agencies exceeds $10,000,000 for any period of time during the period of performance of this Federal award, then you as the recipient must ensure the information available in the responsibility/qualification records through the System for Award Management (*SAM.gov*), about civil, criminal, or administrative proceedings described in paragraph (b) of this award term is current and complete. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. 2313). As required by section 3010 of Public Law 111-212, all information posted in responsibility/qualification records in *SAM.gov* on or after April 15, 2011 (except past performance reviews required for Federal procurement contracts) will be publicly available.

(b) ***Proceedings About Which You Must Report.***

(1) You must submit the required information about each proceeding that—

(i) Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;

(ii) Reached its final disposition during the most recent five-year period; and

(iii) Is one of the following—

(A) A criminal proceeding that resulted in a conviction;

(B) A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of $5,000 or more;

(C) An administrative proceeding that resulted in a finding of fault and liability and your payment of either a monetary fine or penalty of $5,000 or more or reimbursement, restitution, or damages in excess of $100,000; or

(D) Any other criminal, civil, or administrative proceeding if—

(*1*) It could have led to an outcome described in paragraph (b)(1)(iii)(A) through (C);

(*2*) It had a different disposition arrived at by consent or compromise with an acknowledgment of fault on your part; and

(*3*) The requirement in this award term to disclose information about the proceeding does not conflict with applicable laws and regulations.

(c) ***Reporting Procedures.*** Enter the required information in *SAM.gov* for each proceeding described in paragraph (b) of this award term. You do not need to submit the information a second time under grants and cooperative agreements that you received if you already provided the information in *SAM.gov* because you were required to do so under Federal procurement contracts that you were awarded.

(d) ***Reporting Frequency.*** During any period of time when you are subject to the requirement in paragraph (a) of this award term, you must report proceedings information in *SAM.gov* for the most recent five-year period, either to report new information about a proceeding that you have not reported previously or affirm that there is no new information to report. If you have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than $10,000,000, you must disclose semiannually any information about the criminal, civil, and administrative proceedings.

(e) ***Definitions.*** For purposes of this award term—

Administrative proceeding means a non-judicial process that is adjudicatory in nature to make a determination of fault or liability (for example, Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with the performance of a Federal contract or grant. It does not include audits, site visits, corrective plans, or inspection of deliverables.

Conviction means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

Total value of currently active grants, cooperative agreements, and procurement contracts includes the value of the Federal share already received plus any anticipated Federal share under those awards (such as continuation funding).

II. [Reserved]

[89 FR 30207, Apr. 22, 2024]

Title 2 —Federal Financial Assistance
Subtitle B —Federal Agency Regulations for Grants and Agreements
Chapter XXXIV —Department of Education

PART 3485—NONPROCUREMENT DEBARMENT AND SUSPENSION

Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474, unless otherwise noted.

Source: 77 FR 18673, Mar. 28, 2012, unless otherwise noted.

§ 3485.12 What does this part do?

(a)

(1) The Department of Education (the "Department" or "ED") adopts subparts A through I of the Office of Management and Budget guidance in 2 CFR part 180. Thus, this part gives regulatory effect to the OMB guidance and supplements the guidance as needed for the Department. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" (3 CFR part 1986 Comp., p. 189), Executive Order 12689, "Debarment and Suspension" (3 CFR part 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327).

(2) The table of contents for this part contains only those sections in part 3485 that include supplements to the guidance in part 180 and new sections needed to implement the guidance for the Department's programs. In those sections of the OMB guidance that are supplemented, the section in part 3485 includes both the text of the OMB guidance that is not affected by the change and any additional paragraphs that need to be added to the OMB guidance. For example, § 180.220 of this title contains only paragraphs (a) and (b). The text of § 3485.220, which supplements § 180.220 to extend lower-tier transactions to certain transactions below the primary tier, includes both the text of paragraph (a) and (b) of § 180.220 and the text of added paragraph (c).

(3) In those sections in part 180 that do not have paragraph designations and that the Department supplements, the section in this part implementing the OMB guidance designates the undesignated paragraph from part 180 as paragraph (a) and the first supplemental paragraph as paragraph (b). For example, 2 CFR 180.330 includes an undesignated lead in paragraph and two subparagraphs designated (a) and (b). In § 3485.330, the undesignated paragraph in 2 CFR 180.330 is designated paragraph (a) and the two subparagraphs are designated paragraphs (1) and (2). The added paragraphs are designated paragraph (b) and (c).

(b) The authority for all the provisions in 2 CFR part 180 as adopted in this part is listed as follows.

Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474, unless otherwise noted.)

§ 3485.22 Does this part apply to me?

This part applies to you if you are—

(a) A participant or principal in a "covered transaction" (see subpart B of this part and the definition of "nonprocurement transaction" in § 180.970 of this title).

(b) A respondent in a suspension or debarment action of the Department.

