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Tuesday, August 16, 2016

Department of Health and Human Service

Health and Human Service Grant Regulation: 45 CFR C.F.R. Part 75

Submission to: www.regulations.gov

Re: Proposed Rulemaking: RIN 0991-AC06, Published at: 81 Federal Register 45270

On behalf of the Native American Finance Officers Association (NAFOA), we respectfully submit comments regarding the Department of Health and Human Services (HHS) recently proposed regulations (RIN 0991-AC06) published at 81 Federal Register 45270. This proposed rulemaking would add new regulatory requirements to Indian Self-Determination and Education Assistance Act (ISDEAA) self-determination contracts and self-governance compacts entered into by tribes and tribal organizations by extending audit requirements and cost principles currently applicable to all HHS federal funds. We strongly recommend that the HHS exempt tribal health programs from these general grant management rules.

NAFOA is a national tribally-led organization representing over 95 tribal governments throughout the United States and many more professionals that provide crucial financial management services to Indian Country. NAFOA advocates for sovereignty, sound economic and fiscal policy, develops training programs in financial management, and convenes tribal leadership, experienced professionals, and economic partners to meet the challenges of growth and change.

NAFOA has raised HHS' proposed rule to our community. From this feedback, NAFOA is submitting comments in reference to RIN 099-1AC06.

1. Meaningful Consultation

The White House issued a memorandum in November of 2009 stating its commitment to honor the “unique legal and political relationship with Indian tribal governments” through “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications” pursuant to Executive Order 13175.

In an effort to ensure tribal government interests were considered in both the development, and later implementation of the Uniform Guidance, NAFOA, Indian tribes, and other organizations met with the Office of Management and Budget (OMB) and federal agencies several times over the past four years as the Uniform Guidance was being developed and as federal agencies began adopting the final guidance. This collaborative engagement and consultation with Indian tribes has led to the publication of the Uniform Guidance and agency implementation of that guidance. Both have thus far, taken into consideration the unique relationship between the federal government and Indian tribes, while still meeting the mission of the Administration of improving delivery, management, coordination, and accountability of federal grants and cooperative agreements.

NAFOA and its community are united in our disappointed with the HHS’ decision to develop federal policies without consultation or consideration of how the OMB developed the Uniform Guidance. In particular, HHS’ proposed rule has direct and specific tribal implications throughout and specifically as it pertains to potential conflict remedies (§ 75.505 sanctions enforceable through remedies in § 75.371).

2. The Proposed Rule Violates the ISDEAA and the ISDEAA Regulations

The general HHS federal funding remedies for non-compliance in the HHS proposed grant rules violates the ISDEAA. During the development of the Uniform Guidance, the OMB included language in 2 CFR § 200.101(b)(3) to make clear that other than the Single Audit Act, where a provision in the Uniform Guidance conflicts with the ISDEAA, that the ISDEAA provision shall prevail and govern. Instead of applying this clear, overarching principle to the proposed rule, HHS does the opposite and creates a new regulatory framework that, in part, conflicts with the ISDEAA.

The proposed rule violates ISDEAA by allowing the Secretary to apply the remedies for non-compliance in §75.371 to ISDEAA contracts, compacts, and funding agreements, including:

- (a) Temporarily withhold cash payments pending correction of the deficiency by the non-federal entity or more severe enforcement action by the HHS awarding agency or pass-through entity.
- (b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action of compliance.

- (c) Wholly or partly suspend (suspension of award activities) or terminate the federal award.
- (d) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and HHS awarding agency regulations at 2 CFR part 376.
- (e) Withhold further federal awards for the project or program.
- (f) Take other remedies that may be legally available.

The sanctions in § 75.371 clearly contradict the ISDEAA. For instance, 25 U.S.C. § 450j-l(f) bars any action related to disallowance of costs made over one year after the Secretary receives the tribal government's audit. Additionally, § 450j-l (l) precludes these types of remedies, and provides that the Secretary may only suspend, withhold, or delay payment of funds for a period of 30 days beginning on the date the Secretary makes a determination that a tribe or tribal organization failed to substantially carry out a self-determination contract without cause.

The Secretary must also provide the tribe or tribal organization with reasonable advance notice, technical assistance, and a hearing on the record not later than 10 days after the date of such a determination. Further, section 1(e)(2) of the model contract and § 450m-1(b) of the ISDEAA preclude unilateral modifications of self-determination contracts to impose new conditions, and under §450m, self-determination contracts may only be rescinded and the contracted programs reassumed, based upon (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons, or (2) gross negligence or mismanagement of contract funds.

3. The ISDEAA Restricts the Secretary's Rulemaking Authority to Regulate ISDEAA Contracts, Compacts, and Funding Agreements

HHS' proposed rulemaking does not meet ISDEAA statutory requirements and exceeds the Secretary's rulemaking authority delegated in the ISDEAA. Section 450k(a)(1) of the ISDEAA restricts the Secretary's rulemaking authority to regulate self-determination contracts by providing that the Secretary not promulgate any regulation relating to self-determination contracts, or the approval, award, or declination of such contracts. Section 450k(c) of the ISDEAA authorizes the Secretary, with the participation of Indian tribes and tribal organizations, to revise or amend ISDEAA Title I regulations (controlling self-determination contracts), provided that prior to issuance, the Secretary: (1) present the proposed revisions to certain congressional committees; (2) consult with national and regional Indian organizations; and (3) publish the proposed revisions in the Federal Register 60 days prior to their effective date.

Section 458aaa-16 of the ISDEAA governs the rulemaking authority of the HHS Secretary to regulate self-governance compacts and funding agreements entered into pursuant to Title V of the ISDEAA. Section 458aaa-16 sets strict timelines for promulgation of

regulations and requires that the Secretary utilize negotiated rulemaking procedures. HHS' proposed rulemaking violates these provisions of Title V and its implementing regulations.

4. The ISDEAA Precludes Application of Grant and Cooperative Agreement Rules to ISDEAA Contracts, Compacts, and Funding Agreements

Section 450e-1 of the ISDEAA provides that the requirements of the Federal Grant and Cooperative Agreement Act (FGCA), 31 U.S.C. § 6301, et seq. shall not apply to self-determination contracts. The purpose of the FGCA, described in § 6301, is to prescribe criteria for federal agencies to use in selecting the appropriate legal instrument (procurement contracts, grants, or cooperative agreements) in making federal awards; and also to promote competition in making awards through procurement contracts, grants, or cooperative agreements.

Self-determination contracts are not procurement contracts. Nor are they grants and cooperative agreements. Rather, § 450(l) of the ISDEAA contains a required model self-determination contract that must be used by the Secretary and tribes and tribal organizations. Entering into a self-determination contract is mandatory under § 450f(a) of the ISDEAA, unless the Secretary declines under specific declination criteria. Section 450j(a) of the ISDEAA precludes application of contracting, grant, or cooperative agreement laws and regulations to self-determination contracts, notwithstanding any other provision of law.

In summary, we respectfully ask the HHS to reconsider the proposed rule as it violates the ISDEAA and its implementing regulations. The decision to apply general grant rules to self-determination contracts and self-governance compacts was made without the benefit of tribal input through consultation. These comments represent the common view of a significant number of tribal governments; however, we urge the HHS to carefully consider all comments received by tribal governments and other tribal organizations.

Thank you for your consideration. We look forward to addressing the topics we have raised at your earliest convenience.

Sincerely,



Dante Desiderio, Member of Sappony
Executive Director, NAFOA