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DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 75

RIN 0991-AC06

Health and Human Services Grants Regulation

AGENCY: Department of Health and Human Services; Office of the Assistant Secretary for Financial Resources, Division of Grants, Office of Grants Policy, Oversight, and Evaluation.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) proposes changes to the Department of Health and Human Services' (HHS) adoption of the Office of Management and Budget's (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards ("Uniform Administrative Requirements") published on December 19, 2014 (79 FR 75871) and the technical amendments published by HHS on January 20, 2016 (81 FR 3004). HHS codified the OMB language, with noted modifications as explained in the preamble to the December promulgation, in 45 CFR part 75. The HHS-specific modifications to the Uniform Administrative Requirements adopted prior regulatory language that was not in conflict with OMB's language, and provided additional guidance to the regulated community. Unlike all of the other modifications to the Uniform Administrative Requirements, these proposed changes, although based on existing law or HHS policy, were not previously codified in regulation. This NPRM seeks comments on these important proposed regulatory changes.

DATES: To be assured consideration, comments must be received at the address provided below, no later than 5 pm on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: In commenting, please refer to file code 0991-AC06. Because of staff and resource limitations, comments must be submitted electronically to www.regulations.gov.

Follow the “Submit a comment” instructions.

FOR FURTHER INFORMATION CONTACT: Dr. Audrey Clarke at HHS at 202-720-1908.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. We post all comments received before the end of the comment period on the following website as soon as possible after they have been received:

<http://regulations.gov>. Follow the search instructions on that website to view the public comments.

Background:

This NPRM proposes changes to the HHS’s adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published on December 19, 2014 (79 FR 75871) and the technical amendments published by HHS on January 20, 2016 (81 FR 3004). HHS codified the OMB language, with noted modifications, in 45 CFR part 75. Unlike all of the other modifications to the Uniform Administrative Requirements, these proposed changes, although based on existing law or HHS policy, were not previously codified in regulation. This NPRM seeks comments for these important regulatory changes.

In order to give full effect to other important government-wide initiatives, HHS is proposing further amendments at this time, which HHS intends to finalize as soon as possible. HHS proposes several additional changes to the codification of 2 CFR part 200 in 45 CFR part 75. First, HHS proposes to add language to 45 CFR 75.102, clarifying that the audit requirements and cost principles apply to the Indian Self Determination and Education Contracts by subparts E and F including § 75.505 Sanctions for noncompliance, and that certain other sections apply to ISDEAA contracts and compacts.

This made sense to me that clarification may be needed since ISDEAA refers to the old circulars that are no longer applicable and to help understand which section of the new Uniform Guidance would replace the references to the old circulars.

Notably, the ISDEAA itself specifies that contracts and compacts awarded pursuant to the ISDEAA are subject to the Single Audit Act and OMB Circulars A-133, A-87, and A-122 and that ISDEAA contracts are not subject to federal grant and cooperative agreement requirements. 25 U.S.C. 450c(f), 458aaa-5(c). In order to clarify how the Uniform Administrative Requirements interact with the prior-enacted Federal statute, and to minimize confusion regarding applicability, HHS has determined that this clarification is required. This will additionally ensure that Indian tribes and tribal organizations are fully apprised of their rights and responsibilities. Although HHS considers this amendment to be a requirement of existing statute and regulation, HHS proposes this change with notice and an opportunity for comment to ensure that the regulated community is aware of this clarification.

In addition, HHS proposes to add language to clarify the meaning of disallowed cost as used in 25 U.S.C. 450j-1(f) to reflect that the meaning must adhere to the audit requirements of 45 CFR part 75, subpart F. Because subpart F applies to ISDEAA contracts and compacts, and the ISDEAA contains a stringent time limitation on certain claims pursuant to the Single Audit Act

I don't know enough about the ISDEAA disallowed cost requirements to understand what impact this has.

Amendments of 1996 (31 U.S.C. 7501-7507), HHS proposes to clarify that the scope of the time limitation applies only to cost disallowances arising under such Act, and not to other claims or disallowances identified through other audits or investigations. Without the addition of this clarifying language a different interpretation of the time limitation (which has been adopted in a few isolated judicial and administrative cases) would place additional administrative burdens on the Indian Health Service and entities holding ISDEAA contracts and compacts by compelling the government and the entities to perform burdensome and intrusive program compliance reviews in addition to the annual single audit required by the Single Audit Act. HHS believes the proposed language avoids imposing unreasonable burdens on the government and tribes and limits the need for yearly program compliance reviews.

Second, HHS proposes two changes to 45 CFR 75.300. First, HHS is codifying a prohibition in the provision of services of discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity. This provision codifies for all HHS service grants what is already applicable for all HHS service contracts, as required by the HHS Acquisition Regulation (HHSAR) 352.237-74. The HHSAR provision makes explicit HHS's non-discrimination policy when obligating appropriations for solicitations, contracts and orders that deliver service under HHS's programs directly to the public. In order to ensure that this same provision applies equally to grants, HHS proposes an addition to make this explicit in the grants context.