(c) An ED deciding official; or

(d) An ED officer authorized to enter into any type of nonprocurement transaction that is a covered transaction.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.32 What policies and procedures must I follow?

The Department's policies and procedures that you must follow are the policies and procedures specified in this part and in Subparts A through I of 2 CFR part 180. The contracts that are covered transactions, for example, are specified in § 3485.220. Section 180.205 of this title does not require supplementation, so it is not included in the table of contents for this part and is not separately stated in this part.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart A—General

§ 3485.137 May the Department grant an exception to let an excluded person participate in a covered transaction?

(a) Yes, the Secretary delegates to the ED Deciding Official the authority under this section to grant an exception permitting an excluded person to participate in a particular covered transaction.

(b) If the ED Deciding Official grants an exception, the exception must be in writing and state the reason(s) for deviating from the Governmentwide policy in Executive Order 12549.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart B—Covered Transactions

§ 3485.220 Are any procurement contracts included as covered transactions?

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions.

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 180.210 of this title, and the amount of the contract is expected to equal or exceed $25,000.

(2) The contract requires the consent of an official of a Federal agency. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the Appendix to Part 3485—Covered Transactions.

(3) The contract is for Federally-required audit services.

(4) The contract is to perform services as a third party servicer in connection with a title IV, HEA program.

(c) In addition to the contracts covered under 2 CFR 180.220(b) of the OMB guidance, this part applies to any contract, regardless of tier, that is awarded by a contractor, subcontractor, supplier, consultant, or its agent or representative in any transaction, if the contract is to be funded or provided by ED under a covered nonprocurement transaction and the amount of the contract is expected to equal or exceed $25,000. This extends the coverage of the ED nonprocurement suspension and debarment requirements to all lower tiers of subcontracts under covered nonprocurement transactions, as permitted under the OMB guidance at 2 CFR 180.220(c) (see optional lower tier coverage in the figure in Appendix A to Part 3485—Covered Transactions).

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart C—Responsibilities of Participants Regarding Transactions

§ 3485.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless another Federal agency responsible for the transaction grants an exception under § 180.135 of this title or ED grants an exception under § 3485.137.

(c) If you are a title IV, HEA participant, you may not continue a title IV, HEA transaction with an excluded person after the effective date of the exclusion unless permitted by 34 CFR 668.26, 682.702, or 668.94, as applicable.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.315 May I use the services of an excluded person as a principal under a covered transaction?

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless another Federal agency responsible for the transaction grants an exception under § 180.135 of this title or, if ED took the action, an ED deciding official grants an exception under § 3485.137.

(c) If you are a title IV, HEA participant—

(1) You may not renew or extend the term of any contract or agreement for the services of an excluded person as a principal with respect to a title IV, HEA transaction; and

(2) You may not continue to use the services of that excluded person as a principal under this kind of an agreement or arrangement more than 90 days after you learn of the exclusion or after the close of the Federal fiscal year in which the exclusion takes effect, whichever is later.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.330 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

(a) Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(1) Comply with this subpart as a condition of participation in the transaction. You must do so using the method specified in paragraph (b) of this section; and

(2) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

(b) To communicate the requirements in this part to a participant, you must include a term or condition in the transaction that requires the participant's compliance with part 180, subpart C, of this title, as adopted at § 3485.12, and requires the participant to include a similar term or condition in lower-tier covered transactions.

(c) The failure of a participant to include a requirement to comply with Subpart C of 2 CFR part 180 in the agreement with a lower tier participant does not affect the lower tier participant's responsibilities under this part.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart D—Responsibilities of the Department's Officials Regarding Transactions

§ 3485.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?

(a) You as a Federal agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 3485.137.

(c) ***Title IV, HEA transactions.*** If you are a title IV, HEA participant—

(1) You may not renew or extend the term of any contract or agreement for the services of an excluded person as a principal with respect to a title IV, HEA transaction; and

(2) You may not continue to use the services of that excluded person as a principal under this kind of an agreement or arrangement more than 90 days after you learn of the exclusion or after the close of the Federal fiscal year in which the exclusion takes effect, whichever is later.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.437 What method do I use to communicate to a participant the requirements described in § 180.435 of this title?

To communicate the requirements in this part to a participant, you must include a term or condition in the transaction that requires the participant's compliance with part 180, subpart C, of this title, as adopted at § 3485.12 and requires the participant to include a similar term or condition in lower-tier covered transactions.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart E [Reserved]

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 3485.611 What procedures do we use for a suspension or debarment action involving a title IV, HEA transaction?

(a) If we suspend a title IV, HEA participant under Executive Order 12549, we use the following procedures to ensure that the suspension prevents participation in title IV, HEA transactions:

(1) The notification procedures in § 180.715 of this title.

(2) Instead of the procedures in §§ 180.720 through 180.760 of this title, the procedures in 34 CFR part 668, subpart G, or 34 CFR part 682, subpart D or G, as applicable.

