

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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**Editor's Note: Crunching the Numbers**

Victoria Prussen Spears

1

**DOJ's False Claims Act Recoveries in Fiscal Years 2020 and 2019**

Joseph R. Berger, Thomas O. Mason, and Sarah M. Hall

3

**Life Sciences Enforcement Trends in 2020 and Outlook for 2021**

Sarah K. diFrancesca and Courtney M. White

12

**OMB Issues Extensive Revisions to the Uniform Guidance**

Christian B. Nagel, Kara M. Ward, and Kelsey M. Hayes

20

**U.S. Supreme Court Asked to Resolve Circuit Split Over the Scope  
of the False Claims Act**

David DiBari, Glen Donath, Joshua Berman, Steve Nickelsburg,  
Michelle Williams, and Doug Tomlinson

25

**Where Are We Going With Section 889 Part B?**

Justin A. Chiarodo, Merle M. DeLancey, Jr., and Robyn N. Burrows

31

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## OMB Issues Extensive Revisions to the Uniform Guidance

*By Christian B. Nagel, Kara M. Ward, and Kelsey M. Hayes\**

*This article addresses some of the most noteworthy changes in the recently issued Office of Management and Budget Guidance for Grants and Agreements.*

The Office of Management and Budget (“OMB”) recently issued Final Guidance<sup>1</sup> revising sections of OMB Guidance for Grants and Agreements (“Uniform Guidance”). The Final Guidance—the first major revision to the Uniform Guidance since it was implemented—includes much-anticipated changes and updates. The majority of the revisions are aimed at supporting the implementation of the President’s Management Agenda<sup>2</sup> and other Administration priorities, while the other sections implement statutory updates and clarify existing requirements regarding areas of misrepresentation.<sup>3</sup>

This article addresses some of the most noteworthy changes. The revisions in the Final Guidance became effective on November 12, 2020, except for the revisions to 2 C.F.R. §§ 200.216 and 200.340 (discussed below), which became effective on August 13, 2020.

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<sup>1</sup> <https://www.federalregister.gov/documents/2020/08/13/2020-17468/guidance-for-grants-and-agreements>.

<sup>2</sup> <https://www.performance.gov/PMA/PMA.html>.

<sup>3</sup> “The President’s Management Agenda lays out a long-term vision for modernizing the Federal Government in key areas that will improve the ability of agencies to deliver mission outcomes, provide excellent service, and effectively steward taxpayer dollars on behalf of the American people.” Most administrations publish updates quarterly and use it to showcase cross-agency action. For example, in the Obama Administration, the Management Agenda looked closely at technology upgrades to cloud services. The Trump Administration emphasis is on creating a more customer-friendly interface for entities doing business with or on behalf of the federal government.

## SUPPORTING IMPLEMENTATION OF THE ADMINISTRATION'S INITIATIVES AND PRIORITIES

OMB's revisions are designed largely to promote and encourage the use of performance-based metrics and practices to achieve program goals and objectives, and lessen the compliance burdens on both federal awarding agencies and recipients. In support of this goal, the revisions "emphasize the importance of focusing on performance to achieve program results[.]" Consistent with this objective, the Final Guidance implements the following noteworthy revisions:

- *More Agency Flexibility to Request Exceptions: 2 C.F.R. § 200.102 Exceptions.* The existing regulations provide that OMB may allow exceptions or approve of agency changes to the Uniform Guidance only if "unusual circumstances" exist. The Final Guidance removes the "unusual circumstances" restriction and adds language encouraging agencies to request exceptions "in support of innovative program designs that apply a risk-based, data-driven framework to alleviate selective compliance requirements and hold recipients accountable for good performance." This is a welcome change from OMB and an acknowledgement that program goals and their intended results differ, rendering exceptions to the Uniform Guidance beneficial in some instances.
- *New Emphasis on Performance Metrics in Setting Goals: 2 C.F.R. § 200.202 Program Planning and Design.* This new provision formalizes a requirement already expected of federal awarding agencies—to develop "a strong program design by establishing program goals, objectives, and indicators" prior to soliciting applications. This revision is part of OMB's overall push for agencies to develop clear program goals and objectives "to set the stage for demonstrating program results." Having clear program goals and objectives will be critical because these goals and objectives will serve as benchmarks for federal awarding agencies' measurement of recipients' performance<sup>4</sup> and also as a basis for termination in the event the award "no longer effectuates the program goals or agency priorities."<sup>5</sup>
- *Formal Adoption of "Performance Goals" in Award Agreements: 2 C.F.R. § 200.211 Information Contained in a Federal Award.* Revisions to this section require Federal awarding agencies to include the "[p]erformance

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<sup>4</sup> See 2 C.F.R. § 200.301.

<sup>5</sup> See 2 C.F.R. § 200.340.

goals, indicators, targets, and baseline data”<sup>6</sup> in the award. The new regulation also requires federal awarding agencies to specify how the agency will assess the recipient’s performance in the award’s terms and conditions, to include the timing and scope of the recipient’s expected performance.

- *Goal Achievement Defines Program Success: 2 C.F.R. § 200.301 Performance Measurement.* Consistent with the information to be contained in federal awards per 2 C.F.R. § 200.211, this regulation requires federal awarding agencies to measure recipients’ performance based on their achievement of the program goals and objectives
- *New Termination Factors: 2 C.F.R. § 200.340 Termination.* Under this regulation, OMB strengthened the ability of federal awarding agencies to terminate awards when the award “no longer effectuates the program goals or agency priorities.”<sup>7</sup> The revised regulation requires federal awarding agencies to articulate the conditions under which a federal award may be terminated “clearly and unambiguously.” Despite this requirement, there is ambiguity and uncertainty in terms of how much discretion federal awarding agencies have in determining whether an award “no longer effectuates the program goals or priorities.” OMB explained that the intent behind this change “is to ensure that federal awarding agencies prioritize ongoing support to federal awards that meet program goals.” It remains to be seen just how far agencies will take this grant of authority.

