

ALERT

HHS Proposal Could Have Significant Impact on Certain Grantees

July 14, 2016

WHAT: HHS issued a notice of proposed rulemaking relating to six potential changes to its adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. Broadly, the changes involve: (1) clarifying audit requirements and cost principles applicable to contracts and compacts awarded under the Indian Self Determination and Education Assistance Act; (2) prohibiting discrimination in the administration of grants; (3) clarifying applicability to states of certain payment provisions; (4) permitting HHS awarding agencies to require public access to data produced under an award; (5) restricting indirect cost rates for certain grants; and (6) disallowing from costs under a grant any assessments imposed as a result of a failure to maintain minimum essential coverage or offer health coverage to employees under the Affordable Care Act.

WHEN: HHS issued the notice of proposed rulemaking on July 13, 2016. Comments on the proposed rulemaking are due August 12, 2016.

WHAT DOES IT MEAN FOR INDUSTRY: These proposed changes impact multiple aspects of HHS grants. While some of the changes simply clarify existing law, other changes could have a significant impact on certain grantees. Interested parties should therefore closely review the proposed rulemaking and submit comments where their interests are affected.

MORE INFORMATION:

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Practice Areas

Federal Grants and Cooperative
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Government Contracts

On July 13, 2016, the Department of Health and Human Services (HHS) issued a notice of proposed rulemaking. HHS has proposed six changes to HHS's adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. HHS noted that these changes, while based on existing law or HHS policy, have not previously been codified.

First, HHS proposed to clarify that the audit requirements and cost principles applicable to contracts and compacts awarded pursuant to the Indian Self Determination and Education Assistance Act (ISDEAA). The proposed rule specifies that ISDEAA contracts and compacts are governed by HHS's cost principles and audit requirements. Because ISDEAA contracts are not subject to federal grant and cooperative agreement requirements, they are not subject to HHS's pre-federal award requirements and post federal award requirements. In addition, HHS proposed to clarify the meaning of disallowed cost to only include cost disallowances arising under the Single Audit Act Amendments of 1996, and not to other claims or disallowances identified through other audits or investigations.

Second, HHS proposed a prohibition on discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity. This includes ensuring that same-sex couples are treated the same as opposite-sex couples. The prohibition on discrimination will apply to HHS as well as to grant recipients administering programs supported by HHS awards. This provision does not apply to funding under the Temporary Assistance for Needy Families Program (TANF), as the TANF statute already identifies the nondiscrimination provisions that can be applied to TANF.

Third, HHS proposed to clarify that for states, payments are covered by the provisions of Treasury–State Cash Management Improvement Act agreements and default procedures. The proposed language further clarifies that to the extent that the governing provisions are silent as to the payment provisions described in the Uniform Administrative Requirements, states are required to expend refunds and rebates prior to drawing down additional grant funds.

Fourth, HHS proposed to amend sections related to restrictions on public access to records, in order to implement the Executive Order making open and machine-readable the new default for Government information. In line with this Executive Order, the new language would permit HHS awarding agencies to require recipients to permit public access to manuscripts, publications, and data produced under an award, consistent with applicable law.

Fifth, HHS proposed to add a provision to restrict indirect cost rates for certain grants. It is long-standing HHS policy to restrict. HHS proposed to restrict training grants and grants awarded to foreign organizations and foreign public entities to a maximum eight percent indirect cost rate. In the proposed rule, American University, Beirut, and the World Health Organization are exempted specifically from the indirect cost rate limitation. This restriction on indirect costs flows down to subawards and subrecipients.

Finally, under the proposed rule, any payments or assessments imposed on an individual or individuals because of any failure to maintain minimum essential coverage as required by the Affordable Care Act, are not allowable costs under a grant. The same rule would apply to payments imposed for failure to offer health

coverage to employees.