(3) In addition to the findings and conclusions required by 34 CFR part 668, subpart G, or 34 CFR part 682, subpart D or G, the suspending official, and, on appeal, the Secretary determines whether there is sufficient cause for suspension as explained in § 180.700 of this title.

(b) If we debar a title IV, HEA participant under E.O. 12549, we use the following procedures to ensure that the debarment also precludes participation in title IV, HEA transactions:

(1) The notification procedures in §§ 180.805 and 180.870 of this title.

(2) Instead of the procedures in §§ 180.810 through 180.885 of this title, the procedures in 34 CFR part 668, subpart G, or 34 CFR part 682, subpart D or G, as applicable.

(3) On appeal from a decision debarring a title IV, HEA participant, we issue a final decision after we receive any written materials from the parties.

(4) In addition to the findings and conclusions required by 34 CFR part 668, subpart G, or 34 CFR part 682, subpart D or G, the debarring official, and, on appeal, the Secretary determines whether there is sufficient cause for debarment as explained in § 180.800 of this title.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.612 When does an exclusion by another agency affect the ability of the excluded person to participate in a title IV, HEA transaction?

(a) If a title IV, HEA participant is debarred by another agency under E.O. 12549, using procedures described in paragraph (d) of this section, that party is not eligible to enter into title IV, HEA transactions for the duration of the debarment.

(b)

(1) If a title IV, HEA participant is suspended by another agency under E.O. 12549 or under a proposed debarment under the Federal Acquisition Regulation (FAR) (48 CFR part 9, subpart 9.4), using procedures described in paragraph (d) of this section, that party is not eligible to enter into title IV, HEA transactions for the duration of the suspension.

(2)

(i) The suspension of title IV, HEA eligibility as a result of suspension by another agency lasts for at least 60 days.

(ii) If the excluded party does not object to the suspension, the 60-day period begins on the 35th day after that agency issues the notice of suspension.

(iii) If the excluded party objects to the suspension, the 60-day period begins on the date of the decision of the suspending official.

(3) The suspension of title IV, HEA eligibility does not end on the 60th day if—

(i) The excluded party agrees to an extension; or

(ii) Before the 60th day we begin a limitation or termination proceeding against the excluded party under 34 CFR part 668, subpart G, or part 682, subpart D or G.

(c)

(1) If a title IV, HEA participant is debarred or suspended by another Federal agency—

(i) We notify the participant whether the debarment or suspension prohibits participation in title IV, HEA transactions; and

(ii) If participation is prohibited, we state the effective date and duration of the prohibition.

(2) If a debarment or suspension by another agency prohibits participation in title IV, HEA transactions, that prohibition takes effect 20 days after we mail notice of our action.

(3) If the Department or another Federal agency suspends a title IV, HEA participant, we determine whether grounds exist for an emergency action against the participant under 34 CFR part 668, subpart G, or part 682, subpart D or G, as applicable.

(4) We use the procedures in § 3485.611 to exclude a title IV, HEA participant excluded by another Federal agency using procedures that did not meet the standards in paragraph (d) of this section.

(d) If a title IV, HEA participant is excluded by another agency, we debar, terminate, or suspend the participant—as provided under this part, 34 CFR part 668, or 34 CFR part 682, as applicable—if that agency followed procedures that gave the excluded party—

(1) Notice of the proposed action;

(2) An opportunity to submit and have considered evidence and argument to oppose the proposed action;

(3) An opportunity to present its objection at a hearing—

(i) At which the agency has the burden of persuasion by a preponderance of the evidence that there is cause for the exclusion; and

(ii) Conducted by an impartial person who does not also exercise prosecutorial or investigative responsibilities with respect to the exclusion action;

(4) An opportunity to present witness testimony, unless the hearing official finds that there is no genuine dispute about a material fact;

(5) An opportunity to have agency witnesses with personal knowledge of material facts in genuine dispute testify about those facts, if the hearing official determines their testimony to be needed, in light of other available evidence and witnesses; and

(6) A written decision stating findings of fact and conclusions of law on which the decision is rendered.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart G—Suspension

§ 3485.711 When does a suspension affect title IV, HEA transactions?

(a) A suspension under § 3485.611(a) takes effect immediately if the Secretary takes an emergency action under 34 CFR part 668, subpart G, or 34 CFR part 682, subpart D or G, at the same time the Secretary issues the suspension.

(b)

(1) Except as provided under paragraph (a) of this section, a suspension under § 3485.611(a) takes effect 20 days after those procedures are complete.

(2) If the respondent appeals the suspension to the Secretary before the expiration of the 20 days under paragraph (b)(1) of this section, the suspension takes effect when the respondent receives the Secretary's decision.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart H—Debarment

§ 3485.811 When does a debarment affect title IV, HEA transactions?

(a) A debarment under § 3485.611(b) takes effect 30 days after those procedures are complete.

