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PUBLIC CONTRACTS

Annual Review
Grants
Supplementary Materials

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OFFICE OF MANAGEMENT AND BUDGET

2 CFR Parts 25, 170, 183, and 200

Guidance for Grants and Agreements

ACTION: Final guidance.

SUMMARY: The Office of Management and Budget (OMB) is revising sections of OMB Guidance for Grants and Agreements. This revision reflects the foundational shift outlined in the President's Management Agenda (PMA) to set the stage for enhanced result-oriented accountability for grants. This guidance is reflects the Administration's focus on improved stewardship and ensuring that the American people are receiving value for funds spent on grant programs. The revisions are limited in scope to support implementation of the President's Management Agenda, Results-Oriented Accountability for Grants Cross-Agency Priority Goal (Grants CAP Goal) and other Administration priorities; implementation of statutory requirements and alignment of these sections with other authoritative source requirements; and clarifications of existing requirements in particular areas within these sections.

DATES: These revisions to the guidance are effective November 12, 2020, except for the amendments to §§ 200.216 and 200.340, which are effective on August 13, 2020.

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SUPPLEMENTARY INFORMATION:

Background and Objectives

In 2013, OMB partnered with the Council on Financial Assistance Reform (COFAR) to revise and streamline guidance to develop the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) located in title 2 of the Code of Federal Regulations (2 CFR part 200) (79 FR 78589; December 26, 2013). The intent of this effort was to simultaneously reduce administrative burden and the risk of waste, fraud, and abuse while delivering better performance on behalf of the American people. Implementation of the Uniform Guidance became effective on December 26, 2014 (79 FR 75867, December 19, 2014) and must be reviewed every five years in accordance with 2 CFR 200.109.

Based on feedback and ongoing engagement with the grants management community, the Administration established the Results-Oriented Accountability for Grants Cross Agency Priority Goal (Grants CAP Goal) in the President's Management Agenda on March 20, 2018 (available at: *https://www.performance.gov/CAP/grants/*). The Grants CAP Goal recognizes that grants managers report spending a disproportionate amount of time using antiquated processes to monitor compliance. Efficiencies could be gained from modernization and grants managers could instead shift their time to analyze data to improve results. To address this challenge, the Grants CAP Goal Executive Steering Committee (ESC), which reports to the Chief Financial Officer's Council (CFOC), has identified four strategies to work toward maximizing the value of grant funding by developing a risk-based, data-driven framework that balances compliance requirements with demonstrating successful results for the American taxpayer.

1. Strategy 1: Operationalize the Grants Management Standards
2. Strategy 2: Establish a Robust Marketplace of Modern Solutions
3. Strategy 3: Manage Risk
4. Strategy 4: Achieve Program Goals and Objectives

The revisions to 2 CFR support these four strategies. In support of Strategies 1 and 2, OMB is implementing changes throughout 2 CFR to modernize reporting by recipients of Federal grants by requiring Federal agencies to adopt standard data elements for the information recipients are required to report (available at: *https://ussm.gsa.gov/fibf/*). This adoption will enable technology solutions to better manage the data the recipients report to the Federal government. These changes also support implementation of the Grants Reporting Efficiency and Agreements Transparency Act of 2019 (GREAT Act). OMB is also implementing revisions to strengthen the governmentwide approach to performance and risk, to support efforts under Strategies 3 and 4 by encouraging agencies to measure the recipient's performance in a way that will help Federal awarding agencies and non-Federal entities to improve program goals and objectives, share lessons learned, and spread the adoption of promising performance practices.

OMB is also revising 2 CFR to implement relevant statutory requirements. These revisions include requirements from several National Defense Authorization Acts (NDAAs) and the Federal Funding Accountability and Transparency Act (FFATA), as amended by the Digital Accountability and Transparency Act (DATA Act).

Finally, OMB is implementing revisions to 2 CFR to clarify areas of misinterpretation. The revisions are intended to reduce recipient burden by improving consistent interpretation. OMB consulted and collaborated with agency representatives identified by the Grants CAP Goal ESC to support the implementation of these revisions. OMB also solicited feedback from the broader Federal financial assistance community by publishing the proposed changes to 2 CFR in the **Federal Register** for a sixty (60) day public comment period (*https://www.federalregister.gov/d/2019-28524*). OMB received 215 submissions with over 1,200 comments from the public, around 1,200 comments from Federal agencies, and around 100 comments from the Council of the Inspectors General on Integrity and Efficiency (CIGIE) Grant Reform Workgroup for a total of over 2,500 comments. OMB reconvened agency representatives to review the comments and make changes to the proposed revisions as appropriate.

In summary and as discussed further in the sections below, OMB is revising 2 CFR parts 25, 170, and 200. Additionally, OMB is adding part 183 to 2 CFR to implement Never Contract with the Enemy. The sections are revised within the following scope. Comments received that were out of scope for the revision were not accepted by OMB.

I. To support implementation of the President's Management Agenda Results-Oriented Accountability for Grants CAP Goal and other Administration priorities;

II. To meet statutory requirements and to align with other authoritative source requirements; and

III. To clarify existing requirements.

I. Support Implementation of the President's Management Agenda and Other Administration Priorities

A. Emphasizing Stewardship and Results-Oriented Accountability for Grant Program Results

The President's Management Agenda, Results-Oriented Accountability for Grants CAP goal is working toward shifting the balance between compliance and performance while reducing burden. Agencies are encouraged to promote promising performance practices that support the achievement of program goals and objectives. Many Federal agencies are working together to innovate and develop a risk-based approach that incorporates performance to achieve

results-oriented grants (where applicable). By shifting the focus to the balance between performance and compliance, agencies may have the opportunity to streamline burdensome compliance requirements for programs that demonstrate results. To support this goal, OMB is publishing revisions in multiple sections of the guidance that together emphasize the importance of focusing on performance to achieve program results throughout the Federal award lifecycle.

The provisions that were revised to improve the governmentwide approach to performance and risk emphasize stewardship and results-oriented grant making. Revisions to 2 CFR 200.102 *Exceptions* encourages Federal awarding agencies to apply a risk-based, data-driven framework to alleviate select compliance requirements for programs that demonstrate results. 2 CFR 200.202 *Program planning and design* highlights the importance of developing a strong plan and design to set the stage for demonstrating program results. 2 CFR 200.205 *Federal awarding agency review of merit proposals* strengthens the merit review process which is linked to 2 CFR 200.301 *Performance measurement* requiring Federal awarding agencies to measure recipient performance, which is derived from program planning and design (§ 200.202). Performance information focused on results must be made available to recipients in the solicitation and in the award, which is reflected in 2 CFR 200.211 *Information contained in a Federal award.* Award recipients must also be aware of termination provisions in 2 CFR 200.340 *Termination* and reinforced in 2 CFR 200.211 *Information contained in a Federal award,* which are linked to performance goals of the program (§ 200.301). Revisions to 2 CFR 200.413 *Direct costs* were also made to include evaluation costs as an example of a direct cost, which demonstrates program results.

Revisions to 2 CFR 200.202 *Program planning and design* develops a new provision. This section formalizes a requirement that are already expected of Federal awarding agencies to develop a strong program design by establishing program goals, objectives, and indicators, to the extent permitted by law, before the applications are solicited. The development of 2 CFR 200.202 emphasizes the importance of sound program design as an essential component of performance management and program administration. Ideally, program design takes place before an agency drafts related projects. This enables Federal agency leadership and employees to codify program goals, objectives, and intended results before specifying the goals and objectives of in a solicitation. A well-designed program has clear goals and objectives that facilitate the delivery of meaningful results, whether a new scientific discovery, positive impact on citizen's daily life, or improvement of the Nation's infrastructure. Well-designed programs also represent a critical component of an agency's implementation strategies and efforts that contribute to and support the longer-term outcomes of an agency's strategic plan. OMB encourages Federal awarding agencies to reference the ''Managing for Results: The Performance Management Playbook for Federal Awarding Agencies'' for promising performance practices throughout the Federal award lifecycle, including steps to develop a strong program plan and design (*www.performance.gov/CAP/grants/*).

Program design elements may include a problem or needs statement, goals and objectives; a logic model depicting the program's structure; program activities; a theory or theories of change and the evidence supporting them; performance and other indicators to measure program accomplishments and find ways to improve, set priorities, and identify targets of opportunity. In addition, it may include use or intended use of independently available sources of data, development and support of learning communities which may benefit from a shared understanding of promising practices and collaboration on common challenges and opportunities, and a system to periodically review award selection criteria.

OMB is revising to 2 CFR 200.205 *Federal awarding agency review of merit proposals,* 2 CFR 200.203 *Requirement to provide public notice of Federal financial assistance programs* and § 200.204 *Notices of funding opportunities* to strengthen merit review, public notice of Federal financial assistance programs, and the notices of funding opportunities to further the goals of results-oriented grantmaking. These changes require Federal awarding agencies to extend their merit review process to discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications.

Additional language was included to articulate an explanation of the merit review process that Federal awarding agencies are expected to follow. Further, Federal awarding agencies are required to periodically review their Federal award merit review process. These changes support the Administration's priority to ensure a fair and transparent process for the selection of award recipients and supports efforts under the President's Management Agenda to ensure that Federal awards are designed to achieve program goals and objectives.

Changes to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants* allow Federal awarding agencies to adjust requirements when a risk-evaluation indicates that it may be merited. Changes are included in 2 CFR 200.211 *Information contained in a Federal award* and 2 CFR 200.301 *Performance measurement* further emphasize existing requirements for requiring Federal awarding agencies to provide recipients with clear performance goals, indicators, targets, and baseline data. OMB is adding language to § 200.102 *Exceptions* to emphasize that Federal awarding agencies are encouraged to request exceptions to certain provisions of 2 CFR part 200 in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. OMB recognizes that Federal financial assistance program goals and their intended results will differ by type of Federal program. For example, criminal justice grant programs may focus on specific goals such as reducing crime, basic scientific research grant programs may focus on expanding knowledge, and infrastructure projects may fund building or infrastructure projects.

Related to the above changes that aim to strengthen program planning and Federal award terms and conditions, OMB is revising §§ 200.211 *Information contained in a Federal award* and 200.340 *Termination* to strengthen the ability of the Federal awarding agency to terminate Federal awards, to the greatest extent authorized by law, when the Federal award no longer effectuates the program goals or Federal awarding agency priorities. Federal awarding agencies must clearly and unambiguously articulate the conditions under which a Federal award may be terminated in their applicable regulations and in the terms and conditions of Federal awards. The intent of this change is to ensure that Federal awarding agencies prioritize ongoing support to Federal awards that meet program goals. For instance, following the issuance of a Federal award, if additional evidence reveals that a specific award objective is ineffective at achieving program goals, it may be in the government's interest to terminate the Federal award. Further, additional

evidence may cause the Federal awarding agency to significantly question the feasibility of the intended objective of the award, such that it may be in the interest of the government to terminate the Federal award. OMB is also eliminating the termination for cause provision because this term is not substantially different than the provision allowing Federal awarding agencies to terminate Federal awards when the recipient fails to comply with the terms and conditions.

In addition, OMB is expanding the definition of fixed amount awards in § 200.1 to allow Federal awarding agencies to apply the provision to both grant agreements and cooperative agreements.

The revisions in 2 CFR 200.301 emphasize that agencies are encouraged to measure recipient performance to improve program goals and objectives, share lessons learned, and spread the adoption of promising practices. While understanding that grant program goals and their intended results will differ by type of program, the Grants CAP Goal is working to shift the culture of Federal grant making from a heavy focus on compliance to a balanced approach that includes a focus on the degree to which grant programs achieve their goals and intended results. To provide clarity and consistency among Federal awarding agencies, a revision to include program evaluation costs as an example of a direct cost under a Federal award has been included in 2 CFR 200.413 *Direct costs.* Please refer to OMB Circular A–11 for a definition on program evaluation. Evaluation costs are allowed as a direct cost in existing guidance. This language is intended to strengthen this intent and ensure that agencies are applying this consistently.

Agencies are reminded that evaluation costs are allowable costs (either as direct or indirect), unless prohibited by statute or regulation. The work under the Grants CAP goal performance work group emphasizes evaluation as an important practice to understand the results achieved with Federal funding.

200.102 Exceptions

OMB received several comments on this section asking for clarification on the proposed revisions. Some commenters also noted that the addition of the ''or less restrictive requirements'' in 2 CFR 200.102(c) and 200.208 is confusing, redundant and not needed because Federal awarding agencies already have the discretion to impose conditions on the recipient. OMB deliberated upon these comments and ultimately agreed to replace the language ''or less restrictive requirements'' with ''adjust requirements'' within the final guidance. OMB strongly encourages Federal awarding agencies to add or remove requirements by applying a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. One commenter felt that the inclusion of the requirement for agencies to ''apply more restrictive terms and conditions when merited as indicated by a risk evaluation'' did not warrant an exception from OMB and thus did not belong in the exceptions section. OMB concurred with the commenter and moved this language to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants.*

200.202 Program Planning and Design

Many commenters were supportive of this new section and the other revisions related to results-based grant making. Some commenters also thought the proposal could go further to better utilize federal grantees' activities to build and disseminate evidence of what works. One commenter expressed concern that revisions to the performance sections would lead to the unintended consequence of making research look like a contract agreement. OMB provided explicit language to state that performance measures for each program will be different. One commenter expressed concern that this new requirement would add burden. OMB respectfully disagrees, as this requirement is not new and does not add burden. This section reflects activities that were previously implied within 2 CFR and not explicitly included in its own section.

OMB appreciates the commenters who challenged OMB to go even further with the proposal with regards to evidence-building. OMB looks forward to furthering this discussion with stakeholder sessions in fall 2020 and will also consider these proposals in future revisions of 2 CFR. This provision is designed to operate in tandem with evidence-related statutes (*e.g.,* The Foundations for Evidence-Based Policymaking Act of 2018, which emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal government) and related OMB implementation guidance (*e.g.,* OMB Memorandum M–19–23: Phase 1 implementation of the Foundations for Evidence-Based Policymaking Act of 2018. Learning Agendas, Personnel, and Planning Guidance).

200.203 Requirement To Provide Public Notice of Federal Financial Assistance Programs

There were several comments provided in response to the changes made to 2 CFR 200.203. One comment inquired as to why no similar requirements exist within the Uniform Guidance and is applicable to pass-through entities within 2 CFR 200.332. OMB notes that the Federal awarding agency does not have a direct relationship with the subaward recipient; that is the role of the pass-through entity. Mandating application of this requirement would require additional public comment as it would add burden to the process. Further, comments asked for OMB to develop guidance to help ensure that Federal awarding agencies have the appropriate controls in place with respect to their processes for making awarding decisions. OMB rejects this change for this iteration of 2 CFR as it would be a significant change that would require an opportunity for public comment based on the language and requirements imposed. Additionally, some commenters requested for language to be added regarding how often updates are expected. OMB rejects these suggestions as the language references guidance provided by General Services Administration (GSA) in consultation with OMB. That is where the requirement to update each Assistance Listing on an annual basis is specified, and it is not necessary to include this level of detail in 2 CFR 200.203.

200.204 Notice of Funding Opportunities

Commenters observed that the change in terminology from ''competitive'' to ''discretionary'' appears to broaden the requirement of these notices to not just competitive announcements, but also sole source discretionary announcements. Some commenters suggested for the language to be changed back to ''competitive'' and questioned the value of this revision. One commenter requested clarification as to whether or not this new requirement is intended to apply when the discretionary award is non-competitive. Another commenter suggested that it would be burdensome and inefficient to require agencies to have notices of funding opportunities for noncompetitive awards. OMB deliberated these comments and subsequently decided to change this language to reflect discretionary awards that are competed.