This provision does not apply to funding under the Temporary Assistance for Needy Families Program (TANF) (title IV-A of the Social Security Act, 42, U.S.C. 601-619). The TANF statute, 42 U.S.C. 608(d), already identifies the nondiscrimination provisions that can be applied to TANF.

In addition, HHS is codifying its implementation of the decisions in U.S. v. Windsor, 570 U.S. ___ (2013), 133 S.Ct. 2675 and Obergefell v. Hodges, 576 U.S. ___ (2015), 135 S.Ct. 2584. The HHS codification of its interpretation of these Supreme Court decisions ensures that same-sex spouses, marriages, and households are treated the same as opposite-sex spouses, marriages, and households in terms of determining beneficiary eligibility or participation in grant-related activities.

Because these two codifications are being proposed for consistency with law and current HHS policy, HHS believes that they are non-controversial, but nonetheless requests public comment. Third, HHS is proposing to clarify the language currently codified in 45 CFR part 75 regarding the applicability to states of certain payment provisions. Because the current language applies the provisions of Treasury–State Cash Management Improvement Act agreements and default procedures codified at 31 CFR part 205 and TM 4A-2000, and such agreements may not contain specific provisions addressed by 45 CFR 75.305, HHS seeks to modify the language to ensure clarity. In doing so, to the extent that the governing provisions are silent as to the payment provisions described in the Uniform Administrative Requirements, there should be no effect on states, as they had been subject to these same provisions pursuant to 45 CFR 92.21. However, HHS proposes the clarification so that all states are aware of the necessity to, for example, expend refunds and rebates prior to drawing down additional grant funds.

Fourth, HHS is proposing to amend 45 CFR 75.365, related to restrictions on public access to records, in order to implement the President’s Executive Order 13,642 (May 9, 2013), and corresponding law. See, e.g. <http://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government->, and Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2014,

Pub. L. 113-76, Div. H, Sec. 527. HHS proposes to codify permissive authority for HHS awarding agencies to require public access to manuscripts, publications, and data produced under an award, consistent with applicable law.

Fifth, HHS is proposing to amend 45 CFR 75.414(c) to add a provision to restrict indirect cost rates for certain grants. It is long-standing HHS policy to restrict training grants to a maximum eight percent indirect cost rate. HHS proposes additionally to impose this same limitation on foreign organizations and foreign public entities, which typically do not negotiate indirect cost rates. In the proposed rule, American University, Beirut, and the World Health Organization are exempted specifically from the indirect cost rate limitation because they are eligible for negotiated facilities and administration (F&A) cost reimbursement. This restriction on indirect costs, as indicated by 45 CFR 75.101, flows down to subawards and subrecipients.

Finally, HHS proposes a new selected item of cost for codification in the cost principles at 45 CFR 75.477, regarding shared responsibility payments. As HHS has already announced in policy for the Ryan White HIV/AIDS Program, any payments or assessments imposed on an individual or individuals pursuant to 26 U.S.C 5000A(b) as a result of any failure to maintain minimum essential coverage as required by 26 U.S.C. 5000A(a), are not allowable costs under a grant. See HAB Policy Notice 13-04, at 2-3;

<http://hab.hrsa.gov/manageyourgrant/pinspals/pcn1304privateinsurance.pdf>. Because this is a sound public policy requirement for all grants, not just the Ryan White HIV/AIDS Program grants, HHS proposes to codify this provision in the Uniform Administrative Requirements.

Furthermore, HHS proposes to adopt the same stance with regard to payments for failure to offer health coverage to employees. Because the provision codified at 26 USC 4980H has not yet been

enforced against any employers, HHS has not had the need previously to announce a stance on this issue. HHS does so now, and seeks comments from the public.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1), HHS reviewed this NPRM and determined that there are no new collections of information contained therein.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that an agency provide a final regulatory flexibility analysis or to certify that the rule will not have a significant economic impact on a substantial number of small entities. This NPRM aligns 45 CFR part 75 with various regulatory and statutory provisions, implements Supreme Court decisions, and codifies long-standing policies thus clarifying and enhancing the provisions in HHS's interim final guidance issued December 19, 2014, and amended on January 20, 2016. In order to ensure that the public receives the most value, it is essential that HHS grant programs function as effectively and efficiently as possible, and that there is a high level of accountability to prevent waste, fraud, and abuse. The proposed additions provide enhanced direction for the public and will not have a significant economic impact beyond HHS's current regulations.

Executive Order 12866 Determination

Pursuant to Executive Order 12866, HHS has designated this NPRM to be economically non-significant. This rule is not being treated as a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. 1532) requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. HHS has determined that this NPRM will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, HHS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 13132 Determination

HHS has determined that this NPRM does not have any Federalism implications, as required by Executive Order 13132.