(b) If the respondent appeals the debarment to the Secretary before the expiration of the 30 days under paragraph (a) of this section, the debarment takes effect when the respondent receives the Secretary's decision.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart I—Definitions

§ 3485.937 ED Deciding Official.

The ED Deciding Official is an officer of the Department who has delegated authority under the procedures of the Department of Education to decide whether to affirm a suspension or enter a debarment.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.952 HEA.

HEA means the Higher Education Act of 1965, as amended.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.995 Principal.

Principal means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

(c) For the purposes of Department of Education title IV, HEA transactions—

(1) A third-party servicer, as defined in 34 CFR 668.2 or 682.200; or

(2) Any person who provides services described in 34 CFR 668.2 or 682.200 to a title IV, HEA participant, whether or not that person is retained or paid directly by the title IV, HEA participant.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p.189); E.O. 12689 (3 CFR 1989 Comp., p.235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.1016 Title IV, HEA participant.

A title IV, HEA participant is—

(a) An institution described in 34 CFR 600.4, 600.5, or 600.6 that provides postsecondary education; or

(b) A lender, third-party servicer, or guaranty agency, as those terms are defined in 34 CFR 668.2 or 682.200.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p.189); E.O. 12689 (3 CFR 1989 Comp., p.235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.1017 Title IV, HEA program.

A title IV, HEA program includes any program listed in 34 CFR 668.1(c).

(Authority: E.O. 12549 (3 CFR 1986 Comp., p.189); E.O. 12689 (3 CFR 1989 Comp., p. 235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

§ 3485.1018 Title IV, HEA transaction.

A title IV, HEA transaction includes—

(a) A disbursement or delivery of funds provided under a title IV, HEA program to a student or borrower;

(b) A certification by an educational institution of eligibility for a loan under a title IV, HEA program;

(c) Guaranteeing a loan made under a title IV, HEA program; and

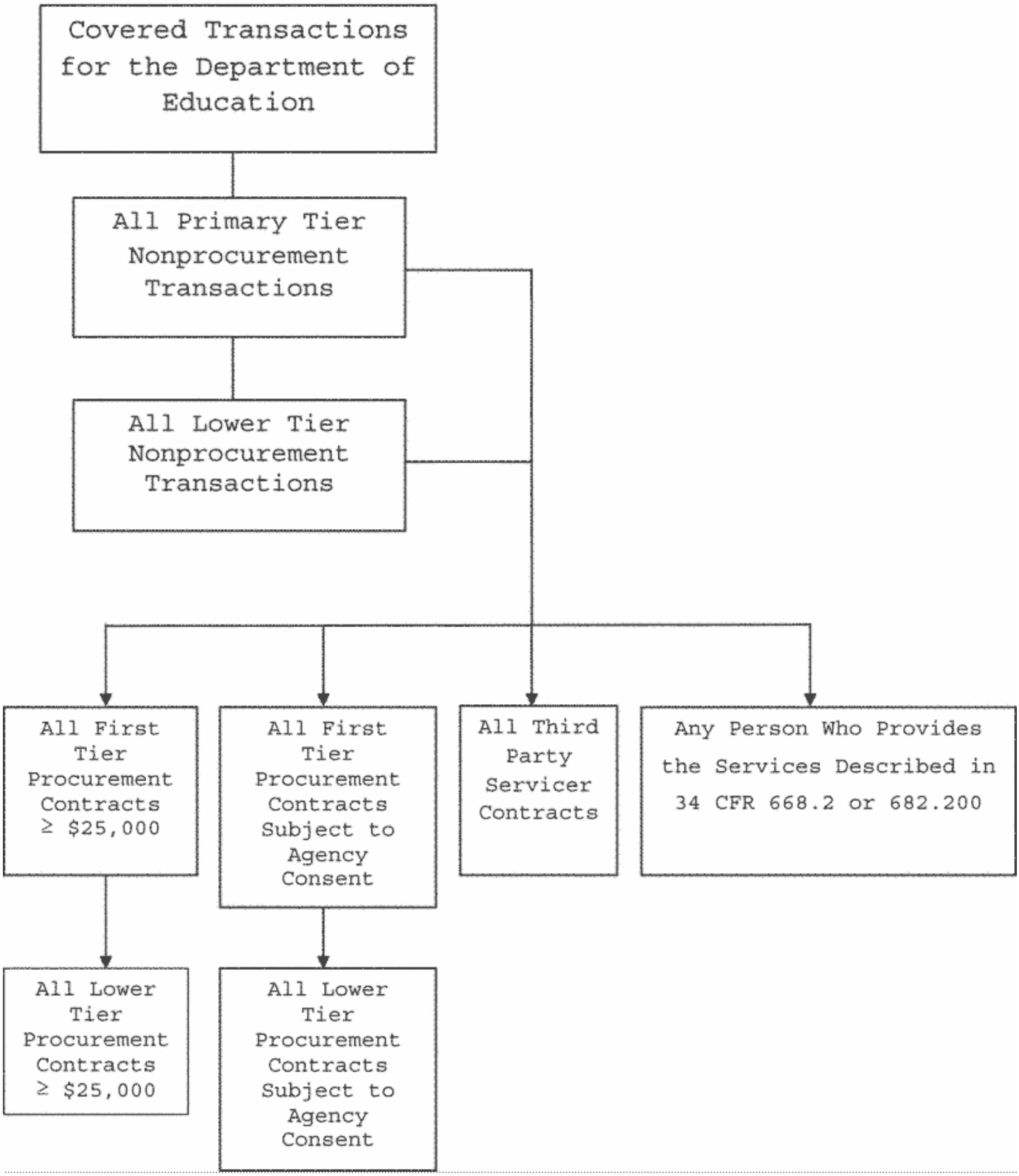
(d) The acquisition or exercise of any servicing responsibility for a grant, loan, or work study assistance under a title IV, HEA program.