200.205 Federal Awarding Agency Review of Merit Proposals

Some of the comments received were from Federal agencies who wanted to know the purpose and the benefits behind the proposed revisions to justify the added burden. There were also concerns about the efficiency of the awarding process if these changes are made. Some commenters asked for clarity on what a systematic review meant and what would classify as ''effective.'' OMB considered all comments and made further revisions to specify that the merit review process should be periodically reviewed as a point of clarity on the process review.

OMB disagrees with the commenters that expressed these revisions will add burden. The purpose of these revisions is to add clarity to the merit review process which should already be occurring and is not a new requirement.

200.206 Federal Awarding Agency Review of Risk Posed by Applicants

As stated in the above section describing the comments received for § 200.102, one commenter felt that the inclusion of the requirement for agencies to ''apply more restrictive terms and conditions when merited as indicated by a risk evaluation'' did not warrant an exception from OMB and thus did not belong in the exceptions section. OMB concurred with the commenter, moved this language to 2 CFR 200.206 *Federal awarding agency review of risk posed by applicants*, and provided revisions to the language to read ''. . . adjust requirements when a risk-evaluation indicates that it may be merited either pre-award or post-award.'' One commenter requested pass-through entities to have access to enter information into the FAPIIS system and require a pass-through entity review as part of the risk assessment process. OMB deliberated this comment and while it is an important topic for discussion, OMB feels the scope of this revision would be too substantial for finalization without receiving additional comments from the public. Thus, OMB respectfully declines this comment. Some commenters requested for OMB to include the requirement for Federal awarding agencies to leverage commercially available data management tools. OMB declines this comment and does not specify tools required for use.

200.208 Specific Conditions

As stated above in 2 CFR 200.102, some commenters were not supportive of the requirement of the language ''or less restrictive requirements'' in 2 CFR 200.102(c) and 200.208. Some commenters described this new language as confusing, redundant and not needed because Federal awarding agencies already have the discretion to impose conditions on the recipient. One commenter applauded OMB's decision to further emphasize the flexibilities afforded to Federal awarding agencies revise or remove certain requirements based on a risk analysis. After deliberation, OMB replaced this language with ''the Federal awarding agency may adjust requirements to a class of Federal awards or non-Federal entities when approved by OMB .....''

200.211 Information Contained in a Federal Award

Some comments asked for clarity on the revisions that were proposed. One clarifying question was the difference between the data point for the ''Total Approved Cost Sharing or Matching, where applicable'' and ''Total Amount of the Federal Award including approved Cost Sharing or Matching.'' These are two completely separate data points which call for the approved cost sharing or matching to be identified, and then the total amount of the Federal award that is approved cost sharing or matching. OMB did not recommend that these were removed. Further, in response to various comments, the language in (a) was streamlined and users are referred to the relevant performance sections for additional information. The data points previously proposed in paragraph (b) related to performance were already captured in paragraph (a), and thus removed from (b). The proposed language for (e) was revised and moved to § 200.105(b) within the guidance. Many comments received suggested revisions that would make the language more prescriptive. Title 2 CFR was written as guidance for a large array of users. If the language is too prescriptive, it doesn't provide sufficient flexibility for use by the large array of users. Additional technical corrections were made for clarity throughout this provision. Revisions were made to § 200.211(c)(1)(iv) to clarify that if the underlying legal authority for a program changes, that may be a reason why there would be no future budget periods under an award.

200.301 Performance Measurement

Some commenters were in support of the revisions to this section. Many commenters provided suggestions for further revisions to the guidance. Several commenters provided suggestions with regards to the use of ''should'' and ''must'' throughout this section. Some commenters wanted the language to be written strongly and use the word ''must'' throughout, others preferred ''should'' and many suggested the use of these words should be consistent throughout this section. Some commenters also expressed the need for OMB to include data quality within this section. OMB concurs with the comments that consistent use of ''must'' and ''may'' should be used in this section. Some commenters also pointed out discrepancies between various performance sections and a few commenters pointed out that there are discrepancies between what is required in 2 CFR 200.211 and 200.301. In response to commenters, OMB re-wrote this section for clarity and consistency.

200.340 Termination

There were several comments received in response to the revisions proposed to this section. The comments can be group into the following discreet categories:

- Concern over arbitrary Federal award termination;
- Adding or editing language for clarity;
- Concern over how Federal awarding agencies will evaluate awards with long-term outcomes;
- Request further OMB guidance; and
- Not relevant.

The largest number of commenters expressed a concern that the proposed language will provide Federal agencies too much leverage to arbitrarily terminate awards without sufficient cause. Several commenters requested OMB reinstate the language, *for cause,* to address this issue. Some commenters requested additional clarity and examples. OMB deliberated upon these requests and decided as written agencies are not able to terminate grants arbitrarily and that it was not appropriate to include examples in 2 CFR for this section. OMB made a technical correction to provide additional clarity. Some commenters expressed concerns over how Federal awarding agencies will evaluate awards with long-term outcomes. One example from the commenter was an environmental program where the performance will require years to measure. The example from the commenter should be determined in coordination with the Federal awarding agency. OMB respectfully declines this comment. Title 2 CFR is intended to be written and used by a large array of stakeholders and thus the language is not intended to be prescriptive, as the commenter has requested. Some commenters requested further OMB guidance on this provision. OMB appreciates the request for additional

guidance and notes that guidance beyond what has been provided in the proposed rule is out of scope for this revision effort. Other comments provided were not relevant to the revisions proposed and thus OMB has rejected these comments.

200.413 Direct Costs

Most comments received for this 2 CFR 200.413 were in agreement of the revisions. The remaining comments were out of scope. Therefore, OMB did not make changes to the revised language. Some commenters requested OMB include additional examples for clarity that the activities are direct costs such as planning and program coordination, data technology, analytics, staff training, data collection, storage, communication of evaluation and analytics, and more. OMB appreciates the request to clarify additional examples as direct costs and would like to expand on this further in future revisions of 2 CFR. OMB does not think it is appropriate to include specific examples within the guidance because it could be unintentionally interpreted to be limited to only that list of items. However, as we think of ways to encourage promising performance practices, OMB would like to discuss this further during stakeholder sessions in the fall 2020.

200.328 Financial Reporting

There were some comments received in response to the revisions made to this provision. One commenter requested that the collection of information be no more frequently than semiannually to reduce burden. OMB declines this comment and notes that it was out of scope because there were no proposed changes to the frequency of financial reporting. One commenter requested that OMB add language to discourage pass-through entities from the practice of requiring more frequent and more detailed financial reporting. After discussion, OMB declines this comment as it is out of scope for this revision but will consider the comment for a future revision of 2 CFR. Several commenters sought clarification on the use of the term ''OMB-designated standards lead.'' Pursuant to the Grant Reporting Efficiency and Agreements Transparency Act of 2019 (GREAT Act), the OMB Director is required to designate a standard-setting agency (*i.e.*, the Executive department that administers the greatest number of programs under which Federal awards are issued in a calendar year). The Executive department designated by OMB as the standard-setting agency assists OMB with execution of the requirements of the GREAT Act.

In response to commenters' requests for clarity on the performance sections of the guidance, OMB moved the financial reporting requirement noted currently in 2 CFR 200.301 *Performance measurement* to 2 CFR 200.328 *Financial reporting.*

200.329 Monitoring and Reporting Program Performance

Several commenters requested clarity regarding the ''OMB-designated standards lead'' and notes that this terminology has been used throughout the guidance. As mentioned above, one commenter also suggested a technical correction to reference the Grant Reporting Efficiency and Agreements Transparency (GREAT) Act for clarity on this designation. One commenter suggested that this provision should be tied together with the closeout provision with regards to the timeframe to submission of reports. OMB concurred with this commenter and made revisions accordingly. One commenter noted concern and confusion regarding the requirement that ''costs must be charged to the approved budget period in which they were incurred.'' The commenter also suggested edits to clarify this requirement. OMB concurred with the commenter and accepted the edits for incorporation into the package.

Appendix I to Part 200—Full Text of the Notice of Funding Opportunity

A number of commenters suggested edits to this section. One commenter suggested including the term ''outcome'' to indicate the end result and also include terms for tracking and determining if that end result is being or has been achieved. OMB agreed with this commenter and made the revisions accordingly. Another commenter suggested that OMB include the requirement for Federal awarding agencies to ensure SAM registration is current before making any advanced payments and/or issuing any reimbursements. OMB disagrees with this recommendation, as this requirements is already stated in 2 CFR 25.205.

B. Expanded Use of the De Minimis Rate

The revision to 2 CFR 200.414(f) expands use of the de minimis rate of 10 percent of modified total direct costs (MTDC) to all non-Federal entities (except for those described in Appendix VII to Part 200—State and Local Government and Indian Tribe Indirect Cost Proposals, paragraph D.1.b). Currently, the de minimis rate can only be used for non-Federal entities that have never received a negotiated indirect cost rate. The use of the de minimis rate has reduced burden for both the non-Federal entities and the Federal agencies for preparing, reviewing, and negotiating indirect cost rates. Since the publication of 2 CFR in 2013, both Federal agencies and non-Federal entities have advocated expansion of the de minimis rate for non-Federal entities that have negotiated an indirect cost rate previously, but for some circumstances, the negotiated rates have expired. The expiration may be due to breaks in Federal relationships and grant funding, or lack of resources for preparing an indirect cost proposal. This change will further reduce the administrative burden for non-Federal entities and Federal agencies and shift more resources toward accomplishing the program mission.

Another revision adds language to 2 CFR 200.414(f) to clarify that when a non-Federal entity is using the de minimis rate for its Federal grants, it is not required to provide proof of costs that are covered under that rate. The 10 percent de minimis 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 minimis rate. Lastly, for transparency purposes, another revision adds a new paragraph (h) to § 200.414 to require that negotiated agreements for indirect cost rates are collected and displayed on a public website.

200.414 Indirect (F&A) Costs

200.414(f)

OMB received several comments that were concerned with awarding a de minimis rate that is higher than a Negotiated Indirect Cost Rate Agreement (NICRA). OMB concurs with the concerns regarding applying a higher de minimis rate in cases where a NICRA rate is lower than 10 percent. However, the regulation states in paragraph (c)(1) that Federal agencies must honor negotiated rates. Additionally, some commenters expressed concern that guidance will be misinterpreted to allow provisional rates to be considered as expired. OMB intends to include provisional rates and added clarifying language to the section in response to these comments. Further, commenters were concerned with a lack of required documentation. OMB concurs with concerns that the language implies source documents rather than the indirect cost rate agreement and altered the language accordingly. There were

several comments that suggested that the Modified Total Direct Cost (MTDC) be used as the base. However, this suggestion is out of the scope of this revision. Additionally, OMB would like to note that Federal agencies must accept the negotiated rate even if it is lower than the de minimis rate.

200.414(h)

OMB appreciated the many comments that supported the proposed requirement to post NICRAs to a public website. There were several comments that cited concerns over the sharing of proprietary information through the posting of NICRA information on a public website. To address these concerns, OMB clarified that the requirement is not for the entire rate agreement and added language to specify the exact information that is requested be provided for a non-Federal entity; the indirect negotiated rate; distribution base; and the rate type. In addition, the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) are excluded. Further, there were several comments that inquired about the applicability of this section. Lastly, there were comments that inquired about who is responsible for making sure this information is publically posted. OMB recognizes this concern and notes that the responsibility of the Federal government will be communicated appropriately.

C. Eliminate References to Non-Authoritative Guidance

To support implementation of E.O. 13892 of October 9, 2019 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication) and to prohibit Federal awarding agencies from including references to non-authoritative guidance in the terms and conditions of Federal awards, OMB proposed changes to § 200.105 *Effect on other issuances*. The proposed change was intended to reduce recipient burden and prevent Federal awarding agencies from imposing non-binding guidance as award requirements for recipients that has not gone through appropriate public notice and comment. The proposed revisions related to eliminating references to non-authoritative guidance were included in 2 CFR 200.211(e) *Information contained in a Federal award.* Some commenters suggested for this requirement to be moved within the guidance to 2 CFR 200.105(b) *Effect on other issuances* for clarity of the policy intent. OMB concurred with the commenter's suggestion and moved the requirement accordingly.

200.105 Effect on Other Issuances

There were several commenters in strong support of this new provision while other commenters expressed concerns regarding the implementation. One commenter mentioned that finalizing this proposal would cause significant difficulties in effective implementation and effectively overseeing programs. OMB appreciates the comments received. To address concerns, the language was re-written to better align with E.O. 13892 and provide clarity.

D. Promoting Free Speech

Several provisions within 2 CFR are revised to align with E.O. 13798 ''Promoting Free Speech and Religious Liberty'' and E.O. 13864 ''Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities.'' These sections include 2 CFR 200.300 *Statutory and national policy requirements,* 200.303 *Internal controls,* 200.339 *Remedies for noncompliance,* and 200.341 *Notification of termination requirement.* These E.O.s advise Federal awarding agencies on the requirements of religious liberty laws, including those laws that apply to grants and provide a policy for free inquiry at institutions receiving Federal grants. The revision to 2 CFR underscores the importance of compliance with the First Amendment.

200.209 Certifications and Representations, 200.300 Statutory and National Policy Requirements, 200.303 Internal Controls, 200.339 Remedies for Noncompliance, 200.341 Notification of Termination Requirement

OMB received several comments in response to this policy proposal. Some commenters supported compliance with the Constitution while other commenters questioned the need to include a reference to the Constitution. OMB appreciates all comments received and after consideration has decided to retain the proposed language within these sections. One comment suggested the removal of the word ''statutory.'' OMB concurred with this recommendation and made the change.

E. Standardization of Terminology and Implementation of Standard Data Elements

OMB is standardizing terms across 2 CFR part 200 to support efforts under the Grants CAP Goal to standardize the grants management business process and data. OMB is replacing the term ''obligation'' to either ''financial obligation'' or ''responsibility'' within the guidance as appropriate, to ensure alignment with DATA Act definitions. OMB is adding changes across the entirety of 2 CFR to ensure consistent use of terms across parts 25, 170, 183, and 200 where possible, relying on 2 CFR part 200 as the primary source. As reflected in the changes, there are instances where the terms within 2 CFR cannot be made consistent. For example, the term ''non-Federal entity'' cannot be consistently defined across 2 CFR: Parts 25 and 170 apply to Federal awards to foreign organizations, foreign public entities, and for-profit organizations, while part 200 only applies to these type of non-Federal entities when a Federal awarding agency elects for part 200 to apply. For definitions that are consistent across 2 CFR parts 25, 170, and 200, revisions have been made to parts 25 and 170 to refer definitions to part 200 as the authoritative source.

The definitions ''Catalog for Federal Domestic Assistance (CFDA) number'' and ''CFDA program title'' have been replaced with the terms ''Assistance Listings number'' and ''Assistance Listings program title'' to reflect the change in terminology.

OMB is also revising several definitions for clarity. For example, the term management decision is revised to emphasize that it is a written determination provided by a Federal awarding agency or pass-through entity.

To promote uniform application of standard data elements in future information collection requests, OMB is also revising 2 CFR 200.207 and 200.328 to reflect that information collection requests must adhere to the standards available from the OMB-designated standards lead. This change further supports OMB Memorandum M–19–16 Centralized Mission Support Capabilities for the Federal Government, which requires that future shared service solutions must adhere to the Federal Integrated Business Framework standards (available at: *https://ussm.gsa.gov/fibf/*).