### **EXPANDED USE OF THE *DE MINIMIS* RATE**

The Final Guidance expands the use of the 10 percent *de minimis* rate provided in 2 C.F.R. § 200.414(f). Under the existing regulations, only non-federal entities that have never received a negotiated indirect cost rate agreement (“NICRA”) could elect to charge a *de minimis* rate of 10 percent of modified total direct costs (“MTDC”).

The revisions expand the use of the *de minimis* rate to all non-federal entities (except state and local governments and Indian tribes) that do not have a *current* negotiated rate. OMB explains that the expansion of this rule will benefit organizations “that have negotiated an indirect cost rate previously, but for some circumstances, the negotiated rates have expired,” for example, “due to breaks in federal relationships and grant funding or lack of resources for preparing an indirect cost proposal.”

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<sup>6</sup> Developed pursuant to 2 C.F.R. § 200.202.

<sup>7</sup> As developed under 2 C.F.R. § 200.202 and specified in the award pursuant to 2 C.F.R. § 200.211.

## **SUPPORT FOR DOMESTIC PREFERENCES FOR PROCUREMENT**

The Final Guidance adds a new section, 2 C.F.R. § 200.322 *Domestic Preferences for Procurement*, to encourage federal awarding agencies to “maximize the use of goods, products, and materials produced in the United States when procuring goods and services under federal awards.” The new section implements the Administration’s policy expressed in two Buy American Executive Orders, E.O. 13788 (Buy American and Hire American) and E.O. 13858 (Strengthening Buy American Preferences for Infrastructure Projects).

## **CHANGES TO THE MICRO-PURCHASE AND SIMPLIFIED ACQUISITION THRESHOLDS**

The Final Guidance revises the Uniform Guidance to increase the micro-purchase threshold from \$3,500 to \$10,000 and the simplified acquisition threshold from \$100,000 to \$250,000 to reflect changes implemented by the National Defense Authorization Act of 2018 (“NDAA 2018”). The revisions also allow non-federal entities to request a higher micro-purchase threshold, up to \$50,000. These changes are reflected in 2 C.F.R. § 200.1 *Definitions* and impact 2 C.F.R. § 200.320 *Methods of procurement to be followed*.

## **CHANGES TO CLOSEOUT PROVISIONS**

Under the existing regulations, recipients have 90 days after the end date of the period of performance to submit all financial, performance, and other closeout reports and to liquidate all financial obligations. OMB is revising the closeout period from 90 days to 120 days to “support timely closeout of awards, improve the accuracy of final closeout reporting, and reduce recipient burden.”<sup>8</sup> While recipients will surely benefit from an increased closeout period, it is important to note that this change comes with increased compliance risks. OMB will now require federal awarding agencies to report when a non-federal entity “does not submit final closeout reports as a *failure to comply with the terms and conditions of the award* to the OMB-designated integrity and performance system.”

## **MEETING STATUTORY AND OTHER AUTHORITATIVE REQUIREMENTS**

The Final Guidance includes revisions to comply with various statutory requirements, including the NDAA’s for FY 2019 and FY 2013, as well as to align the Uniform Guidance with other authoritative requirements such as the Generally Accepted Accounting Principles (“GAAP”).

- *Complying with Section 889 (Chinese Telecommunications Ban)*. The

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<sup>8</sup> See 2 C.F.R. § 200.344.

Final Guidance adds two new sections, 2 C.F.R. § 200.216 *Prohibition on certain telecommunications and video surveillance service or equipment* and 2 C.F.R. § 200.471 *Telecommunication and video surveillance costs*, to align with Section 889 of the NDAA for FY 2019. Section 889 of the NDAA for FY 2019 prohibits the expenditures of federal funds to procure or obtain “covered telecommunications equipment or services.”

- *Never Contract with the Enemy.* OMB is adding part 183 to 2 C.F.R. to implement Never Contract with the Enemy, a law included in the NDAA for FY 2015 and extended in the NDAA for FY 2020 that prohibits providing funds to a person or entity that is actively opposing the United States. The new regulations will apply only to “grants and cooperative agreements that exceed \$50,000, are performed outside the United States, including U.S. territories, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.”
- *Including information on an entity’s parent, subsidiary or successor entities in The Federal Awardee Performance and Integrity Information System (“FAPIIS”).* OMB is revising 2 C.F.R. parts 25 and 200 to implement the requirement from NDAA for FY 2013 that FAPIIS include information on a non-federal entity’s parent, subsidiary or successor entities. OMB’s revisions to these parts require applicants to provide information in the System for Award Management (“SAM”) on their immediate owner and highest-level owner and subsidiaries, as well as on all predecessors that have been awarded a federal contract, grant or cooperative agreement in the last three years.

## **CLARIFYING REQUIREMENTS REGARDING AREAS OF MISREPRESENTATION**

The last section of the Final Guidance includes clarifications that are aimed at “reducing recipient administration burden and ensuring consistent interpretation of guidance.” One of these clarifications includes a revision to 2 C.F.R. § 200.332 *Requirements for pass-through entities*. The Final Guidance notes that OMB is revising this regulation to clarify that pass-through entities are “responsible for addressing only a subrecipient’s audit findings that are specifically related to their subaward” and not all of the subrecipient’s audit findings.

## **CONCLUSION**

As noted above, OMB’s revisions to the Uniform Guidance are significant and detailed. We encourage you to review the entire publication.