(Authority: E.O. 12549 (3 CFR 1986 Comp., p.189); E.O. 12689 (3 CFR 1989 Comp., p.235); sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474)

Subpart J [Reserved]

Appendix A to Part 3485—Covered Transactions

Appendix A to Part 3485--Covered Transactions



Frequently Asked Questions (FAQs) to Assist U.S. Department of Education (ED) Grantees to Appropriately Use Federal Funds for Food, Conferences, and Meetings[1]

August 2024

Using Federal ED Grant (Discretionary and Formula) Funds for Food

1. May a grantee use its U.S. Department of Education (ED) grant funds for food, beverages, or snacks at an event related to its grant?

All grant expenditures, including those for food, beverages, or snacks, must be reasonable, necessary, allocable to the grant, and allowable. (Office of Management and Budget's (*OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance)* at 2 CFR §§ 200.403 through 200.405).[2]

Generally, a grantee needs to substantiate with specificity the rationale for why paying for food and beverages with Department funds is necessary to meet the goals and objectives of a grant. When a grantee is hosting an event related to its ED grant, the grantee should first consider structuring the agenda for the meeting so that there is time for participants to bring or purchase their own food, beverages, and snacks. In addition, when planning a meeting, grantees may want to consider a location in which participants have easy access to food and beverages.

There may be limited circumstances under which providing food or beverages is reasonable and necessary to achieve the purpose of a particular grant. Because food and beverage costs are not of a type generally recognized as ordinary and necessary for the operation of the grantee or the proper and efficient performance of the Federal award (see 2 CFR § 200.404(a)), grantees must document their evidence and analysis that justify that the use of food or beverage is reasonable and necessary in each instance.

In determining reasonableness of a given cost, including those for food and drink, consideration must be given to:

- Whether the cost is generally recognized as ordinary and necessary for the grantee's operation or the proper and efficient performance of the Federal award;
- The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; Federal, State, local, Tribal, and other laws and regulations; and terms and conditions of the Federal award;
- Market prices for comparable costs for the geographic area;
- Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the recipient or grantee, its employees, its students or membership (if applicable), the public at large, and the Federal Government; and

[1] Other than statutory and regulatory requirements included in the document, the contents of this FAQ document do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

[2] Revisions to 2 CFR part 200, referred to as the "OMB Uniform Guidance," were published on April 22, 2024, and are generally effective on October 1, 2024. In general, the April 2024 revisions do not substantively affect the content in this FAQ document. While the OMB Uniform Guidance in 2 CFR § 200.1 defines recipient, this FAQ uses the term grantee to align with the definitions that apply to ED regulations in the Education Department General Administrative Regulations (EDGAR) in 34 CFR § 77.1.

- Whether the cost represents a deviation from the recipient or grantee's established written policies and procedures for incurring (2 CFR § 200.404).

Please note that, in addition to determining whether the costs are necessary and reasonable, State grantees also must determine whether the same costs are allowable under State law for the use of State funds. Under 2 CFR § 200.302(a), States are required to expend and account for Federal funds in accordance with State laws and procedures for expending and accounting for their own State funds. In other words, if State laws or procedures would not permit the use of State funds for conferences or meals, then State grantees may not use their Federal grant funds to pay those costs either.

2. Are there examples of when food costs might be considered reasonable and necessary to the performance of a particular grant?

The question of whether a food cost is reasonable and necessary to the performance of a grant will depend on the ED grant, including any program-specific rules or requirements that may apply to that grant, as well as the unique circumstances of the food cost. The following are some examples of situations when a food cost might be considered reasonable and necessary:

- Food costs at a family engagement event: For some ED programs, family engagement is a critical part of the purpose of the program or of the success of a project. In such a program, if a family meeting would occur during a typical mealtime, or if the grantee has evidence that attendance at the event would be affected by the absence of food or snacks, the grantee may be able to justify that is reasonable and necessary to provide light refreshments or meals to participants.