Further, OMB is revising 2 CFR part 200 to replace the term ''standard form'' with ''common form.'' Some commenters submitted feedback with concerns that the change in terminology would allow agencies to create unique forms with a lack of standardization. OMB did not make any changes to the final language based on these comments. Existing forms widely adopted by Federal awarding agencies that are regularly referred to as standard forms are in fact common forms. For instance, the SF–424 series, SF–425,

and research performance progress report are all common forms/formats. OMB acknowledges that this is a significant change in how the community refers to these forms and will ensure that any future guidance on the adoption of standard data elements clarifies the use of common forms. More information regarding common forms and flexibility under the Paperwork Reduction Act is available at: *https://www.whitehouse.gov/omb/information-regulatory-affairs/federal-collection-information/.* Finally, OMB is reformatting the definitions section of 2 CFR part 200, subpart A—Acronyms and Definitions, by removing the section numbers to facilitate future additions to this section.

Subpart A—Acronyms and Definitions

New Defined Terms

Several commenters sought to clarify existing parts within 2 CFR and grant processes and procedures through the addition of several defined terms under 200.1 *Definitions.* Examples of recommended terms to include were formula grant, program beneficiary/recipient, procurement, administrative costs, for-profit organization, conflict of interest, covered technology, architectural/engineering professional services, Federally-owned property, and demonstration.

In certain cases OMB agrees that additional terms may provide greater clarification to the regulation and the management of Federal financial assistance. OMB may consider the recommended definitions for the suggested terms in future updates to 2 CFR. In other cases, the terms are either not used in 2 CFR or are only applicable to a small number of Federal awarding agencies. OMB declined these recommendation either due to scope, or because they do not align with the intent of this regulation.

Inserting Programmatic Instruction in Definitions

Several commenters recommended inserting programmatic instruction for specific terms, which would provide more guidance for Federal agencies, non-Federal entities, auditors, or others.

OMB considered these comments, but determined that it was inappropriate to include programmatic guidance in the definition of terms for the regulation. The purpose of 2 CFR 200.1 *Definitions* is to provide meaning for specified terms within the regulation; guidance and instruction is more appropriate other parts of 2 CFR.

Modification to Existing Definitions

Several commenters sought to clarify existing definitions by providing technical corrections or clarification statements.

In several cases, OMB agrees that technical corrections are necessary. The updates to these definitions are minor and did not affect the intent of the term. In other cases, the recommendations were either too substantive or did not align with the intent of this update to the regulation. OMB may consider these recommendations in future updates to 2 CFR.

Formatting

Several commenters disagreed with the removal of the numbering of the definitions. The commenters were concerned about the overall changes to the numbering of 2 CFR part 200, which would add burden to updating the non-Federal entities' policies and procedures.

OMB appreciates these concerns, but does not believe that the removal of the definition numbering will generate any significant additional burden on non-Federal entities, because these groups already should regularly review and update their policies and procedures to ensure compliance with Federal, state, and local laws and regulations. This revision is expected to limit future burden for non-Federal entities in the event of new terms are added to this section of part 200, which would change the section's numeration.

Subpart A—Specific Definitions

Compliance Supplement

A number of commenters recommended clarifying the definition of compliance supplement and offered revised wording for the definition. OMB concurred and adapted the definition in consultation with members of the interagency working group. One commenter recommended revising the definition to frame the compliance supplement as the sole source of information for auditors. OMB did not include this recommendation because the compliance supplement is one of the authoritative sources that auditors can use when auditing Federal programs. Other sources include Federal awarding agency and program specific documents.

Contract

One commenter noted that the definition of contract was confusing, while another recommended cross-referencing the Subrecipient and Contractor Determinations subsection (§ 200.331). OMB agreed with this assessment and updated the definition to make it easier to read, understand, and use. Another commenter recommended the addition of mutual aid or intergovernmental agreements to the definition of contract. This change was not considered because it would substantively alter the definition without providing the public the opportunity to comment on the revision.

Cooperative Agreement, Grant Agreement

One commenter recommended specifically explaining ''transfer anything of value'' in the definitions of cooperative agreement and grant agreement. OMB opted to keep the existing language because both definitions cite 31 U.S.C. 6101(3), which provides the scope of the ''transfer of anything of value.'' A commenter recommended further describing substantial involvement in the definition of cooperative agreement. This change was not considered because the Federal awarding agency and the recipient are given the discretion to negotiate this relationship. Another commenter stated that there was a conflict §§ 25.306 and 200.1 associated with the transfer of land or property. OMB disagrees as the two definitions align and are also in alignment with the associated legislation. Through the review of the definitions of cooperative agreement and grant agreement, OMB and members of the working group clarified that the relationship was between the Federal awarding agency and a recipient or a pass-through entity and a subrecipient.

Discretionary, Non-Discretionary Award

Technical edits were made to the definitions of discretionary award and non-discretionary award to provide clarity to the intended definitions.

Federal Interest

Two commenters recommended correcting the formula for determining *Federal interest,* noting that reliance on the Federal share of the total project costs does not appropriately account for the Federal interest in real property, equipment, or supplies. OMB agreed with this recommendation and amended the definition to appropriately rely on the percentage of Federal participation in the total cost of the real property, equipment, or supplies as part of the formula.

Recipient

One commenter recommended amending recipient be inclusive of entities that are not necessarily non-Federal entities such as for-profit and

foreign entities as well as Federal agencies. OMB agreed with this assessment and updated the definition appropriately.

Subsidiary

One commenter recommended replacing non-Federal entity with entity, while another recommended adding ''or controlled'' after owned to be more inclusive of a diversity of organizations that may have subsidiaries. Several other commenters were confused by the reference to the FAR or found it to be redundant, recommending that it be removed from the definition. OMB agreed with these recommended changes to the definition and incorporated them, as appropriate.

Period of Performance, Budget Period, and Renewal

OMB also revised the proposed definitions of period of performance, budget period, and renewal in 2 CFR part 200, as there were a significant number of comments from varying stakeholders indicating that the proposed revised definitions of period of performance, budget period, and renewal created more confusion than clarity. In response, the final rule revises the definitions for these terms to clarify how period of performance, budget period, and renewal operationally relate. Additionally, the final rule revises 2 CFR 200.309 to better describe how the period of performance is modified if there is an extension or termination of a current award. Some commenters expressed concern about the removal of pass-through entities' authority to allow pre-award costs to subrecipients. It was not OMB's intention to remove the pass-through entities' authority to allow pre-award costs to subrecipients. OMB recognizes these concerns and added language to 2 CFR 200.458 for clarification in response to commenters. Further, there were many comments that expressed concern about removing 2 CFR 200.309 from the guidance due to burden with other entities that reference 2 CFR within their own rules and regulations. Including 2 CFR 200.309 in the final publication will eliminate that concern from commenters.

The definition of period of performance and renewal was revised to help clarify that the term period of performance reflects the total estimated time interval between the start of an initial Federal award and the planned end date, and that the period of performance may include one or more budget periods, but the identification of the period of performance does not commit funding beyond the currently approved budget period. The definition of budget period was edited to clarify that recipients are authorized to expend the current funds awarded, including any funds carried forward or other revisions pursuant to 2 CFR 200.308. Further, recipients may only incur costs during the first year budget period until subsequent budget periods are funded based on the availability of appropriations, satisfactory performance, and compliance with the terms and conditions of the award. The definition of renewal was edited to help clarify that a renewal award begins a distinct period of performance that starts contiguous with, or closely following, the end of the expiring award. This change also ensures consistent use of the term for purposes of transparency reporting as required by FFATA.

200.403 Factors Affecting Allowability of Costs

To maintain consistency within the guidance regarding the definition of *Budget Period,* 2 CFR 200.403(h) has been added to clarify that costs must be incurred during the approved budget period and the Federal awarding agency may waive prior written approval to carry forward unobligated balances to subsequent budget periods.

Improper Payment, Questioned Costs

Based on some confusion expressed in comments, the definition of improper payment was revised to accurately reflect how questioned costs, including costs questioned costs identified in audits, are not improper payments until reviewed and confirmed as such.

Internal Controls

Based on some confusion expressed in comments, minor modifications to the definition of internal controls were made to provide greater clarity on the internal controls requirements for non-Federal entities and Federal agencies.

Oversight Agency for Audit

Several commenters expressed confusion with the revision to this definition. Some commenters provided suggested edits for clarity. After deliberation and in response to the commenters, OMB made further edits to this definition for clarity.

Simplified Acquisition Threshold, Micro-Purchase

Multiple commenters were confused by the second paragraph proposed to be added to the definition for *simplified acquisition threshold.* Revisions were made to this paragraph to alleviate confusion and accurately reflect how the simplified acquisition may be determined. Minor technical edits were made to the definition for *micro-purchase,* based on comments, to clarify that the cognizant agency for indirect costs may approve a higher micro-purchase threshold if requested by the non-Federal entity.

F. Support for Domestic Preferences for Procurement

As expressed in Executive Order (E.O) 13788 of April 18, 2017 (Buy American and Hire American) and E.O. 13858 of January 21, 2019 (Executive Order on Strengthening Buy-American Preferences for Infrastructure Projects), it is the policy of this Administration to maximize, consistent with law, the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards. In support of this policy, OMB is adding a new section 2 CFR 200.322 *Domestic preferences for procurement,* encouraging Federal award recipients, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States when procuring goods and services under Federal awards. This Part will apply to procurements under a grant or cooperative agreement.

200.322 Domestic Preferences for Procurement

OMB appreciates the many comments were very supportive of this section. Several comments suggested including language in Appendix II because the proposed new 2 CFR 200.322 includes the requirement that such term be flowed down to all contracts and purchase orders. OMB accepts this change and has made the appropriate edits to the final language. Several comments asked for clarification regarding how preference is given. OMB rejects this change as the language gives Federal awarding agencies the flexibility to adjust their guidance accordingly. Further, another comment suggested to exempt purchases below the micro-purchase threshold from requirements in this section to reduce the burden on non-Federal entities. OMB rejects this suggestion as OMB does not agree with the assessment that an additional burden is being placed. The language did not set a dollar threshold and instead states that domestic preference should be used as appropriate and to ''to the maximum extent practicable.'' One commenter suggested a reference to this section should also be included in *Appendix II to Part 200—Contract Provisions for Non-Federal Entity*

Contracts Under Federal Awards. OMB concurred with this commenter and made the revision accordingly.

G. Changes to the Procurement Standards to Better Target Areas of Greater Risk and Conform to Statutory Requirements

To better target 2 CFR requirements on areas of greater risk consistent with the intent of the Grants CAP Goal, and to align with legislation related to procurement standards, OMB is revising the guidance to increase the micro-purchase threshold from $3,500 to $10,000, raising the simplified acquisition threshold from $100,000 to $250,000, and allowing non-Federal entities to request a micro-purchase threshold higher than $10,000 based on certain conditions. The NDAA 2017 increased the micro-purchase threshold from $3,500 to $10,000 for institutions of higher education, or related or affiliated nonprofit entities, nonprofit research organizations or independent research institutes (41 U.S.C. 1908).

The NDAA 2017 also established an interim uniform process by which these recipients can request, and Federal awarding agencies can approve requests to apply, a higher micro-purchase threshold. Specifically, the NDAA 2017 allowed a threshold above $10,000, if approved by the head of the relevant executive agency and consistent with clean audit findings under chapter 75 of title 31, internal institutional risk assessment, or State law. The NDAA for FY 2018 (NDAA 2018) increased the micro-purchase threshold to $10,000 for all recipients and also increased the simplified acquisition threshold from $100,000 to $250,000 for all recipients. The revisions to § 200.320 outline a permanent process by which non-Federal entities may establish a micro-purchase level above the $10,000 threshold.

A proposal to increase the micro-purchase and simplified acquisition thresholds in the Federal Acquisition Regulation (FAR) was published in the **Federal Register** on October 2, 2019 (84 FR 52420), FAR Case 2018–004. The FAR Rules at 48 CFR part 2, subpart 2.1, were finalized on July 2, 2020 (85 FR 40060, 85 FR 40064) with the effective date of August 31, 2020. In addition, the American Innovation and Competitiveness Act of 2017 (AICA), section 207(b) required that 2 CFR part 200 be revised to conform to the requirements concerning the micro-purchase threshold.

In response to these statutory changes, OMB issued OMB Memorandum M–18–18, Implementing Statutory Changes to the Micro-Purchase and the Simplified Acquisition Thresholds for Financial Assistance (June 20, 2018) which is now incorporated in 200.320. With the final procurement guidance now implemented, OMB Memorandum M–18–18 is rescinded.

200.320 Methods of Procurement To Be Followed

There were nearly 100 comments received relating to this section. Many expressed confusion with the proposed revisions and provided recommendations for clarity. In response, the section was rewritten to incorporate many of the suggestions from commenters.

The following revisions were made to 2 CFR 200.320:

- The procurement types were grouped into three categories: (1) Informal (micro-purchase, small purchase); (2) formal (sealed bids, proposals) and (3) Non-Competitive (sole source)
- The micro-purchase threshold was raised from $3,500 to $10,000
- All non-Federal entities are now authorized to request a micro-purchase threshold higher than $10,000 based on certain conditions that include a requirement to maintain records for threshold up to $50,000 and a formal approval process by the Federal government for threshold above $50,000; and
- The simplified acquisition threshold was raised from $150,000 to $250,000

200.321 Contracting With Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms

Several comments were made regarding this section that were out of scope for the current set of revisions. As such, no changes to the proposed language will be made at this time.

200.317 Procurements by States

One commenter suggested that 2 CFR 200.317 should reference the procurement requirements in 2 CFR 200.322 Domestic preference for procurements, as it is applicable to all non-Federal entities. OMB concurred with the commenter and made revisions accordingly.

200.318 General Procurement Standards

One commenter expressed strong support for the revisions proposed for this provision. Most commenters provided suggested edits for clarity. One commenter provided suggested edits to clarify that the ''. . . non-Federal entity must use its own documented procurement procedures which must conform to applicable State, local, and tribal laws and regulations; and Federal law. In addition, procurements for goods and services that are directly charged to a Federal award must conform to the standards identified in this part.'' OMB agreed with this clarifying revision and incorporated it within 2 CFR 200.318.

200.319 Competition

One commenter expressed support for the revisions to 2 CFR 200.319. Other commenters provided suggested edits for clarity. One commenter asked for clarity of the meaning ''section'' and expressed the entire subpart D should be referenced. OMB declines this comment and notes that the term ''section'' should not be interpreted to mean the entire subpart D and the proposed revisions to 2 CFR 200.319 only adds a new reference to 2 CFR 200.320. This new language in no way infers that the other procurement provisions do not apply. One commenter expressed that it is unclear what ''required'' under an award means. OMB notes that this language is used throughout the document as no such change was made.

H. Emphasis on Machine-Readable Information Format

OMB aims to clarify the methods for collection, transmission, and storage of data in 2 CFR 200.336 to further explain and promote the collection of data in machine-readable formats. A machine-readable format is a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost (44 U.S.C. 3502(18)). The clarification reinforces the machine-readable requirements in *the Foundations of Evidence-Based Policymaking Act of 2018* (Pub. L. 115–435) and accompanying OMB guidance. This requirement also reflects the need to continually evaluate which formats (and structures) maximize accessibility and usability for all stakeholders. Machine-readable formats will also help support the Leveraging Data as a Strategic Asset Cross-Agency Priority Goal (CAP Goal #2) and efforts under the Grants CAP Goal to Build Shared IT Infrastructure.

200.336 Methods for Collection, Transmission, and Storage of Information

OMB received some comments on 2 CFR 200.336 requesting the inclusion of PDFs in the language. OMB declined this suggestion since prescribing a specific format in official guidance was deemed inappropriate.

I. Changes to Closeout Provisions To Reduce Recipient Burden and Support GONE Act Implementation

Based on lessons learned from the implementation of 2 CFR part 200 and the Grants Oversight and New Efficiency Act (GONE Act), OMB is revising 2 CFR 200.344 *Closeout* to support timely closeout of awards, improve the accuracy of final closeout reporting, and reduce recipient burden.