Sylvia M. Burwell,

Secretary,

Department of Health and Human Services.

List of Subjects

45 CFR Part 75, Accounting, Administrative practice and procedure, Cost principles, Grant programs, Grant programs-health, Grants administration, Hospitals, Indians, Nonprofit organizations reporting and recordkeeping requirements, and State and local governments.

For the reasons set forth in the preamble, part 75 of title 45 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for 45 CFR part 75 continues to read as follows:

Authority: 5 U.S.C. 301.

2. Amend § 75.101 by adding paragraph (f) to read as follows:

§ 75.101 Applicability.

* * * * *

(f) Section 75.300(c) does not apply to the Temporary Assistance for Needy Families Program (title IV-A of the Social Security Act, 42 U.S.C. 601-619).

3. Amend § 75.102 by adding paragraph (e) to read as follows:

§ 75.102 Exceptions.

* * * * *

(e)(1) Indian tribes and tribal organizations carrying out a compact or contract under the ISDEAA must comply with Subpart E, Cost Principles, and Subpart F, Audit Requirements, including § 75.505 Sanctions, enforceable through § 75.371 Remedies for noncompliance. References to cost principles and audit requirements in the ISDEAA and its implementing regulations, including OMB Circulars A-87, A-122, and A-133 (which were superseded by 2 CFR 200), shall be deemed to be references to Subparts E and F. Except for statutorily mandated grants added to a funding agreement in accordance with 42 CFR Part 137, Subpart F, certain

sections of this Part, applicable to grants and cooperative agreements, do not apply to ISDEAA contracts and compacts, including 45 CFR 75.111, 75.112, and 75.113 and Subparts C and D.

(2) Cost disallowances to which the limitation on remedies under 25 U.S.C. § 450j-1(f) applies shall include only disallowed costs that are identified through a Single Agency Audit conducted pursuant to the Single Audit Act and subject to the requirements of Subpart F, and shall not include claims or disallowances identified through other audits or investigations.

4. Amend § 75.300 by adding paragraphs (c) and (d) to read as follows:

§ 75.300 Statutory and national policy requirements.

* * * * *

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

(d) In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

5. Revise § 75.305(a) to read as follows:

§ 75.305 Payment.

(a)(1) For states, payments are governed by Treasury-State CMIA agreements and default procedures codified at 31 CFR part 205 and TFM 4A-2000 Overall Disbursing Rules for All Federal Agencies.

(2) To the extent that Treasury-State CMIA agreements and default procedures do not address expenditure of program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds, such funds must be expended before requesting additional cash payments.

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6. Revise § 75.365 to read as follows:

§ 75.365 Restrictions on public access to records.

Consistent with section 75.322 of this part, HHS awarding agencies may require recipients to permit public access to manuscripts, publications, and data produced under an award. However, no HHS awarding agency may place restrictions on the non-Federal entity that limit public access to the records of the non-Federal entity pertinent to a Federal award identified in sections 75.361 through 75.364, except for protected personally identifiable information (PII) or when the HHS awarding agency can demonstrate that such records will be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) or controlled unclassified information pursuant to Executive Order 13556 if the records had belonged to the HHS awarding agency. The Freedom of Information Act (5 U.S.C. 552) (FOIA) does not apply to those records that remain under a non-Federal entity's control except as required under § 75.322. Unless required by Federal, state, local, or tribal statute, non-Federal entities are not required to permit public access to their records identified in sections 75.361 through 75.364. The non-Federal entity's records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

7. In § 75.414(c)(1) add paragraphs (c)(1)(i) through (iii):

§ 75.414 Indirect (F&A) costs.

* * * * *

(c)(1) * * *

(i) indirect costs on training grants are limited to a fixed rate of eight percent of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of \$25,000;

(ii) indirect costs on grants awarded to foreign organizations and foreign public entities and performed fully outside of the territorial limits of the U.S. may be paid to support the costs of compliance with federal requirements at a fixed rate of eight percent of MTDC exclusive of tuition and related fees, direct expenditures for equipment, and subawards in excess of \$25,000; and,

(iii) negotiated indirect costs may be paid to the American University, Beirut, and the World Health Organization.

* * * * *

8. Add § 75.477 to read as follows:

§ 75.477 Shared Responsibility Payments

(a) *Payments for failure to maintain minimum essential health coverage.* Any payments or assessments imposed on an individual or individuals pursuant to 26 USC 5000A(b) as a result of any failure to maintain minimum essential coverage as required by 26 USC 5000A(a) are not allowable expenses under Federal awards from an HHS awarding agency.

(b) *Payments for failure to offer health coverage to employees.* Any payments or assessments imposed on an employer pursuant to 26 USC 4980H as a result of the employer's failure to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan are not allowable expenses under Federal awards from an HHS awarding agency.

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