

**ALERT**

# Proposed Super Circular Revisions Could Mean Increased Flexibility and Accountability and Ambiguity for Federal Grants

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February 3, 2020

The Office of Management and Budget (OMB) recently proposed several revisions to the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, commonly referred to as the “Super Circular,” which governs federal grant awards. While many of the proposed revisions would provide awarding agencies and grant recipients with greater flexibility in administering and executing federal grants, other provisions call for heightened scrutiny and more oversight of awards while at the same time failing to provide necessary information on how agencies will apply this heightened scrutiny. Below is a summary of the key proposed changes.

## Increased Micro-Purchase Threshold and Simplified Costing for Non-Federal Entities

OMB proposes two substantial changes for non-Federal entity grant recipients. First, it proposes flexibility for non-Federal entities to request a micro-purchase threshold that exceeds the current \$10,000 limit. Non-Federal entities would submit such requests to the agency responsible for setting the applicable indirect cost rates. That agency would then determine whether the requesting entity is considered low risk, based on, among other things, a review of the entity’s audit findings and its internal institutional risk assessments. This proposed revision reflects statutory changes of micro-purchase thresholds in the National Defense Authorization Act (NDAA) for Fiscal Years (FY) 2017 and 2018 and the American Innovation Competitiveness Act of 2017.

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Government Contracts

Second, the proposal would allow non-Federal entities to charge the *de minimis* rate of 10% of their modified total direct costs (MTDC) when submitting indirect cost rate proposals. Currently, the *de minimis* rate can be used only by non-Federal entities that have never received a negotiated indirect cost rate. Under the proposed revision, non-Federal entities would not have to provide proof of costs that fall under the *de minimis* rate for federal grants.

Both of these proposed changes, if implemented, should have an immediate positive impact on grant recipients.

### **More Flexible SAM Registration Requirements**

The proposed revisions would increase the time grant recipients have to submit closeout reports to awarding agencies and liquidate all financial obligations from 90 days to 120 days. Subrecipients, however, will still need to submit closeout reports to their pass-through entities within 90 days. Additionally, awarding agencies will have to report when non-Federal entities fail to properly submit their closeout reports.

OMB also proposes changes to current System for Award Management (SAM) registration requirements. Under the proposal, financial assistance applicants will have to provide information on any parent, subsidiary, or successor entities that have been awarded a federal contract, grant, or cooperative agreement within the prior three years. Additionally, awarding agencies will be given flexibility to waive the SAM registration requirement for foreign entities applying for or receiving an award or subaward performed outside the United States that is valued at less than \$100,000, which is an increase from the current \$25,000 threshold.

### **A New Approach to Grant Compliance and Performance**

The proposal encourages awarding agencies to approach procurements by focusing on the balance between compliance and performance instead of focusing solely on strict compliance. This will require agencies to design programs with established goals but would also allow them to apply less restrictive conditions and request exceptions to certain provisions of the Super Circular to support certain innovative program designs.

Additionally, it will become easier for agencies to terminate awards if they no longer carry out a program's goals or the agency's priorities. Given this enhanced termination authority, the proposal eliminates the Super Circular's current termination for cause provision.

### **Tighter Controls on Foreign Procurement—"Huawei Ban" & More**

Consistent with language in the FY2019 NDAA, the proposal prohibits award recipients from using federal funds to contract with entities that use prohibited telecommunication and video surveillance services or equipment. This includes those produced by Huawei, ZTE, Hytera, Hangzhou Hikvision, Dahua, and any of their subsidiaries or affiliates. Because to date there is no official definition of the term "entities that use prohibited

... services or equipment”, compliance with the rule as proposed could prove extremely burdensome. Accordingly, it is important for entities that want to receive federal grants to respond to OMB’s request for “feedback on the feasibility, burden, programmatic impact, and cost associated with implementing this requirement” and for “relevant data on the impacts of this proposed change and suggestions on how to support implementation of this prohibition.”

OMB also proposes adding a “Never Contract with the Enemy” provision that would require agencies to check SAM for prohibited or restricted persons or entities before awarding a grant or cooperative agreement above \$50,000 for performance outside the United States.

### **Increased Transparency in Reported Spending**

OMB proposes revisions to increase transparency in Federal spending reports, as required by the Federal Funding Accountability and Transparency Act (FFATA) and the Digital Accountability and Transparency Act (DATA Act). Proposed changes include:

- Expanding the applicability of reporting requirements related to federal spending to include other types of financial assistance beyond grants and cooperative agreements;
- Requiring agencies to report their spending on awards greater than or equal to the micro-purchase threshold and subawards greater than or equal to \$30,000;
- Making grantees’ negotiated agreements for indirect cost rates publicly available;
- Requiring agencies to identify the authorizing statute for all financial assistance opportunities that are publicly listed; and

### **Alignment with Administration Priorities—How Do You Measure Success?**

OMB proposes changes that will align the Super Circular with the current Administration’s policy priorities. This includes establishing a preference for domestic procurements and ensuring First Amendment protections. Such changes are typical within any administration.

Additionally, and perhaps more notably, the proposal would require agencies to use a merit review process for all competitive awards, with the objective of selecting award recipients that are most likely to successfully deliver results consistent with program objectives. Agencies would also have to systematically review their award selection criteria for effectiveness.

While a merit-based review process has some ostensible appeal to it, in theory it could threaten to stifle agencies from aggressively seeking innovations through grant awards. Searching for innovations comes with no guarantee for success so this type of review process may have the unintended consequence of dissuading agencies from giving funding to, for example, R&D programs. Defining how success is measured will be key here and something tech, biotech, and other companies and universities will want to monitor.

## Improved Standardization and Clarification

The proposal aims to standardize various terms used throughout the Super Circular and clarify guidance that may currently be subject to misinterpretation. Proposed changes include adding or replacing terms and definitions to standardize the Super Circular's terminology, in addition to revising certain sections to allow for more consistent interpretations.

Wiley's Government Contracts Practice has the requisite expertise to assist clients with understanding and responding to OMB's proposed Super Circular revisions. Comments on the proposal are due on or before March 23, 2020.

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*Jennifer Eve Retener, a Law Clerk in Wiley's Government Contracts Practice, contributed to this alert.*

**\*Note: this is an update to an alert that was originally published on January 23, 2020.**