The final language will increase the number of days for recipients to submit closeout reports and liquidate all financial obligations from 90 days to 120 days. This change takes into consideration the challenges faced by pass-through entities with respect to awards that contain a large number of subawards. These recipients must reconcile subawards and submit final reports to Federal awarding agencies within the same 90 day period. Recognizing the need for pass-through entities to receive timely reports from subrecipients to report back to Federal awarding agencies, OMB will continue to require subrecipients to submit their reports to the pass-through entity within 90 days. The intent of this change is to support financial reconciliation, help ease the burden associated with submitting reports for closeout, and promote improved accuracy. However, OMB recognizes that providing additional time may increase the likelihood that non-Federal entities will not submit their final closeout reports. To mitigate this risk, OMB is requiring Federal awarding agencies to report when a non-Federal entity does not submit final closeout reports as a failure to comply with the terms and conditions of the award to the OMB-designated integrity and performance system. Finally, OMB is publishing the requirement of Federal awarding agencies to make every effort to close out Federal awards within one year after the end of the period of performance unless otherwise directed by authorizing statute. The language is intended to promote timely closeout of awards, assist with reconciling closeout activities, and hold recipients accountable for submitting required closeout reports.

200.344 Closeout

Many of the comments in response to revisions to 2 CFR 200.344 were in support of the proposed revisions. The two sections listed below received the highest volume of comments.

200.344(a)

OMB is appreciative of the many commenters who supported the proposed extension of deadlines for the submission of reports. Due to the significant amount of support for the changes, OMB is keeping the language published in the proposed version. OMB also received comments to permit pass-through entities to establish earlier dates, in accordance with existing practice. OMB accepts this recommendation. OMB also received comments relating to final indirect cost rates after the end of the period of performance. OMB rejects these suggestions, as a revised final Federal financial report can be submitted after closeout. Therefore, lengthening the deadline would not have an impact. OMB is making several small changes based on received comments, such as changing ''non-Federal entity'' to ''recipient'' and adding ''or an earlier date as agreed upon by the pass-through entity and subrecipient.''

200.344(i)

OMB received several comments that recommended making the Federal Awardee Performance and Integrity Information System (FAPIIS) entries optional. The intent of the added regulation was to hold recipients accountable and share performance across Federal agencies, which promotes results-oriented grantmaking. Therefore, OMB is finalizing the language that makes entry into FAPIIS mandatory. Further, it should be noted that entry into FAPIIS does not constitute a termination, which OMB has clarified in the final language.

200.345 Post-Closeout Adjustments and Continuing Responsibilities

Some commenters expressed concerns that the language proposed for this provision was too open-ended and the period could extend beyond record retention. OMB concurred with the commenters and made revisions to address these concerns.

J. Changes to Performing the Governmentwide Audit Quality Project

Revisions to 2 CFR 200.513 include a change in the date for the requirement for a governmentwide audit data quality project that must be performed once every 6 years beginning with audits submitted in 2018. This date has been changed to 2021, given the significant changes to the 2019 Compliance Supplement in support of the Grants CAP Goal.

200.513 Responsibilities

Comments in response to the change regarding the assignment of the cognizant agency for audit responsibilities based on the direct funding and total funding were positive and thus OMB did not make changes to the language for the final publication. We clarified that the determination for funding is based the federal award expenditures as reported in the recipient's Schedule of expenditures of Federal Awards (see § 200.510(b)). Commenters in response on the governmentwide project to determine the quality of single audits suggested a delay on such project by a few years due the changes in the 2019 Compliance Supplement regarding the maximum of review for compliance areas. Commenters also suggested the use of current and on-going quality review performed by agencies on single audits to substitute or complement the governmentwide project. We agreed on the suggested timing of the project and have removed the specific date listed in the proposal. OMB will work with the agencies and the single audit stakeholders to determine a future date for the project that is more optimal. OMB added language to address that current quality control review work performed by the agencies can be leveraged for the governmentwide project.

II. Meeting Statutory Requirements and Aligning 2 CFR With Other Authoritative Source Requirements

A. Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment

OMB revised 2 CFR to align with section 889 of the NDAA for FY 2019 (NDAA 2019). The NDAA 2019 prohibits the head of an executive agency from obligating or expending loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems prohibited systems as identified in NDAA 2019. To implement this requirement, OMB is adding a new section, 2 CFR 200.216 *Prohibition on certain telecommunication and video surveillance services or equipment,* which prohibit Federal award recipients from using government funds to enter into contracts (or extend or renew contracts) with entities that use covered telecommunications equipment or services. This prohibition applies even if the contract is not intended to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services. As described in section 889 of the NDAA 2019, covered telecommunications equipment or services includes:

D Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

D For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

D Telecommunications or video surveillance services provided by such entities or using such equipment.

D Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

200.216 Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment

Commenters expressed widespread concerns on the impact and implementation of the statutory requirement. OMB sought to address commenter concerns by re-writing this section to align closely with the law, add a new definition for telecommunications and video surveillance costs, and add a new section 2 CFR 200.471. The final language provides guidance describing the meaning of covered telecommunications as explained in the statute. The language also aligns with the requirements in the statute affecting the financial assistance community to include the prohibition of non-Federal entities from obligating or expending loan or grant funds to (1) procure or obtain, (2) extend or renew a contract to procure or obtain, or (3) enter into a contract (or extend or renew a contract) to procure or obtain, equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system.

Federal awarding agencies are also required by the law to work with OMB to prioritize available funding and technical support to assist affected businesses, institutions and organizations. In addition, the funds must be prioritized as reasonably necessary for affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained. Further, OMB added a new 2 CFR 200.471 *Telecommunication and video surveillance costs* to provide clarity that the telecommunications and video surveillance costs associated with 2 CFR 200.216 are unallowable. A new definition for *telecommunication and video surveillance costs*, which is described in 2 CFR 200.471, has also been added to 2 CFR for clarity.

B. Never Contract With the Enemy

To meet statutory requirements, OMB is adding part 183 to 2 CFR to implement Never Contract with the Enemy, consistent with the fact that the law applies to only a small number of grants and cooperative agreements. Never Contract with the Enemy applies only to grants and cooperative agreements that exceed $50,000, are performed outside the United States, including U.S. territories, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

To implement Never Contract with the Enemy and to reflect current practice, OMB requires Federal awarding agencies to utilize the System for Award Management (SAM) Exclusions and the FAPIIS to ensure compliance before awarding a grant or cooperative agreement. Federal awarding agencies are prohibited from making awards to persons or entities listed in SAM Exclusions (NDAA 2017) pursuant to Never Contract with the Enemy and are required to list in FAPIIS any grant or cooperative agreement terminated due to Never Contract with the Enemy as a Termination for Material Failure to Comply. The revisions also require agencies to insert terms and conditions in grants and cooperative agreements regarding non-Federal entities' responsibilities to ensure no Federal award funds are provided directly or indirectly to the enemy, to terminate subawards in violation of Never Contract with the Enemy, and to allow the Federal Government access to records to ensure that no Federal award funds are provided to the enemy.

The law allows Federal awarding agencies to terminate, in whole or in part any grant, cooperative agreement, or contract that provides funds to the enemy, as defined in the NDAA for FY 2015 (NDAA 2015). This statute applies to procurement as well as to grants and cooperative agreements. OMB coordinated with the procurement community as appropriate before issuing this final guidance, including the roles and responsibilities of the covered combatant command and Federal awarding agencies.

Part 183 Never Contract With the Enemy

Many of the comments focused on aligning the regulation with the authorizing legislation and streamlining and using consistent terms in the regulatory language. OMB concurred with these comments and made the necessary changes to the language. OMB also agreed with several comments suggested the use of ''recipient'' rather than ''non-Federal entity.'' In addition, OMB revised part 183 to include a reference to void covered grants or cooperative agreements, and updated specific parts of the legislative authority that were set to expire by aligning with recently passed legislation for the extension of dates.

A couple commenters noted the potential burden associated with checking *SAM.gov* on a monthly basis. OMB concurred with these comments and revised the language accordingly.

C. Requirement for the FAPIIS To Include Information on a Non-Federal Entity's Parent, Subsidiary, or Successor Entities

To meet statutory requirements, OMB revised 2 CFR parts 25 and 200 to implement Sec. 852 of the NDAA for FY 2013 (NDAA 2013), which requires that the FAPIIS include information on a non-Federal entity's parent, subsidiary, or successor entities. OMB requires financial assistance applicants to provide information in SAM on their immediate owner and highest-level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract, grant, or cooperative agreement within the last three years. In addition, OMB requires that prior to making a grant or cooperative agreement, agencies must consider all of the information in FAPIIS with regard to an applicant's immediate owner or highest-level owner and predecessor, or subsidiary, if applicable. These revisions are consistent with the Federal Acquisition Regulation (FAR) final rule regarding this law published at 81 FR 11988 on March 7, 2016.

Part 25 Universal Identifier and System for Award Management

OMB received a significant number of comments concerning subrecipient requirements and registration with the

SAM database. These commenters expressed concern with requiring subrecipients to fully register with the SAM database. The commenters thought this requirement would be overly burdensome and was unnecessary.

It was not OMB's intention to require subrecipients to fully register with the SAM database. To address this concern, OMB added a new ''Subpart C-Recipient requirements of subrecipients'' and a note to the terms in appendix A to clearly state that subrecipients do not need to fully register with the SAM database.

Further, several commenters thought the addition of the requirement for subrecipients to register with the SAM database, Federal agencies applying for or receiving Federal awards register in the SAM database made sections of part 25 confusing. The commenters thought that using the term ''Federal agency'' could be misunderstood. Some commenters thought this was particularly true with regard to section 100.

OMB agreed that the addition of the term ''Federal agency'' in part 25 made the requirements in part 25 less clear. OMB and the interagency work group also thought that there was a need for additional clarity on who the requirements actually apply to and in what situation. As a result, OMB added definitions for ''applicant'' and ''recipient'' in part 25 and removed ''non-Federal entity'' and ''Federal agency'' where appropriate throughout part 25.

25.200 Requirements for Notice of Funding Opportunities, Regulations, and Application Instructions

Several commenters stated that their organizations do not have a higher level owner or subsidiaries and they may not have predecessors. OMB recognizes that not all entities will have the same organizational structure. The purpose of providing this information is for greater transparency in the awarding of Federal financial assistance. The regulatory language requires that applicants and recipients must provide the information ''if applicable.'' If the requested information is not applicable, an applicant or recipient would not be required to report it.

D. Increase Transparency Through FFATA, as Amended by the DATA Act

OMB made several revisions to increase transparency regarding Federal spending as required by FFATA, as amended by the DATA Act, which mandates Federal agencies to report Federal appropriations received or expended by Federal agencies and non-Federal entities. OMB has revised the reporting thresholds to further align financial assistance requirements with those of the Federal acquisition community.

To increase transparency, OMB extended the applicability of Federal financial assistance in 2 CFR part 25 and 2 CFR part 170 beyond grants and cooperative agreements so that it includes other types of financial assistance that Federal agencies receive or administer such as loans, insurance, contributions, and direct appropriations.

OMB also made changes throughout 2 CFR to make it clear that Federal agencies may receive Federal financial assistance awards. This will increase transparency for Federal awards received by Federal agencies.

To further align implementation of FFATA, as amended by DATA Act, between the Federal financial assistance and acquisition communities, OMB revises the Federal awarding agency and pass-through entity reporting thresholds. For Federal awarding agencies, OMB revises 2 CFR part 170 to require agencies to report Federal awards that equal or exceed the micro-purchase threshold as set by the FAR at 48 CFR part 2, subpart 2.1. Consistent with the FAR threshold for subcontract reporting, OMB will raise the reporting threshold for subawards that equal or exceed $30,000.

OMB proposed to revise 2 CFR part 25 to allow agencies the flexibility to exempt a foreign entity applying for or receiving an award for a project or program performed outside the United States valued at less than $100,000. Currently, Federal awarding agencies have the flexibility to exempt this requirement for awards valued at less than $25,000. The exemption applies to cases where the Federal agency has conducted a risk-based analysis and deems it impractical for the entity to comply with the requirements(s). OMB proposed to make this revision after receiving feedback from the international community that requiring certain foreign entities to register in SAM introduces substantial burden with no significant value for the Federal awarding agency. Federal awarding agencies will continue to remain responsible for reporting these awards for transparency purposes.

Finally, OMB will require Federal awarding agencies to associate Federal Assistance Listings with the authorizing statute to make listings more consistent. This supports implementation of the DATA Act which requires agencies to report award level Federal Assistance Listings information for display on *www.usaspending.gov*.

Part 25 Universal Identifier and System for Award Management

Some commenters expressed concern regarding the proposal to expand SAM registration requirements to all type of Federal financial assistance as required by FFATA. Specifically, commenters requested clarity on who is considered the applicant or recipient in cases when the intended recipient does not have a direct relationship with the Federal awarding agency. For instance, for certain loan and loan guarantee programs, a third-party administers the program on behalf of the Federal awarding agency. One organization specifically expressed concern that these third-party administers may not participate in loan guarantee programs, if they are required to register in SAM. OMB disagrees that it is overly burdensome for third-party administrators to register in SAM, however, OMB agreed that it would be inappropriate to have the intended recipient who does not have a direct relationship with the Federal awarding agency to register in these instances. In response to these comments, OMB revised the definitions of applicant and recipient to clarify that SAM registration requirements apply to those entities that receive Federal awards directly from a Federal awarding agency and that applicants and recipients also include those entities that administer Federal awards on behalf of Federal awarding agencies.

25.110 Exceptions to This Part

Some commenters supported raising the threshold for foreign organizations or foreign public entities to $100,000 in 2 CFR 25.110. Other commenters expressed concerns that a thorough pre-award Federal review would not be conducted for foreign entity recipients under this higher threshold and it would be a disservice to the American taxpayer to raise the threshold. OMB also received comments that requiring Federal awarding agencies to only grant exemptions to foreign organizations or foreign public entities on a case-by-case basis to be overly burdensome.

OMB does not think that requiring Federal awarding agencies to determine whether to grant exemptions to foreign organizations or foreign public entities on a case-by-case basis is overly burdensome. Considering the comments received, OMB decided to retain the current threshold of $25,000.

Based on feedback provided by agencies and in light of the COVID–19 emergency and past emergency

situations where this requirement has been waived, OMB added an exception in § 25.110 allowing agencies to waive the requirement to register in SAM when there are exigent circumstances that would prevent an applicant from registering prior to the submission of an application. Federal awarding agencies are responsible for the determination on whether there are exigent circumstances that prevent an applicant from registering in SAM and are no longer required to request a waiver from OMB in these instances.

Part 170 Reporting Subaward and Executive Compensation Information

170 Definitions

Several commenters mentioned the difference between the term non-Federal entity in part 170 and part 200 and requested that part 170 reference part 200 for this definition. Related comments also were provided to the definitions of foreign organizations and foreign public entity. The definition of non-Federal entity in part 170 intentionally includes foreign organizations, foreign public entities, and for-profit organizations, which is not included in the definition of non-Federal entity in part 200. Part 200 only applies to these organization types when a Federal awarding agency chooses to apply the requirements in their adoption of part 200. Part 170 applies to foreign and for-profit organizations because of the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, hereafter cited as ''Transparency Act'') requirements. Thus, the definition for non-Federal entity in part 200 and part 170 will remain different.

170.110 Types of Entities to Which This Part Applies

Several commenters requested clarification on the language surrounding ''non-Federal'' and ''Federal agencies.'' OMB concurred with these comments and made the corresponding changes to ensure clarity. Further, OMB also agreed with comments that suggested clarification to § 170.110(b) in relation to Title IV funds and made the subsequent edits in the final language.