- Food costs for a working lunch at a day-long meeting: A grantee may find that one critical component of its grant activities is hosting an onsite day-long training for professionals working in a field that is a central focus of the grant. If the grantee is able to demonstrate that the lunchtime session is necessary to achieve the goals of the project, attendance at the lunchtime session is necessary to achieve full participation by attendees, and the business carried out at the lunchtime session could not be carried out at another reasonable time, the grantee may be able to justify that it is reasonable and necessary to provide meals or a snack to attendees.

- Light refreshments at a series of regular after-hours meetings: A grantee may find that an important part of its grant activities is hosting meetings after the traditional working day so that professionals from within the field but across different employers have an opportunity to collaborate on focused topics. If the grantee can demonstrate that the sessions have planned agendas that are central to the grant, that engaging this group of people is necessary to achieve the purposes of the grant, and that there is evidence that attendance at the meetings would be affected by the absence of food, the grantee may be able to justify that it is reasonable and necessary to provide light refreshments to participants.

- Costs of light snacks at a day-long meeting: To achieve the purposes of its grant, a grantee may find that is necessary to host day-long meetings or training sessions so that involved individuals can collaborate. If the grantee has evidence that providing light snacks (e.g., granola bars and water) at the meeting will result in improved participation, such as more

time spent on grant activities and less time needed for breaks during the sessions, the grantee may be able to justify that is reasonable and necessary to provide light snacks to participants.

If an ED grantee has questions about a specific food cost, they should contact their ED program officer.

3. What are examples of situations when costs for food would not be considered reasonable and necessary?

There are some situations when food costs would not be considered reasonable and necessary to a grant or would otherwise be unallowable under the *Uniform Guidance* found at 2 CFR part 200.

- Food costs at networking sessions: In nearly all cases, using grant funds to pay for food and beverages for networking sessions with a purely social focus is not justified because participation in such activities is rarely necessary to achieve the purpose of the grant.
- Food costs at regular staff meetings: Food costs for recurring business meetings, staff meetings, or other day-to-day activities are generally not reasonable because participation in such activities is rarely necessary to achieve the purpose of the grant.
- Food costs for remote meetings: Food costs for meetings conducted remotely, such as sending food to individual meeting participants' locations, are generally not justified since participants' participation is less impacted by them attending the meeting remotely.
- Entertainment: Federal grant funds may not be used to pay for entertainment, which includes costs for amusement, diversion, and social activities, unless they have a specific and direct programmatic purpose and are included in the Federal award. 2 CFR § 200.438. Celebrations, receptions, banquets, and other social events generally are not events where purchasing food with ED grant funds is appropriate.
- Alcohol: In all cases, use of Federal funds for alcoholic beverages is unallowable. 2 CFR § 200.423.

Using ED Federal Grant (Discretionary and Formula) Funds to Host a Meeting or Conference

4. May a grantee receiving funds from ED use its Federal grant funds to host a meeting or conference?

Yes. Federal grant funds may be used to host a meeting or conference if doing so is:

- Consistent with its approved application or plan;
- For purposes that are directly relevant to the program and the operation of the grant, such as for conveying technical information related to the objectives of the grant; and
- Reasonable and necessary to achieve the goals and objectives of the approved grant.

The *Uniform Guidance* in 2 CFR § 200.432 describes costs associated with conferences that may be allowable.

5. What are examples of "technical information" that may be conveyed at a meeting or conference?

Examples of technical information include, but are not limited to, the following, each of which must be related to implementing the program or project funded by the grant:

- Specific programmatic, administrative, or fiscal accountability requirements;
- Best practices in a particular field;
- Theoretical, empirical, or methodological advances in a particular field;
- Effective methods of training or professional development; and
- Effective grant management and accountability.

6. What factors should a grantee consider when deciding whether to host a meeting or conference?

Grantees should consider whether a face-to-face meeting or conference is the most effective or efficient way to achieve the desired result and whether there are alternatives, such as webinars or video conferences, that would be equally or similarly effective and more efficient in terms of time and costs than a face-to-face meeting. In addition, grantees should consider how the meeting or conference will be perceived by the public; for example, will the meeting or conference be perceived as a good use of taxpayer dollars?

7. Are there conflict-of-interest rules that grantees should follow when selecting vendors, such as logistics contractors, to help with a meeting or conference?

As specified in 2 CFR § 200.317, States and Indian Tribes[3] must comply with their own procurement policies and procedures, including any policies or procedures for ensuring that there are no conflicts of interest in the procurement process. In addition to its own policies and procedures, a State or Indian Tribe must also comply with the following procurement standards: 2 CFR §§ 200.321, 200.322, 200.323, and 200.327. If a State or Indian Tribe does not have its own procurement policies and procedures, it must follow the procurement standards in 2 CFR §§ 200.318 through 200.327.

