

OMB Proposes Improving Rules for Reimbursing Nonprofits' Indirect Costs

The federal rules governing grants to nonprofits would be substantially improved under [proposed revisions to the Uniform Guidance](#) announced January 22, 2020 by the U.S. Office of Management and Budget (OMB). Most notably, the proposed regulations would expand and strengthen the guarantee that nonprofits receive reimbursement of their indirect costs. The proposed rules would also prohibit several tactics used by state and local governments and others to avoid the protections of the OMB Uniform Guidance. Further, the draft proposes numerous changes to federal regulations related to data collection and enforcement, as well as updates to federal rules to conform to several new laws and Executive Orders.

The 2020 revisions would update the 2013 reforms (Uniform Guidance) governing federal grants to state and local governments, Indian tribes, institutions of higher education, and charitable nonprofits. The 2013 rules expressly stated – for the first time – that governments and other pass-through entities must pay nonprofits for their legitimate indirect costs incurred when providing services on behalf of governments. The OMB Uniform Guidance mandated that nonprofits must be paid either their negotiated indirect cost rate or a *de minimus* rate of 10 percent of modified total direct costs. It also reemphasized the right of nonprofits to negotiate indirect cost rates with the federal government and other entities (known as pass-through entities) that pass federal funds through to nonprofits for work performed. Although groundbreaking and long overdue, the mandate as originally worded was interpreted by many in ways that thwarted the will of the federal government and imposed unreasonable, unnecessary, and costly burdens on the nonprofits they hired to provide vital services in communities. The draft regulations published January 22, 2020 seek to remedy many of these challenges.

Improving Nonprofit Rights

The proposed rule, if adopted, would significantly improve the rights of nonprofits to be reimbursed at a rate of at least 10 percent of modified total direct costs (the *de minimus* rate). The draft regulations are proposing three key changes in this area (2 USC Sec. 200.414):

1. **Expanding Access to *De Minimus* Rate:** The option of electing the 10 percent *de minimus* rate would be made available to all nonprofits and some non-federal entities receiving funds that originate as federal grants. Nonprofits and others would have sole discretion over whether to continue utilizing the *de minimus* rate indefinitely. Currently, the *de minimus* rate can only be used by entities that *have never* received a negotiated indirect cost rate, thereby excluding many organizations that do not have the capacity to negotiate new indirect cost rates, and essentially leaving them with no options. OMB recognized that the expiration of a negotiated rate “may be due to breaks in Federal relationships and grant funding, or lack of resources for preparing an indirect cost proposal.” In the proposed regulations, it states, “This proposed change will further reduce the administrative burden for non-federal entities and Federal agencies and shift more resources toward accomplishing the program mission.”
2. **Reduced Documentation Burdens:** Use of the *de minimus* rate would remove the burden of collecting data and proving costs. The proposed rule expressly states, “No documentation is required to provide proof of costs that are covered under the *de minimus* indirect cost rate.” From the outset, the point of the *de minimus* rate was to ensure greater fairness for

nonprofits and to relieve administrative burdens, both for nonprofits and governments. This new language should prevent zealous grants managers from imposing unnecessary data collection requirements. As OMB states in the proposal, “the 10% *de minimus* rate was designed to reduce burden for small non-federal entities and the requirement to document the actual indirect costs would eliminate the benefits of using the *de minimus* rate.

3. **Public Disclosure of Rates:** As a way of reducing paperwork burdens and helping to ensure that parties to a federal grant follow the rules, the proposed regulations include language requiring that all rate agreements from non-Federal entities must be available publicly on an OMB-designated federal website. This would empower nonprofits to protect their rights to reimbursement of their negotiated indirect cost rate or the *de minimus* rate.

Improving Compliance by Grantors

The draft regulations also clarify that all granting agencies – whether federal, state, or local governments, Indian tribes, or other nonprofits – must pay nonprofits any existing negotiated indirect cost rates. The grantmaking agencies must also negotiate rates when the nonprofit exercises its right to negotiate a rate. Currently, various granting agencies have interpreted the rules in ways that deny nonprofits their rights granted under the Uniform Guidance. Under the proposed regulations (at 2 USC Sec. 200.331):

1. **Negotiated Rate Rules:** A pass-through entity would be expressly prohibited from requiring use of the 10 percent *de minimus* rate in cases where the nonprofit (subrecipient) has a federally approved indirect cost rate.
2. **Accepting Negotiated Rates:** When a nonprofit doesn't have a federally negotiated indirect cost rate, the proposed rule would eliminate the guesswork: a pass-through entity would be required to accept the following: (i) the negotiated rate between the pass-through entity itself and the nonprofit, (ii) the negotiated rate between a different pass-through entity and the nonprofit, or (iii) the *de minimus* indirect cost rate. The revisions make clear that non-federal entities do not have the discretion to spend federal funds as they see fit; they must follow the rules that protect nonprofits.

Additional Proposed Changes

In other changes, the proposed rules would allow greater flexibility under procurement standards, implement standard data elements across agencies and grants, promote the collection of data in machine-readable formats, and strengthen end-of-grant closeout procedures and enforcement.

Submitting Public Comments

Pursuant to the Administrative Procedures Act, OMB invites the public to review the proposed regulations and submit comments at https://www.regulations.gov/comment?D=OMB_FRDOC_0001-0262. Comments are due on or about **March 23, 2020**.