170.115 Deviations

OMB concurred with comments asking to define ''deviation'' to differentiate between exceptions by removing ''deviation'' and adding paragraph (c) to ''Types of Exemptions.''

170.200 Federal Awarding Agency Reporting

OMB received several comments suggesting that a reference to the definition for micro-purchase in § 200.1 be added to the end of the section. OMB concurred and made this change in the final language. Further, OMB received comments relating to the grammatical structuring of this section. After further review, OMB retained the existing language.

170.210 Requirements for Notices of Funding Opportunities, Regulations, and Application Instructions

OMB concurred with a comment that suggested including the information on the requirements for Notice of Funding Opportunity found in 2 CFR 200.204 and appendix I to part 200. OMB made the suggested changes to appendix I to include these references. Further, comments inquired if OMB has considered collecting the assurance from applicants when they register and renew in *beta.SAM.gov*. OMB would like to note that this is already part of the requirements for award terms and conditions, and the needed assurance should go into the Compliance Supplement for auditors to check that the assurance is received from the recipient. Therefore, no changes related to obtaining assurances were made to the language in this section.

170.220 Award Term

Several commenters referenced the thresholds discussed in part 25. OMB would like to point out that the thresholds in part 25 are unrelated to the threshold in § 170.220. Additionally, several comments suggested changes that were outside of the scope of this revision. OMB concurred with a suggestion to remove a reference to the Recovery Act in appendix A. Further, a comment suggested the deletion of the insertion of ''and Federal agency'' in paragraph (a) of this section. OMB notes that some agencies can make awards to other agencies, dependent on the authority. Therefore, it is necessary to keep the language that was used in the proposed version. One commenter noted that raising the subaward reporting threshold from $25,000 to $30,000 is unlikely to result in greater efficiencies or ease administrative requirements and recommended for the threshold to be increased to at least $75,000 or $100,000. OMB disagrees with this commenter's recommendation, as the purpose of this change was to further align implementation of FFATA, as amended by DATA Act, between the Federal financial assistance and acquisition communities.

170.305 Federal Award

Commenters had questions relating to how this definition differs from part 200. OMB would like to note that the definition differs because this section is discussing Federal awards in the context of ''direct'' federal awards. Federal award in part 200 includes is more expansive to include caveats depending on which section it is applied to, so the definition cannot be the same. As such, the proposed language remains.

170.315 Executive

One comment suggested clarifying this definition as many recipients of Federal awards are state and local governments with elected officials. OMB rejected this change as this is already covered within the ''Exceptions'' to this section. Further, one comment requested that this definition be included in part 200. OMB aims to eliminate duplicative definitions and thus respectfully declines this comment to also include the definition in part 200.

170.320 Federal Financial Assistance Subject to the Transparency Act

A commenter noted that the term Federal financial assistance subject to the Transparency Act is not defined in part 200. OMB concurred with this comment and made edits to the definition in § 170.320 to clarify that the term includes Federal financial assistance as defined in part 200, with some limited exceptions.

170.325 Subaward

Commenters recommended deleting the definition for ''Subaward'' and including a reference to the definition used in part 200 to reduce duplication. OMB concurred with this recommendation and made the subsequent change.

E. Aligning 2 CFR With Authoritative Sources

OMB revises 2 CFR 200.431 to allow states to conform with Generally Accepted Accounting Principles (GAAP), specifically Governmental Accounting Standards Board (GASB) Statement 68, and to continue to claim pension costs that are both actual and funded. OMB has made this revision because GASB issued Statement 68, *Accounting and Financial Reporting for Pensions* which amends GASB Statement 27 and allows non-Federal entities (NFE) to claim only estimated pension costs in their financial

statements. OMB's revision will allow non-Federal entities to continue to claim pension costs that are both actual and funded.

200.431 Compensation

OMB appreciated the comments in support of the proposed changes. In response to several comments that asked for clarification, OMB is revising the final language to require state and local governments to be compliant with GASB #68 for pension costs. OMB would like to note that the cost associated with each fiscal year should be determined in accordance with GAAP.

The definition for ''Improper Payment'' has been revised to refer to the authoritative source for clarity, OMB Circular A–123—Management's Responsibility for Internal Control in Federal Agencies, Appendix C—Requirements for Payment Integrity Improvement. See above Section I for additional information on the changes to ''Improper Payment.''

Some commenters expressed that the reference to OMB Circular A–123 for the definition of ''Improper Payment'' added confusion and suggested retaining the original language. OMB considered this request and respectfully declined the comment in keeping with the practice to align the guidance with source documents, if possible.

III. Clarifying Requirements Regarding Areas of Misinterpretation

Following the publication of 2 CFR part 200, OMB received a substantial amount of questions from stakeholders requesting clarifications about key aspects of the guidance. In other instances, it has come to OMB's attention that the interpretation of certain provisions was not consistent with the intent of 2 CFR part 200. In response, OMB is publishing clarifications that are aimed at reducing recipient administration burden and ensuring consistent interpretation of guidance.

A. Responsibilities of the Pass-Through Entity To Address Only a Subrecipient's Audit Findings Related to Their Subaward

To clarify requirements regarding responsibility for audit findings, OMB revises 2 CFR 200.332 *Requirements for pass-through entities* to clarify that pass-through entities (PTE) are responsible for addressing only a subrecipient's audit findings that are specifically related to their subaward. For example, a PTE is not required to address all of the subrecipient's audit findings. In addition, the PTE may rely on the subrecipient's auditors and cognizant agency's oversight for routine audit follow-up and management decisions. These changes reduce the burden for PTEs by allowing a PTE to rely on the cognizant agency to address a subrecipient's entity-wide issues.

200.332 Requirements for Pass-Through Entities

OMB received substantial feedback relating to the changes made in this section. The two main changes for this section are related to the clarification of the pass-through entities responsibilities toward the establishment of the subrecipient indirect cost rates and the pass-through entities responsibilities for resolving the sub recipient's audit findings (§ 200.332(d)).

Although most commenters approved of the proposed changes regarding the pass-through entities responsibilities for the subrecipient indirect cost rates, some requested clarification on specific situations:

- Where the subrecipient has a federally approved indirect cost rate
- where the subrecipient receives funds from multiple pass-through entities from which it may be already established an indirect cost rate with one of the pass-through entity; or
- where the subrecipient decides to use the direct allocation method instead of the use of indirect cost rate for cost reimbursement.

OMB provides clarifications in the final language for all of the three situations above.

Most commenters supported the proposed changes to clarify the pass-through entities responsibility in the resolution of audit findings reported by the subrecipients and the required management decision letters to address the audit findings. Some commenters questioned the use of the term ''systemic findings'' to describe the findings that impact the whole organization. This section has been revised to streamline and clarify the original intent of the revision which limits the pass-through entity to review and resolve the audit findings that are specifically related to the subaward. OMB replaced the term ''systemic findings'' with ''cross-cutting findings.'' OMB also added that written confirmation by the subrecipients for corrective actions on audit findings can be used as a means for follow-up and monitoring of the subrecipient's performance.

B. Reducing Burden on Universities by Clarifying Timing of the Disclosure Statement

OMB is adding language to the timing of submission of the disclosure statement (DS–2), which is only required for institutions of higher education that meet certain thresholds as defined in 48 CFR 9903.202–1(f). This revision reduces burden while maintaining the requirement for institutions of higher education to implement policies that are in compliance with 2 CFR.

200.419 Cost Accounting Standards and Disclosure Statement

OMB received several comments in response to 2 CFR 200.419 that focused on concerns with the legal instruments that were subject to this part. In response to these concerns, the language was revised to provide clarification.

C. Response to Frequently Asked Questions Related to the Prior Release of 2 CFR

In July 2017, OMB developed and posted Frequently Asked Questions (FAQs) on the Chief Financial Officers Council website in response to stakeholder requests for clarification on the first publication of 2 CFR *(https://cfo.gov//wp-content/uploads/2017/08/July2017-UniformGuidanceFrequentlyAskedQuestions.pdf)*. Due to the volume of questions related to these topics, OMB is including revisions to clarify the following: The meaning of the words ''must'' and ''may'' as they pertain to requirements; applicability and documentation requirements when a non-Federal entity elects to charge the de minimis indirect cost rate of MTDC; PTE responsibilities related to indirect cost rates and audits; and applicability of 2 CFR to FAR based contracts. These proposed revisions are intended to improve clarity and reduce recipient burden by providing guidance on implementing 2 CFR.

The Words ''must'' and ''may'' as They Pertain to Requirements

All commenters that provided feedback on this section were in favor of incorporating the meaning of ''must'' and ''may'' within the guidance. One commenter suggested that the location for this change within the guidance could be within its own section. After consideration, OMB disagrees with the commenter and has determined that this change should remain in the applicability section of the guidance under the stated sub title.

De Minimis Indirect Cost Rate of MTDC Applicability and Documentation

See Section I (K) for additional information on the comments received.

PTE Responsibilities Related to Indirect Cost Rates and Audits

See Section III or additional information on the comments received.

Applicability of 2 CFR to FAR Based Contracts

Many commenters expressed confusion regarding the changes to this section. The intent of the changes to this section are to make clear that the FAR applies to Federal contracts awarded to non-Federal entities, and that these requirements supersede the requirements of 2 CFR part 200 in a Federal contract. Clarification was requested from a commenter to confirm if an audit conducted for a Cost Accounting Standards (CAS) applicable contract will take the place of a Single Audit and how an entity with multiple grants and only one CAS-contract would meet the requirements of the Single Audit Act.

The language clarified in § 200.101(c) to state that for CAS covered contracts, the CAS requirements regarding audit would supersede the audit requirements in subpart F. In addition, in the case where an entity receives many grants and one CAS covered contracts, the entity must comply to both the Single Audits for its grants and the CAS audit requirements for the CAS covered contract.

D. Applicability of Guidance to Federal Agencies

OMB is making changes to 2 CFR 200.101 *Applicability* to clarify that Federal awarding agencies may apply the requirements of 2 CFR part 200 to other Federal agencies, to the extent permitted by law. This change recognizes that there are instances when Federal awarding agencies or pass-through entities have the authority to issue Federal awards to Federal agencies and in these instances, the provisions of 2 CFR part 200 may be applied, as appropriate. This change is consistent with how for-profit entities, foreign public entities, or foreign organizations are treated in the Uniform Guidance.

200.101 Applicability

Several comments expressed concerns as to whether or not it is appropriate to include awards to Federal agencies in the scope of 2 CFR. It was determined that it was appropriate to include Federal agencies in the scope of 2 CFR as some Federal agencies are authorized to receive grants or cooperative agreements as direct recipients or subrecipients. This addition clarifies that subparts A through E of 2 CFR part 200 is applicable when determined by the Federal awarding agency. There will be no change from the proposed version.

E. Other Clarifications

Parts 25 and 170

Many commenters expressed concerns that parts 25 and 170 were confusing, inconsistent and needed to be edited for clarity. In response to these comments, parts 25 and 170 have been revised throughout with many technical corrections to add clarity and consistency.

200.110 Effective/Applicability Date

A number of comments, particularly from Federal agencies, expressed concern about the effective date for negotiated indirect cost rate agreements (NICRAs) in paragraph (b). The intent of this section is to retain the existing NICRAs until they are renegotiated and incorporate the requirements from the revision to 2 CFR upon renegotiation. Non-Federal entities with a NIRCA are expected to work with their cognizant agency for indirect costs as appropriate. OMB clarified the intent for 2 CFR 200.110(b). One Federal agency commenter stated that OMB should specify if the applicability date is for the entire guidance or for the revisions. OMB accepted this comment and made revisions accordingly.

200.200 Purpose

All commenters provided recommendations to revise this section to better align the terms ''competitive'' and ''non-competitive'' with the new terms ''discretionary'' and ''non-discretionary.'' OMB concurs with the recommendation to revise this section to align with other changes within the guidance. In response to commenters, OMB has removed 2 CFR 200.200(b) and made other technical corrections accordingly.

200.207 Standard Application Requirements

OMB received one comment on this section that was out of scope for the current set of revisions, and therefore the proposed language remains the same.

Out of Scope Comments

Many commenters submitted comments that were either not part of the scope of the effort, were not relevant to the revisions proposed, pertained to sections of the guidance that were not proposed to be revised, or would be a change too drastic that would warrant a need for the public to have an opportunity to provide input before finalizing. All comments within these categories were not accepted by OMB.

Changes From the Proposed Revisions Not Recommended

Comments received for several provisions within 2 CFR were reviewed, deliberated, and determined that no changes were needed from the proposed revisions. Some of these provisions within 2 CFR include the following:

- 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts
- 200.207 Standard application requirements
- 200.311 Real property
- 200.312 Federally-owned and exempt property
- 200.313 Equipment
- 200.314 Supplies
- 200.331 Subrecipient and contractor determinations
- 200.430 Compensation—personal services
- 400.458 Pre-award costs

200.402 Composition of Costs

Some commenters requested clarity and noted that the use of ''approved budget period'' is specific to Federal financial assistance when 2 CFR 200.402 would apply to both contracts and Federal financial assistance awarded to non-Federal entities. Another commenter suggested that further clarification is needed for what ''cost principle'' and ''budget period'' mean. Based on the vast array of comments received and the revised definitions for finalization, OMB decided to remove the language proposed for 2 CFR 200.402.

200.449 Interest

One comment was received for this provision. The commenter suggested that OMB provide a different example within 2 CFR 200.449 because lease contracts that transfer ownership are essentially debt financing. The commenter explains that the example is comparing debt financing to debt financing, which doesn't work for the intent. The commenter provided a suggested edit that would enable the example to remain and retain the original intent. OMB concurred with the commenter and made the suggested edit accordingly.

200.461 Publication and Printing Costs

All commenters requested clarity and suggested revisions to this provision. One commenter objected to specifying that costs must be charged to the last budget period, citing that printing costs

are historically charged at various stages of the award. One commenter noted that these costs have historically been allowable up until the closeout of the award. Edits were suggest to provide additional clarity in § 200.461(b)(3) to specify that The non-Federal entity may charge the Federal award during closeout. OMB concurs with this suggested revision and made the change accordingly.

200.507 Program-Specific Audits

One comment was received for 2 CFR 200.507. The commenter requested a clarification on the first phase to indicate ''in some cases'' rather than ''in many cases'' because Appendix VI of the 2019 Compliance Supplement only shows two current program specific audit guides. OMB concurred with the commenter and made the revision accordingly. The commenter provided a second recommendation to remove the 2014 beginning date and instead include the current reference to the Compliance Supplement appendix. OMB also concurs with this suggestion from the commenter and made the revisions.

200.515 Audit Reporting

The comments submitted for 2 CFR 200.515 provided suggestions for clarity. One commenter suggested reviewing this subsection against what the Federal Audit Clearinghouse is collecting in Part III: Information from the Schedule of Findings and Questioned Costs, Item 2. Financial Statements, to ensure an appropriate alignment between the regulation and the Form. Another commenter inquired about the intent of the revisions to this provision. OMB considered and discussed all the comments for clarity and made revisions accordingly.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The revision of 2 CFR is not a significant regulatory action under Executive Order 12866.

Regulatory Flexibilities Act

The Regulatory Flexibility Act 5 U.S.C. 601, *et seq.*, requires a regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities. OMB expects this guidance to have a significant economic impact on a substantial number of such entities. There are some proposed revisions that may impose burden, however, there are more proposed revisions that reduce burden to small entities. When reviewing all the revisions, the burden that will be reduced for recipients is much greater than the burden imposed.