Other grantees must follow procurement procedures that are consistent with their State, local, or Tribal laws and regulations, as appropriate, and that are also consistent with 2 CFR §§ 200.318 through 200.327, including the minimum requirements in 2 CFR § 200.318 related to conflict of interest rules.

8. When a meeting or conference is hosted by a grantee and charged to a Federal grant, may the meeting or conference be promoted as a U.S. Department of Education event?

No. Meetings and conferences hosted by grantees are directed by the grantee, not the U.S. Department of Education. Therefore, the meeting or conference may not be promoted as a U.S. Department of Education meeting or conference, and the seal of the U.S. Department of Education must not be used on conference materials or signage, without ED's written approval. In addition, all meeting or conference materials paid for with Federal grant funds must include appropriate disclaimers, such as the disclaimer provided in 34 CFR§ 75.620. That language reads:

[3] Please note that "States" were the only entities listed under 2 CFR § 200.317 prior to the revisions announced in OMB's April 22, 2024, *Federal Register* notice.

The contents of this [insert type of publication; such as book, report, film, website, and web page] were developed under a grant from the U.S. Department of Education (Department). The Department does not mandate or prescribe practices, models, or other activities described or discussed in this document. The contents of this [insert type of publication] may contain examples of, adaptations of, and links to resources created and maintained by another public or private organization. The Department does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. The content of this [insert type of publication] does not necessarily represent the policy of the Department. This publication is not intended to represent the views or policy of, or be an endorsement of any views expressed or materials provided by, any Federal agency.

Please note that if a grantee charges a fee for attendance at a particular meeting or conference paid for with Federal grant funds, any income generated must be treated as program income under 2 CFR § 200.307 or specific program regulations addressing program income.

9. When a grantee is hosting a meeting or conference, may the grantee use Federal grant funds to pay for food, beverages, or snacks?

As detailed in questions #1-3 above, in general there is a need to substantiate with specificity the rationale for why paying for food and beverages with Department funds is necessary to meet the goals and objectives of a grant, but there may be circumstances when providing food or beverages at a conference is reasonable and necessary to achieve the purpose of the grant. Please see those questions for information about requirements and considerations related to food costs.

10. May a grantee contract with a hotel under which Federal grant funds will be used to provide meals, snacks, and beverages as part of the cost for meeting rooms and other allowable conference-related costs?

Federal grant funds may only be used for expenses that are reasonable and necessary. In planning a conference or meeting and negotiating with vendors for meeting space and other relevant goods and services, grantees may only pay for allowable costs. The fact that food and beverages are embedded in a contract for meeting space does not mean that the food and beverages are being provided at no cost to the grantee. Therefore, if the food and beverage cost is not an allowable cost, and a hotel vendor embeds food and beverage costs into a hotel contract for meeting space, the grantee should work with the hotel to have the food and beverage costs identified and removed from the contract, and have the price for the meeting space appropriately adjusted.

11. What if a hotel or other venue provides "complimentary" beverages (e.g., coffee, tea) and there is no charge to the grantee hosting the meeting?

The grantee has an obligation, under these circumstances, to confirm that the beverages are truly complimentary and will not be reflected as a charge to the grant in another area. For example, many hotels provide complimentary beverages to all guests who attend a meeting at their facility without reflecting the costs of those beverages in other items that their guests or, in this case, the grantee purchases. As noted above, it would not be acceptable for a vendor to embed the cost of beverages in other costs, such as meeting space, without those costs being separately allowable.

12. May indirect cost funds be used to pay for food and beverages?

No. The cost of food and beverages, which are related to meetings that are easily associated with a specific cost and grant objectives, are more appropriately treated as direct costs rather than indirect

costs. As noted above, Federal grant funds cannot be used to pay for food and beverages unless doing so is reasonable and necessary.

13. May a grantee use non-Federal resources (e.g., State or local resources) to pay for food or beverages at a meeting or conference that is being held to meet the goals and objectives of its grant?

Grantees should follow their own policies and procedures and State and local law for using non-Federal resources to pay for food or beverages, including its policies and procedures for accepting gifts or in-kind contributions from third parties. Grantees should be sure that any food and beverages provided with non-Federal funds are appropriate for the grantee event, and do not detract from the event's purpose. Please note that, in general, any funds that a grantee contributes to a project as part of the program's matching or cost-sharing requirement would be subject to the same rules that govern the Federal funds; therefore, the non-Federal funds used to pay for food and beverages for a meeting or conference could only be eligible for use in meeting cost-share or match obligations if Federal funds would also be allowable to pay for the food and beverages.

14. May grantees provide meeting participants with the option of paying for food and beverages (e.g., could a grantee have boxed lunches provided at cost for participants)?

Yes. Grantees may offer meeting participants the option of paying for food (such as lunch, breakfast, or snacks) and beverages, and arrange for these items to be available at the meeting.