The revisions to 2 CFR are not applicable to Federal financial assistance awards issued prior to the effective dates provided in the **DATES** section of this Notice of Final Guidance, including financial assistance awards issued prior to those dates under the Coronavirus Aid, Relief, and Economic Support (CARES) Act of 2020 (Pub. L. 116–136). OMB plans to consult with applicable agencies to provide regulatory flexibility analyses in future revisions to 2 CFR and its subcomponents.

The applicability of Federal financial assistance in 2 CFR part 25 will be expanded beyond grants and cooperative agreements to include other types of financial assistance such as loans and insurance. This revision ensures compliance with FFATA, as amended by the DATA Act, and will impact small entities that voluntarily seek financial assistance. It will not have a significant impact on a substantial number of U.S. small entities as approximately 69,185 small entities who received awards for other types of financial assistance did not have a unique entity identifier in FY 2019, while the Small Business Administration's Office of Advocacy reported 30.7 million U.S. small businesses in that same calendar year. Currently, 2 CFR part 25 requires all non-Federal entities that apply for grants and cooperative agreements to register in the SAM. In alignment with FFATA, the guidance provides that all entities that apply directly to a Federal program for financial assistance such as loans and insurance must register in SAM, which requires the establishment of a unique entity identifier. Individuals who receive Federal financial assistance as a natural person remain exempt from this requirement. In practice, some Federal awarding agencies already require SAM registration for all types of Federal financial assistance and the change would make this practice consistent among agencies. OMB recognizes that this new requirement may be burdensome to small entities and there may be instances where it is appropriate for Federal awarding agencies to request an exception or delay implementation of this requirement for their programs. In response, Federal awarding agencies may exercise the flexibility provided in 2 CFR 25.110 to either exempt an applicant or recipient from this requirement or request an exception from OMB on a case-by-case for a class applicants or recipients, particularly in situations of national emergency such as natural disasters and pandemics.

As noted in the Paperwork Reduction Act section, as of July 1, 2020, there were 159,477 unique Federal financial assistance registrants in the SAM. According to data accessed from *USASpending.gov,* in FY 2018, approximately 2,952 small entities who received awards for other types of financial assistance did not have a unique entity identifier. Assuming that non-Federal entities with a unique entity identifier reported to *USASpending.gov* are already registered in SAM, this change will impact approximately 2,952 small entities annually. SAM registration is estimated to take 2.5 hours per response, which results in 7,380 burden hours annually.

The guidance also provides consistency among definitions and terms and proposes several provisions to increase transparency regarding Federal spending. These revisions are intended to reduce recipient burden and will not have a significant economic impact on a substantial number of small entities because they will affect Federal awarding agencies; they do not include any new requirements for non-Federal entities.

The guidance introduces a new provision to align with section 889 of the NDAA 2019, prohibition on certain telecommunication and video surveillance services or equipment. This statutory requirement will introduce burden to small entities that are prohibited from obligating or expending grant or loan funds to procure or obtain, extend or renew a contract to procure or obtain, or enter in a contract with, as identified in the NDAA 2019. Since this is a new legal requirement, the burden estimate is difficult to calculate. It will impact all unique entities awarded Federal financial assistance, of which 69,185 are small entities.

The guidance implements a new statute that requires applicants of Federal assistance to provide information on their owner, predecessor and subsidiary, including the Commercial and Government Entity (CAGE) Code and name of all predecessors, if applicable. This will not have a significant economic impact on a substantial number of small entities because small entities typically do not have a complex corporate structure requiring them to report information on their owner, predecessor, and

subsidiary. Further, the burden is minimal for a non-Federal entity to provide the name of its immediate owner and highest-level owner.

The NDAA for FY2018 increased the micro-purchase threshold from $3,500 to $10,000 and increased the simplified acquisition threshold from $100,000 to $250,000 for all recipients. OMB's revisions reduces burden and will not have a significant economic impact on a substantial number of small entities because it is likely to reduce burden for all non-Federal entities.

Paperwork Reduction Act

Consistent with the Regulatory Flexibility Act analysis discussion, the Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The guidance contains information collection requirements and will impact the current Information Collection Requests approved under OMB control number 3090–0290 managed by GSA. Accordingly, GSA will submit a request for approval to amend the existing Information Collection Requests for SAM registration requirements for Federal financial assistance recipients.

Annual Reporting Burden

The estimated annual reporting burden includes all possible entities for Federal financial assistance that may be required to register in SAM. The estimated annual reporting burden also includes entities that receive Federal financial assistance reported in *USASpending.gov* and either may or may not be required to register in SAM.

Previously, SAM only requires that applicants and recipients of Federal financial assistance in the form of grants register in the system. However, applicants and recipients are required to maintain accurate SAM registration at all times during which they have an active Federal award, an application, or a plan under consideration by a Federal awarding agency.

The burden estimates are approximations based on the best available data.

As of July 7, 2019, there were 159,477 unique Federal financial assistance registrants in SAM. However, not all registrants ultimately apply for, or receive, Federal financial assistance. OMB aggregated SAM data with Federal financial assistance recipient data from *USASpending.gov,* excluding grants, to determine the anticipated number of additional Federal financial assistance in SAM. OMB ran reports in *USASpending.gov* to identify the number of unique recipients of Federal financial assistance other than grants to isolate the total number of potential registrants in SAM as a result of the updates to the proposed guidance.

OMB removed duplicate recipients based on recipient Data Universal Numbering System Number (DUNS) numbers, from Dun & Bradstreet (D&B). At this time all Federal financial assistance recipients are required to register for DUNS numbers.

In FY 2019 there were 1,751 loan and 8,915 other Federal financial assistance recipients with unique DUNS numbers reported in *USASpending.gov.* Therefore, based on the number of entities with unique DUNS numbers that are registered in SAM (159,477), plus entities that receive loans (122) or other Federal financial assistance (8,915) reported in *USASpending.gov* that may not be reflected in SAM, the total number of entities that may be impacted by the proposed guidance associated Information Collection Requests under OMB control number 3090–0290 could be 172,084 registrants.

Public reporting burden for Information Collection Requests under OMB control number 3090–0290 is managed by the GSA and estimated to average 2.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 172,084.
Responses per Respondent: 1.
Total annual responses: 172,084.
Hours per Response: 2.5.
Total response Burden Hours: 430,210.

The guidance also requires that registrants for Federal financial assistance provide information on their owner, predecessor, and subsidiary, including the CAGE code and name of all predecessors, if applicable. This information is required to implement Sec. 852 of the NDAA of FY 2013, which requires that the FAPIIS include information on a non-Federal entity's parent, subsidiary, or successor entities. Non-Federal entities are already required to obtain a CAGE code for purposes of SAM registration. It is anticipated that including this information as part of SAM registration or for a renewal should not result in significant additional time. Public reporting burden for this collection of information is estimated to average 0.1 hours per response. Based on the burden estimates for the total number of SAM registrants indicated in the previous section, the annual reporting burden for this proposal is estimated as follows:

Respondents: 172,084.
Responses per respondent: 1.
Total annual responses: 172,084.
Preparation hours per response: 0.1.
Total response Burden Hours: 17,208.

List of Subjects

2 CFR Part 25

Administrative practice and procedure, Grant programs, Grants administration, Loan programs.

2 CFR Part 170

Colleges and universities, Grant programs, Hospitals, International organizations, Loan programs, Reporting and recordkeeping requirements.

2 CFR Part 183

Foreign aid, Grant programs, Grants administration, International organizations, Reporting and recordkeeping requirements.

2 CFR Part 200

Accounting, Colleges and universities, Grant programs, Grants administration, Hospitals, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, State and local governments.

Timothy F. Soltis,

Deputy Controller.

For the reasons stated in the preamble, the Office of Management and Budget amends 2 CFR chapters I and II as set forth below:

PART 25—UNIVERSAL IDENTIFIER AND SYSTEM FOR AWARD MANAGEMENT

■ 1. The authority citation for part 25 continues to read as follows:

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

■ 2. Amend § 25.100 by revising the introductory text and paragraph (a) to read as follows:

§ 25.100 Purposes of this part.

This part provides guidance to Federal awarding agencies to establish:

(a) The unique entity identifier as a universal identifier for Federal financial assistance applicants, as well as recipients and their direct subrecipients, and;

* * * * *

■ 3. Revise § 25.105 to read as follows:

§ 25.105 Types of awards to which this part applies.

This part applies to a Federal awarding agency's grants, cooperative agreements, loans, and other types of Federal financial assistance as defined in § 25.406.

- 4. Revise § 25.110 to read as follows:

§ 25.110 Exceptions to this part.

(a) *General.* Through a Federal awarding agency's implementation of the guidance in this part, this part applies to all applicants and recipients of Federal awards, other than those exempted by statute or exempted in paragraphs (b) and (c) of this section that apply for or receive agency awards.

(b) *Exceptions for individuals.* None of the requirements in this part apply to an individual who applies for or receives Federal financial assistance as a natural person (*i.e.*, unrelated to any business or nonprofit organization he or she may own or operate in his or her name).

(c) *Other exceptions.* (1) Under a condition identified in paragraph (c)(2) of this section, a Federal awarding agency may exempt an applicant or recipient from an applicable requirement to obtain a unique entity identifier and register in the SAM, or both.

(i) In that case, the Federal awarding agency must use a generic unique entity identifier in data it reports to *USAspending.gov* if reporting for a prime award to the recipient is required by the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, hereafter cited as ''Transparency Act'').

(ii) Federal awarding agency use of a generic unique entity identifier should be used rarely for prime award reporting because it prevents prime awardees from being able to fulfill the subaward or executive compensation reporting required by the Transparency Act.

(2) The conditions under which a Federal awarding agency may exempt an applicant or recipient are—

(i) For any applicant or recipient, if the Federal awarding agency determines that it must protect information about the entity from disclosure if it is in the national security or foreign policy interests of the United States, or to avoid jeopardizing the personal safety of the applicant or recipient's staff or clients.

(ii) For a foreign organization or foreign public entity applying for or receiving a Federal award or subaward for a project or program performed outside the United States valued at less than $25,000, if the Federal awarding agency deems it to be impractical for the entity to comply with the requirement(s). This exemption must be determined by the Federal awarding agency on a case-by-case basis while utilizing a risk-based approach and does not apply if subawards are anticipated.

(iii) For an applicant, if the Federal awarding agency makes a determination that there are exigent circumstances that prohibit the applicant from receiving a unique entity identifier and completing SAM registration prior to receiving a Federal award. In these instances, Federal awarding agencies must require the recipient to obtain a unique entity identifier and complete SAM registration within 30 days of the Federal award date.

(3) Federal awarding agencies' use of generic unique entity identifier, as described in paragraphs (c)(1) and (2) of this section, should be rare. Having a generic unique entity identifier limits a recipient's ability to use Governmentwide systems that are needed to comply with some reporting requirements.

(d) *Class exceptions.* OMB may allow exceptions for classes of Federal awards, applicants, and recipients subject to the requirements of this part when exceptions are not prohibited by statute.

§ 25.115 [Removed]

- 5. Remove § 25.115.
- 6. Revise § 25.200 to read as follows:

§ 25.200 Requirements for notice of funding opportunities, regulations, and application instructions.

(a) Each Federal awarding agency that awards the types of Federal financial assistance defined in § 25.406 must include the requirements described in paragraph (b) of this section in each notice of funding opportunity, regulation, or other issuance containing instructions for applicants that is issued on or after August 13, 2020.

(b) The notice of funding opportunity, regulation, or other issuance must require each applicant that applies and does not have an exemption under § 25.110 to:

(1) Be registered in the SAM prior to submitting an application or plan;

(2) Maintain an active SAM registration with current information, including information on a recipient's immediate and highest level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract or grant within the last three years, if applicable, at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency; and

(3) Provide its unique entity identifier in each application or plan it submits to the Federal awarding agency.

(c) For purposes of this policy:

(1) The applicant meets the Federal awarding agency's eligibility criteria and has the legal authority to apply and to receive the Federal award. For example, if a consortium applies for a Federal award to be made to the consortium as the recipient, the consortium must have a unique entity identifier. If a consortium is eligible to receive funding under a Federal awarding agency program but the agency's policy is to make the Federal award to a lead entity for the consortium, the unique entity identifier of the lead applicant will be used.

(2) A notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a ''program announcement,'' ''notice of funding availability,'' ''broad agency announcement,'' ''research announcement,'' ''solicitation,'' or some other term.

(3) To remain registered in the SAM database after the initial registration, the applicant is required to review and update its information in the SAM database on an annual basis from the date of initial registration or subsequent updates to ensure it is current, accurate and complete.

- 7. Revise § 25.205 to read as follows:

§ 25.205 Effect of noncompliance with a requirement to obtain a unique entity identifier or register in the SAM.

(a) A Federal awarding agency may not make a Federal award or financial modification to an existing Federal award to an applicant or recipient until the entity has complied with the requirements described in § 25.200 to provide a valid unique entity identifier and maintain an active SAM registration with current information (other than any requirement that is not applicable because the entity is exempted under § 25.110).

(b) At the time a Federal awarding agency is ready to make a Federal award, if the intended recipient has not complied with an applicable requirement to provide a unique entity identifier or maintain an active SAM registration with current information, the Federal awarding agency:

(1) May determine that the applicant is not qualified to receive a Federal award; and

(2) May use that determination as a basis for making a Federal award to another applicant.

- 8. Revise § 25.210 to read as follows:

§ 25.210 Authority to modify agency application forms or formats.

To implement the policies in §§ 25.200 and 25.205, a Federal awarding agency may add a unique entity identifier field to information collections previously approved by OMB, without having to obtain further approval to add the field.

· 9. Revise § 25.215 to read as follows:

§ 25.215 Requirements for agency information systems.

Each Federal awarding agency that awards Federal financial assistance (as defined in § 25.406) must ensure that systems processing information related to the Federal awards, and other systems as appropriate, are able to accept and use the unique entity identifier as the universal identifier for Federal financial assistance applicants and recipients.

· 10. Revise § 25.220 to read as follows:

§ 25.220 Use of award term.

(a) To accomplish the purposes described in § 25.100, a Federal awarding agency must include in each Federal award (as defined in § 25.405) the award term in appendix A to this part.

(b) A Federal awarding agency may use different letters and numbers than those in appendix A to this part to designate the paragraphs of the Federal award term, if necessary, to conform the system of paragraph designations with the one used in other terms and conditions in the Federal awarding agency's Federal awards.

· 11. Revise subpart C to read as follows:

Subpart C—Recipient Requirements of Subrecipients

§ 25.300 Requirement for recipients to ensure subrecipients have a unique entity identifier.

(a) A recipient may not make a subaward to a subrecipient unless that subrecipient has obtained and provided to the recipient a unique entity identifier. Subrecipients are not required to complete full SAM registration to obtain a unique entity identifier.

(b) A recipient must notify any potential subrecipients that the recipient cannot make a subaward unless the subrecipient has obtained a unique entity identifier as described in paragraph (a) of this section.

· 12. Add subpart D to read as follows:

Subpart D—Definitions

Sec
25.400 Applicant.
25.401 Federal Awarding Agency.
25.405 Federal Award.
25.406 Federal financial assistance.
25.407 Recipient.
25.410 System for Award Management (SAM).
25.415 Unique entity identifier.
25.425 For-profit organization.
25.430 Foreign organization.
25.431 Foreign public entity.
25.432 Highest level owner.
25.433 Indian Tribe (or ''Federally recognized Indian Tribe'').
25.440 Local government.
25.443 Non-Federal entity.
25.445 Nonprofit organization.
25.447 Predecessor.
25.450 State.
25.455 Subaward.
25.460 Subrecipient.
25.462 Subsidiary.
25.465 Successor.

Subpart D—Definitions

§ 25.400 Applicant.

Applicant, for the purposes of this part, means a non-Federal entity or Federal agency that applies for Federal awards.

§ 25.401 Federal Awarding Agency.

Federal Awarding Agency has the meaning given in 2 CFR 200.1.

§ 25.405 Federal Award.

Federal Award, for the purposes of this part, means an award of Federal financial assistance that a non-Federal entity or Federal agency received from a Federal awarding agency.

§ 25.406 Federal financial assistance.

(a) *Federal financial assistance,* for the purposes of this part, means assistance that entities received or administer in the form of:

(1) Grant;

(2) Cooperative agreements (which does not include a cooperative research and development agreement pursuant to the Federal Technology Transfer Act of 1986, as amended (15 U.S.C. 3710a));

(3) Loans;

(4) Loan guarantees;

(5) Subsidies;

(6) Insurance;

(7) Food commodities;

(8) Direct appropriations;

(9) Assessed or voluntary contributions; or

(10) Any other financial assistance transaction that authorizes the non-Federal entity's expenditure of Federal funds.

(b) *Federal financial assistance,* for the purposes of this part, does not include:

(1) Technical assistance, which provides services in lieu of money; and

(2) A transfer of title to federally owned property provided in lieu of money, even if the award is called a grant.

§ 25.407 Recipient.

Recipient, for the purposes of this part, means a non-Federal entity or Federal agency that received a Federal award. This term also includes a non-Federal entity who administers Federal financial assistance awards on behalf of a Federal agency.

§ 25.410 System for Award Management (SAM).

System for Award Management (SAM) has the meaning given in paragraph C.1 of the award term in appendix A to this part.

§ 25.415 Unique entity identifier.

Unique entity identifier has the meaning given in paragraph C.2 of the award term in appendix A to this part.

§ 25.425 For-profit organization.

For-profit organization means a non-Federal entity organized for profit. It includes, but is not limited to:

(a) An ''S corporation'' incorporated under Subchapter S of the Internal Revenue Code;

(b) A corporation incorporated under another authority;

(c) A partnership;

(d) A limited liability corporation or partnership; and

(e) A sole proprietorship.

§ 25.430 Foreign organization.

Foreign organization has the meaning given in 2 CFR 200.1.

§ 25.431 Foreign public entity.

Foreign public entity has the meaning given in 2 CFR 200.1.

§ 25.432 Highest level owner.

Highest level owner has the meaning given in 2 CFR 200.1.

§ 25.433 Indian Tribe (or "federally recognized Indian Tribe").

Indian Tribe (or ''federally recognized Indian Tribe'') has the meaning given in 2 CFR 200.1.

§ 25.440 Local government.

Local government has the meaning given in 2 CFR 200.1.

§ 25.443 Non-Federal entity.

Non-Federal entity, as it is used in this part, has the meaning given in paragraph C.3 of the award term in appendix A to this part.

§ 25.445 Nonprofit organization.

Non-Federal organization, has the meaning given in 2 CFR 200.1.

§ 25.447 Predecessor.

Predecessor means a non-Federal entity that is replaced by a successor and includes any predecessors of the predecessor.

§ 25.450 State.

State has the meaning given in 2 CFR 200.1.

§ 25.455 Subaward.

Subaward has the meaning given in 2 CFR 200.1.

§ 25.460 Subrecipient.

Subrecipient has the meaning given in 2 CR 200.1.

§ 25.462 Subsidiary.

Subsidiary has the meaning given in 2 CFR 200.1.

§ 25.465 Successor.

Successor means a non-Federal entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger). The term ''successor'' does not include new offices or divisions of the same company or a company that only changes its name.

▪ 13. Revise appendix A to part 25 to read as follows:

Appendix A to Part 25—Award Term

I. System for Award Management and Universal Identifier Requirements

A. Requirement for System for Award Management

Unless you are exempted from this requirement under 2 CFR 25.110, you as the recipient must maintain current information in the SAM. This includes information on your immediate and highest level owner and subsidiaries, as well as on all of your predecessors that have been awarded a Federal contract or Federal financial assistance within the last three years, if applicable, until you submit the final financial report required under this Federal award or receive the final payment, whichever is later. This requires that you review and update the information at least annually after the initial registration, and more frequently if required by changes in your information or another Federal award term.

B. Requirement for Unique Entity Identifier

If you are authorized to make subawards under this Federal award, you:

1. Must notify potential subrecipients that no entity (*see* definition in paragraph C of this award term) may receive a subaward from you until the entity has provided its Unique Entity Identifier to you.

2. May not make a subaward to an entity unless the entity has provided its Unique Entity Identifier to you. Subrecipients are not required to obtain an active SAM registration, but must obtain a Unique Entity Identifier.

C. Definitions

For purposes of this term:

1. *System for Award Management (SAM)* means the Federal repository into which a recipient must provide information required for the conduct of business as a recipient. Additional information about registration procedures may be found at the SAM internet site (currently at *https://www.sam.gov*).

2. *Unique Entity Identifier* means the identifier assigned by SAM to uniquely identify business entities.

3. *Entity* includes non-Federal entities as defined at 2 CFR 200.1 and also includes all of the following, for purposes of this part:

a. A foreign organization;

b. A foreign public entity;

c. A domestic for-profit organization; and

d. A domestic or foreign for-profit organization; and

d. A Federal agency.

4. *Subaward* has the meaning given in 2 CFR 200.1.

5. *Subrecipient* has the meaning given in 2 CFR 200.1.

PART 170—REPORTING SUBAWARD AND EXECUTIVE COMPENSATION INFORMATION

▪ 14. The authority citation for part 170 continues to read as follows:

Authority: Pub. L. 109–282; 31 U.S.C. 6102.

▪ 15. Revise § 170.100 read as follows:

§ 170.100 Purposes of this part.

This part provides guidance to Federal awarding agencies on reporting Federal awards to establish requirements for recipients' reporting of information on subawards and executive total compensation, as required by the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), as amended by section 6202 of Public Law 110–252, hereafter referred to as ''the Transparency Act''.

▪ 16. Revise § 170.105 to read as follows:

§ 170.105 Types of awards to which this part applies.

This part applies to Federal awarding agency's grants, cooperative agreements, loans, and other forms of Federal financial assistance subject to the Transparency Act, as defined in § 170.320.

▪ 17. Revise § 170.110 to read as follows:

§ 170.110 Exceptions to which this part applies.

(a) *General.* Through a Federal awarding agency's implementation of the guidance in this part, this part applies to recipients, other than those exempted by law or excepted in accordance with paragraphs (b) and (c) of this section, that—

(1) Apply for or receive Federal awards; or

(2) Receive subawards under Federal awards.

(b) *Exceptions.* (1) None of the requirements in this part apply to an individual who applies for or receives a Federal award as a natural person (*i.e.*, unrelated to any business or nonprofit organization he or she may own or operate in his or her name).

(2) None of the requirements regarding reporting names and total compensation of a non-Federal entity's five most highly compensated executives apply unless in the non-Federal entity's preceding fiscal year, it received—

(i) 80 percent or more of its annual gross revenue in Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at § 170.320 (and subawards); and

(ii) $25,000,000 or more in annual gross revenue from Federal procurement contracts (and subcontracts) and Federal financial assistance awards subject to the Transparency Act, as defined at § 170.320; and

(3) The public does not have access to information about the compensation of senior executives, unless otherwise publicly available, through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(c) Exceptions for classes of Federal awards or recipients. OMB may allow exceptions for classes of Federal awards or recipients subject to the requirements of this part when exceptions are not prohibited by statute.

§ 170.115 [Removed]

▪ 18. Remove § 170.115.

▪ 19. Revise § 170.200 to read as follows:

§ 170.200 Federal awarding agency reporting requirements.

(a) Federal awarding agencies are required to publicly report Federal awards that equal or exceed the micro-purchase threshold and publish the required information on a public-facing, OMB-designated, governmentwide website and follow OMB guidance to support Transparency Act implementation.

(b) Federal awarding agencies that obtain post-award data on subaward obligations outside of this policy should take the necessary steps to ensure that

their recipients are not required, due to the combination of agency-specific and Transparency Act reporting requirements, to submit the same or similar data multiple times during a given reporting period.

- 20. Add § 170.210 to read as follows:

§ 170.210 Requirements for notices of funding opportunities, regulations, and application instructions.

(a) Each Federal awarding agency that makes awards of Federal financial assistance subject to the Transparency Act must include the requirements described in paragraph (b) of this section in each notice of funding opportunity, regulation, or other issuance containing instructions for applicants under which Federal awards may be made that are subject to Transparency Act reporting requirements, and is issued on or after the effective date of this part.

(b) The notice of funding opportunity, regulation, or other issuance must require each non-Federal entity that applies for Federal financial assistance and that does not have an exception under § 170.110(b) to have the necessary processes and systems in place to comply with the reporting requirements should they receive Federal funding.

- 21. Revise § 170.220 to read as follows:

§ 170.220 Award term.

(a) To accomplish the purposes described in § 170.100, a Federal awarding agency must include the award term in appendix A to this part in each Federal award to a recipient under which the total funding is anticipated to equal or exceed $30,000 in Federal funding.

(b) A Federal awarding agency, consistent with paragraph (a) of this section, is not required to include the award term in appendix A to this part if it determines that there is no possibility that the total amount of Federal funding under the Federal award will equal or exceed $30,000. However, the Federal awarding agency must subsequently modify the award to add the award term if changes in circumstances increase the total Federal funding under the award is anticipated to equal or exceed $30,000 during the period of performance.

- 22. Revise § 170.300 to read as follows:

§ 170.300 Federal agency.

Federal agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

- 23. Add § 170.301 to read as follows:

§ 170.301 Federal awarding agency.

Federal awarding agency has the meaning given in 2 CFR 200.1.

- 24. Revise § 170.305 to read as follows:

§ 170.305 Federal award.

Federal award, for the purposes of this part, means an award of Federal financial assistance that a recipient receives directly from a Federal awarding agency.

- 25. Add § 170.307 to read as follows:

§ 170.307 Foreign organization.

Foreign organization has the meaning given in 2 CFR 200.1.

- 26. Add § 170.308 to read as follows:

§ 170.308 Foreign public entity.

Foreign public entity has the meaning given in 2 CFR 200.1.

- 27. Revise § 170.310 to read as follows:

§ 170.310 Non-Federal entity.

Non-Federal entity has the meaning given in 2 CFR 200.1 and also includes all of the following, for the purposes of this part:

(a) A foreign organization;

(b) A foreign public entity; and

(c) A domestic or foreign for-profit organization.

- 28. Amend § 170.320 by correctly designating the paragraph (b) that follows paragraph (j) as paragraph (k) and by revising paragraphs (k) introductory text and (k)(2) to read as follows:

§ 170.320 Federal financial assistance subject to the Transparency Act.

* * * * *

(k) Federal financial assistance subject to the Transparency Act, does not include—

* * * * *

(2) A transfer of title to federally-owned property provided in lieu of money, even if the award is called a grant;

* * * * *

- 29. Add § 170.322 to read as follows:

§ 170.322 Recipient.

Recipient, for the purposes of this part, means a non-Federal entity or Federal agency that received a Federal award.

- 30. Revise § 170.325 to read as follows:

§ 170.325 Subaward.

Subaward has the meaning given in 2 CFR 200.1.

- 31. Revise appendix A to part 170 to read as follows:

Appendix A to Part 170—Award Term

I. Reporting Subawards and Executive Compensation

a. Reporting of first-tier subawards.

Applicability. Unless you are exempt as provided in paragraph d. of this award term, you must report each action that equals or exceeds $30,000 in Federal funds for a subaward to a non-Federal entity or Federal agency (see definitions in paragraph e. of this award term).

2. Where and when to report.

i. The non-Federal entity or Federal agency must report each obligating action described in paragraph a.1. of this award term to *http://www.fsrs.gov.*

ii. For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

3. *What to report.* You must report the information about each obligating action that the submission instructions posted at *http://www.fsrs.gov specify.*

b. Reporting total compensation of recipient executives for non-Federal entities.

1. Applicability and what to report. You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

i. The total Federal funding authorized to date under this Federal award equals or exceeds $30,000 as defined in 2 CFR 170.320;

ii. in the preceding fiscal year, you received—

(A) 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards), and

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and,

iii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report executive total compensation described in paragraph b.1. of this award term:

i. As part of your registration profile at *https://www.sam.gov.*

ii. By the end of the month following the month in which this award is made, and annually thereafter.

c. Reporting of Total Compensation of Subrecipient Executives.

1. *Applicability and what to report.* Unless you are exempt as provided in paragraph d. of this award term, for each first-tier non-Federal entity subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—

i. in the subrecipient's preceding fiscal year, the subrecipient received—

(A) 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards) and,

(B) $25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and

ii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at *http://www.sec.gov/answers/execomp.htm.*)

2. *Where and when to report.* You must report subrecipient executive total compensation described in paragraph c.1. of this award term:

i. To the recipient.

ii. By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (*i.e.*, between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.

d. Exemptions.

If, in the previous tax year, you had gross income, from all sources, under $300,000, you are exempt from the requirements to report:

i. Subawards, and

ii. The total compensation of the five most highly compensated executives of any subrecipient.

e. *Definitions.* For purposes of this award term:

1. Federal Agency means a Federal agency as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

2. Non-Federal *entity* means all of the following, as defined in 2 CFR part 25:

i. A Governmental organization, which is a State, local government, or Indian tribe;

ii. A foreign public entity;

iii. A domestic or foreign nonprofit organization; and,

iv. A domestic or foreign for-profit organization

3. *Executive* means officers, managing partners, or any other employees in management positions.

4. Subaward:

i. This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.

ii. The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see 2 CFR 200.331).

iii. A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.

5. *Subrecipient* means a non-Federal entity or Federal agency that:

i. Receives a subaward from you (the recipient) under this award; and

ii. Is accountable to you for the use of the Federal funds provided by the subaward.

6. *Total compensation* means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)).

· 31a. Add part 183 to read as follows:

PART 183—NEVER CONTRACT WITH THE ENEMY

Sec.

183.5 Purpose of this part.
183.10 Applicability.
183.15 Responsibilities of Federal awarding agencies.
183.20 Reporting responsibilities of Federal awarding agencies.
183.25 Responsibilities of recipients.
183.30 Access to records.
183.35 Definitions.

APPENDIX A TO PART 183—CLAUSES FOR AWARD AGREEMENTS

Authority: Pub. L. 113–291.

§ 183.5 Purpose of this part.

This part provides guidance to Federal awarding agencies on the implementation of the Never Contract with the Enemy requirements applicable to certain grants and cooperative agreements, as specified in subtitle E, title VIII of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113–291), as amended by Sec. 822 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

§ 183.10 Applicability.

(a) This part applies only to grants and cooperative agreements that are expected to exceed $50,000 and that are performed outside the United States, including U.S. territories, and that are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. It does not apply to the authorized intelligence or law enforcement activities of the Federal Government.

(b) All elements of this part are applicable until the date of expiration as provided in law.

§ 183.15 Responsibilities of Federal awarding agencies.

(a) Prior to making an award for a covered grant or cooperative agreement (see also § 183.35), the Federal awarding agency must check the current list of prohibited or restricted persons or entities in the System Award Management (SAM) Exclusions.

(b) The Federal awarding agency may include the award term provided in appendix A of this part in all covered grant and cooperative agreement awards in accordance with Never Contract with the Enemy.

(c) A Federal awarding agency may become aware of a person or entity that:

(1) Provides funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency directly or indirectly to covered persons or entities; or

(2) Fails to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency are provided directly or indirectly to covered persons or entities.