Using Federal Grant Funds to Pay for Costs of Attending a Meeting or Conference Sponsored by ED or a Third Party

15. May grantees use Federal grant funds to pay for the cost of attending a meeting or conference?

If attending a meeting or conference is necessary to achieve the goals and objectives of the grant, and if the expenses are reasonable (based on the grantee's own policies and procedures, and State and local laws), Federal grant funds may be used to pay for travel expenses of grantee employees, consultants, or experts to attend a meeting or conference. To determine whether a meeting or conference is "necessary," grantees should consider whether the goals and objectives of the grant can be achieved without the meeting or conference and whether there is an equally effective and more efficient way (in terms of time and money) to achieve the goals and objectives of the grant (see question #6). To determine whether the expenses are "reasonable," grantees should consider how the costs (e.g., lodging, travel, registration fees) compare with other similar events and whether the public would view the expenses as a worthwhile use of Federal funds.

16. What should a grantee consider when planning to use Federal grant funds for attending a meeting or conference?

Among other considerations, grantees should consider how many people should attend a meeting or conference on its behalf. The number of attendees should be reasonable and necessary to accomplish the goals and objectives of the grant. The grantee should also determine whether it is necessary to attend the entire meeting or conference, or whether attending only a portion of the meeting or conference is reasonable and necessary.

17. What travel expenses may be paid for with Federal grant funds?

Grantees may use Federal grant funds for travel expenses only to the extent such costs are reasonable and necessary and do not exceed charges normally allowed by the grantee in its regular operations consistent with its written travel policies. See 2 CFR § 200.475. Federal grant funds may be used to pay expenses for transportation, per diem, and lodging if the costs are reasonable and necessary. Federal grant funds may not be spent on alcohol. See 2 CFR § 200.423. Grantees should follow their own travel and per diem rules and costs when charging travel expenses to their Federal grant. In the absence of an acceptable written policy regarding travel costs, grantees must satisfy the requirements of 2 CFR § 200.475(d).

18. What should grantees consider when including Federal employees at a grantee-sponsored meeting or conference?

In some situations, a grantee may invite a Federal employee to participate in or present at a grantee-organized meeting or conference. Federal employees are subject to Federal ethics laws and regulations. This includes laws and regulations governing conflicts of interest and gifts (e.g., waiver of a registration fee, travel expenses, and meals). Grantees may be subject to their own ethics laws and regulations, and grantee employees should ensure that they comply with them.

Questions Regarding the Allowable Use of Federal Grant Funds

19. What resources are available to help grantees determine whether costs associated with meetings and conferences are reasonable and necessary?

Grantees must follow all applicable statutory and regulatory requirements in determining whether costs are reasonable, necessary, and allowable, especially the regulations found at 2 CFR part 200.

20. Is it allowable for a person whose travel costs are being paid with Federal grant funds to attend a conference in Washington, D.C., and lobby members of Congress while in town?

Appropriated funds may not, except under very limited circumstances, be used for expenses related to any activity designed to influence the enactment of legislation, appropriations, regulations, administrative actions, or Executive Orders proposed or pending before the Congress or the Administration. See 2 CFR § 200.450. To the extent that a portion of time at a conference is spent on lobbying activities, costs associated with the lobbying, including transportation to and from Washington, D.C., lodging, and per diem, may not be charged to the Federal grant. For example, if a meeting or conference lasts for two days and a visit to lobby a member of Congress requires an additional day of travel, it could be determined that one-third (1/3) of all costs involved in attending the meeting or conference, including travel to and from Washington, D.C., may not be charged to the grant.

On the other hand, educating members of Congress about facts relevant to a particular grant program would not, absent other facts, constitute lobbying. For example, it would not be considered a prohibited lobbying activity for a grantee to inform a member of Congress about its program, the services it provides, and the individuals it serves. It also would not be considered a prohibited lobbying activity to attend a presentation by members of Congress related to issues relevant to a grantee's program or the population it serves in general. However, such education-oriented

discussions could easily cross—or appear to cross—the thin line to prohibited lobbying activities. For example, a discussion about the challenges a grantee faces with respect to requirements governing matching funds could easily expand to a discussion about the need for more appropriated funds or legislative changes, which would constitute prohibited lobbying activities. Given that Congress frequently considers the reauthorization of ED programs, a grantee's interactions with members of Congress on such topics could meet the definition of lobbying, which is prohibited. In that case, the costs associated with those interactions could not be supported with Federal funds.

21. What are the consequences of using Federal grant funds on unallowable expenses?

ED may seek to recover any Federal grant funds identified, in an audit or through program monitoring, as having been used for unallowable costs, including unallowable conference expenses.

22. Whom should grantees call if they have specific questions about the allowable use of Federal grant funds?

ED grantees are encouraged to contact their ED program officer to discuss the allowable use of Federal grant funds, including the allowable use of Federal grant funds for meetings and conferences.