(d) When a Federal awarding agency becomes aware of such a person or entity, it may do any of the following actions:

(1) Restrict the future award of all Federal contracts, grants, and cooperative agreements to the person or entity based upon concerns that Federal awards to the entity would provide

grant funds directly or indirectly to a covered person or entity.

(2) Terminate any contract, grant, or cooperative agreement to a covered person or entity upon becoming aware that the recipient has failed to exercise due diligence to ensure that none of the award funds are provided directly or indirectly to a covered person or entity.

(3) Void in whole or in part any grant, cooperative agreement or contracts of the executive agency concerned upon a written determination by the head of contracting activity or other appropriate official that the grant or cooperative agreement provides funds directly or indirectly to a covered person or entity.

(e) The Federal awarding agency must notify recipients in writing regarding its decision to restrict all future awards and/or to terminate or void a grant or cooperative agreement. The agency must also notify the recipient in writing about the recipient's right to request an administrative review (using the agency's procedures) of the restriction, termination, or void of the grant or cooperative agreement within 30 days of receiving notification.

§ 183.20 Reporting responsibilities of Federal awarding agencies.

(a) If a Federal awarding agency restricts all future awards to a covered person or entity, it must enter information on the ineligible person or entity into SAM Exclusions as a prohibited or restricted source pursuant to Subtitle E, Title VIII of the NDAA for FY 2015 (Pub. L. 113–291).

(b) When a Federal awarding agency terminates or voids a grant or cooperative agreement due to Never Contract with the Enemy, it must report the termination as a Termination for Material Failure to Comply in the Office of Management and Budget (OMB)-designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)).

(c) The Federal awarding agency shall document and report to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies):

(1) Any action to restrict all future awards or to terminate or void an award with a covered person or entity.

(2) Any decision not to restrict all future awards, terminate, or void an award along with the agency's reasoning for not taking one of these actions after the agency became aware that a person or entity is a prohibited or restricted source.

(d) Each report referenced in paragraph (c)(1) of this section shall include:

(1) The executive agency taking such action.

(2) An explanation of the basis for the action taken.

(3) The value of the terminated or voided grant or cooperative agreement.

(4) The value of all grants and cooperative agreements of the executive agency with the person or entity concerned at the time the grant or cooperative agreement was terminated or voided.

(e) Each report referenced in paragraph (c)(2) of this section shall include:

(1) The executive agency concerned.

(2) An explanation of the basis for not taking the action.

(f) For each instance in which an executive agency exercised the additional authority to examine recipient and lower tier entity (*e.g.*, subrecipient or contractor) records, the agency must report in writing to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies) the following:

(1) An explanation of the basis for the action taken; and

(2) A summary of the results of any examination of records.

§ 183.25 Responsibilities of recipients.

(a) Recipients of covered grants or cooperative agreements must fulfill the requirements outlined in the award term provided in appendix A to this part.

(b) Recipients must also flow down the provisions in award terms covered in appendix A to this part to all contracts and subawards under the award.

§ 183.30 Access to records.

In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards, to the extent necessary, to ensure that funds, including supplies and services, received under a covered grant or cooperative agreement (see § 183.35) are not provided directly or indirectly to a covered person or entity in accordance with Never Contract with the Enemy. The Federal awarding agency may only exercise this authority upon a written determination by the Federal awarding agency that relies on a finding by the commander of a covered combatant command that there is reason to believe that funds, including supplies and services, received under the grant or cooperative agreement may have been provided directly or indirectly to a covered person or entity.

§ 183.35 Definitions.

Terms used in this part are defined as follows:

Contingency operation, as defined in 10 U.S.C. 101a, means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under 10 U.S.C. 688, 12301a, 12302, 12304, 12304a, 12305, 12406 of 10 U.S.C. chapter 15, 14 U.S.C. 712 or any other provision of law during a war or during a national emergency declared by the President or Congress.

Covered combatant command means the following:

(1) The United States Africa Command.

(2) The United States Central Command.

(3) The United States European Command.

(4) The United States Pacific Command.

(5) The United States Southern Command.

(6) The United States Transportation Command.

Covered grant or cooperative agreement means a grant or cooperative agreement, as defined in 2 CFR 200.1 with an estimated value in excess of $50,000 that is performed outside the United States, including its possessions and territories, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. Except for U.S. Department of Defense grants and cooperative agreements that were awarded on or before December 19, 2017, that will be performed in the United States Central Command, where the estimated value is in excess of $100,000.

Covered person or entity means a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

Appendix A to Part 183—Award Terms for Never Contract With the Enemy

Federal awarding agencies may include the following award terms in all

awards for covered grants and cooperative agreements in accordance with Never Contract with the Enemy:

Term 1

Prohibition on Providing Funds to the Enemy

(a) The recipient must—

(1) Exercise due diligence to ensure that none of the funds, including supplies and services, received under this grant or cooperative agreement are provided directly or indirectly (including through subawards or contracts) to a person or entity who is actively opposing the United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, which must be completed through 2 CFR 180.300 prior to issuing a subaward or contract and;

(2) Terminate or void in whole or in part any subaward or contract with a person or entity listed in SAM as a prohibited or restricted source pursuant to subtitle E of Title VIII of the NDAA for FY 2015, unless the Federal awarding agency provides written approval to continue the subaward or contract.

(b) The recipient may include the substance of this clause, including paragraph (a) of this clause, in subawards under this grant or cooperative agreement that have an estimated value over $50,000 and will be performed outside the United States, including its outlying areas.

(c) The Federal awarding agency has the authority to terminate or void this grant or cooperative agreement, in whole or in part, if the Federal awarding agency becomes aware that the recipient failed to exercise due diligence as required by paragraph (a) of this clause or if the Federal awarding agency becomes aware that any funds received under this grant or cooperative agreement have been provided directly or indirectly to a person or entity who is actively opposing coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

(End of term)

Term 2

Additional Access to Recipient Records

(a) In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards or contracts to the extent necessary to ensure that funds, including supplies and services, available under this grant or cooperative agreement are not provided, directly or indirectly, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, except for awards awarded by the Department of Defense on or before Dec 19, 2017 that will be performed in the United States Central Command (USCENTCOM) theater of operations.

(b) The substance of this clause, including this paragraph (b), is required to be included in subawards or contracts under this grant or cooperative agreement that have an estimated value over $50,000 and will be performed outside the United States, including its outlying areas.

(End of term)

PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 32. The authority citation for part 200 continues to read as follows:

Authority: 31 U.S.C. 503

■ 33. Amend § 200.0 by removing the acronym CFDA, revising the acronym MTDC, adding in alphabetical order the acronym NFE, and revising the acronym SAM to read as follows:

§ 200.0 Acronyms.

* * * * *

MTDC Modified Total Direct Cost

NFE Non-Federal Entity

* * * * *

SAM System for Award Management

* * * * *

■ 34. Revise § 200.1 to read as follows:

§ 200.1 Definitions.

These are the definitions for terms used in this part. Different definitions may be found in Federal statutes or regulations that apply more specifically to particular programs or activities. These definitions could be supplemented by additional instructional information provided in governmentwide standard information collections. For purposes of this part, the following definitions apply:

Acquisition cost means the cost of the asset including the cost to ready the asset for its intended use. Acquisition cost for equipment, for example, means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Acquisition costs for software includes those development costs capitalized in accordance with generally accepted accounting principles (GAAP). Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in or excluded from the acquisition cost in accordance with the non-Federal entity's regular accounting practices.

Advance payment means a payment that a Federal awarding agency or pass-through entity makes by any appropriate payment mechanism, including a predetermined payment schedule, before the non-Federal entity disburses the funds for program purposes.

Allocation means the process of assigning a cost, or a group of costs, to one or more cost objective(s), in reasonable proportion to the benefit provided or other equitable relationship. The process may entail assigning a cost(s) directly to a final cost objective or through one or more intermediate cost objectives.

Assistance listings refers to the publicly available listing of Federal assistance programs managed and administered by the General Services Administration, formerly known as the Catalog of Federal Domestic Assistance (CFDA).

Assistance listing number means a unique number assigned to identify a Federal Assistance Listings, formerly known as the CFDA Number.

Assistance listing program title means the title that corresponds to the Federal Assistance Listings Number, formerly known as the CFDA program title.

Audit finding means deficiencies which the auditor is required by § 200.516(a) to report in the schedule of findings and questioned costs.

Auditee means any non-Federal entity that expends Federal awards which must be audited under subpart F of this part.

Auditor means an auditor who is a public accountant or a Federal, State, local government, or Indian tribe audit organization, which meets the general standards specified for external auditors in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of nonprofit organizations.

Budget means the financial plan for the Federal award that the Federal awarding agency or pass-through entity approves during the Federal award process or in subsequent amendments to the Federal award. It may include the Federal and non-Federal share or only the Federal share, as determined by the Federal awarding agency or pass-through entity.

Budget period means the time interval from the start date of a funded portion

of an award to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions pursuant to § 200.308.

Capital assets means:

(1) Tangible or intangible assets used in operations having a useful life of more than one year which are capitalized in accordance with GAAP. Capital assets include:

(i) Land, buildings (facilities), equipment, and intellectual property (including software) whether acquired by purchase, construction, manufacture, exchange, or through a lease accounted for as financed purchase under Government Accounting Standards Board (GASB) standards or a finance lease under Financial Accounting Standards Board (FASB) standards; and

(ii) Additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations or alterations to capital assets that materially increase their value or useful life (not ordinary repairs and maintenance).

(2) For purpose of this part, capital assets do not include intangible right-to-use assets (per GASB) and right-to-use operating lease assets (per FASB). For example, assets capitalized that recognize a lessee's right to control the use of property and/or equipment for a period of time under a lease contract. See also § 200.465.

Capital expenditures means expenditures to acquire capital assets or expenditures to make additions, improvements, modifications, replacements, rearrangements, reinstallations, renovations, or alterations to capital assets that materially increase their value or useful life.

Central service cost allocation plan means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a State or local government or Indian tribe on a centralized basis to its departments and agencies. The costs of these services may be allocated or billed to users.

Claim means, depending on the context, either:

(1) A written demand or written assertion by one of the parties to a Federal award seeking as a matter of right:

(i) The payment of money in a sum certain;

(ii) The adjustment or interpretation of the terms and conditions of the Federal award; or

(iii) Other relief arising under or relating to a Federal award.

(2) A request for payment that is not in dispute when submitted.

Class of Federal awards means a group of Federal awards either awarded under a specific program or group of programs or to a specific type of non-Federal entity or group of non-Federal entities to which specific provisions or exceptions may apply.

Closeout means the process by which the Federal awarding agency or pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in § 200.344.

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. ''Other clusters'' are as defined by OMB in the compliance supplement or as designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating an ''other cluster,'' a State must identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with § 200.332(a). A cluster of programs must be considered as one program for determining major programs, as described in § 200.518, and, with the exception of R&D as described in § 200.501(c), whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 200.513(a). The cognizant agency for audit is not necessarily the same as the cognizant agency for indirect costs. A list of cognizant agencies for audit can be found on the Federal Audit Clearinghouse (FAC) website.

Cognizant agency for indirect costs means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this part on behalf of all Federal agencies. The cognizant agency for indirect cost is not necessarily the same as the cognizant agency for audit. For assignments of cognizant agencies see the following:

(1) For Institutions of Higher Education (IHEs): Appendix III to this part, paragraph C.11.

(2) For nonprofit organizations: Appendix IV to this part, paragraph C.2.a.

(3) For State and local governments: Appendix V to this part, paragraph F.1.

(4) For Indian tribes: Appendix VII to this part, paragraph D.1.

Compliance supplement means an annually updated authoritative source for auditors that serves to identify existing important compliance requirements that the Federal Government expects to be considered as part of an audit. Auditors use it to understand the Federal program's objectives, procedures, and compliance requirements, as well as audit objectives and suggested audit procedures for determining compliance with the relevant Federal program.

Computing devices means machines used to acquire, store, analyze, process, and publish data and other information electronically, including accessories (or ''peripherals'') for printing, transmitting and receiving, or storing electronic information. See also the definitions of *supplies* and *information technology systems* in this section.

Contract means, for the purpose of Federal financial assistance, a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a Federal award. For additional information on subrecipient and contractor determinations, see § 200.331. See also the definition of *subaward* in this section.

Contractor means an entity that receives a contract as defined in this section.

Cooperative agreement means a legal instrument of financial assistance between a Federal awarding agency and a recipient or a pass-through entity and a subrecipient that, consistent with 31 U.S.C. 6302–6305:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

(2) Is distinguished from a grant in that it provides for substantial involvement of the Federal awarding agency in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or

(ii) An agreement that provides only:

(A) Direct United States Government cash assistance to an individual;

(B) A subsidy;

(C) A loan;

(D) A loan guarantee; or

(E) Insurance.

Cooperative audit resolution means the use of audit follow-up techniques which promote prompt corrective action by improving communication, fostering collaboration, promoting trust, and developing an understanding between the Federal agency and the non-Federal entity. This approach is based upon:

(1) A strong commitment by Federal agency and non-Federal entity leadership to program integrity;

(2) Federal agencies strengthening partnerships and working cooperatively with non-Federal entities and their auditors; and non-Federal entities and their auditors working cooperatively with Federal agencies;

(3) A focus on current conditions and corrective action going forward;

(4) Federal agencies offering appropriate relief for past noncompliance when audits show prompt corrective action has occurred; and

(5) Federal agency leadership sending a clear message that continued failure to correct conditions identified by audits which are likely to cause improper payments, fraud, waste, or abuse is unacceptable and will result in sanctions.

Corrective action means action taken by the auditee that:

(1) Corrects identified deficiencies;

(2) Produces recommended improvements; or

(3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Cost allocation plan means central service cost allocation plan or public assistance cost allocation plan.

Cost objective means a program, function, activity, award, organizational subdivision, contract, or work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capital projects, etc. A cost objective may be a major function of the non-Federal entity, a particular service or project, a Federal award, or an indirect (Facilities & Administrative (F&A)) cost activity, as described in subpart E of this part. See also the definitions of *final cost objective* and *intermediate cost objective* in this section.

Cost sharing or matching means the portion of project costs not paid by Federal funds or contributions (unless otherwise authorized by Federal statute). See also § 200.306.

Cross-cutting audit finding means an audit finding where the same underlying condition or issue affects all Federal awards (including Federal awards of more than one Federal awarding agency or pass-through entity).

Disallowed costs means those charges to a Federal award that the Federal awarding agency or pass-through entity determines to be unallowable, in accordance with the applicable Federal statutes, regulations, or the terms and conditions of the Federal award.

Discretionary award means an award in which the Federal awarding agency, in keeping with specific statutory authority that enables the agency to exercise judgment (''discretion''), selects the recipient and/or the amount of Federal funding awarded through a competitive process or based on merit of proposals. A discretionary award may be selected on a non-competitive basis, as appropriate.

Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or $5,000. See also the definitions of *capital assets, computing devices, general purpose equipment, information technology systems, special purpose equipment,* and *supplies* in this section.

Expenditures means charges made by a non-Federal entity to a project or program for which a Federal award was received.

(1) The charges may be reported on a cash or accrual basis, as long as the methodology is disclosed and is consistently applied.

(2) For reports prepared on a cash basis, expenditures are the sum of:

(i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense charged;

(iii) The value of third-party in-kind contributions applied; and

(iv) The amount of cash advance payments and payments made to subrecipients.

(3) For reports prepared on an accrual basis, expenditures are the sum of:

(i) Cash disbursements for direct charges for property and services;

(ii) The amount of indirect expense incurred;

(iii) The value of third-party in-kind contributions applied; and

(iv) The net increase or decrease in the amounts owed by the non-Federal entity for:

(A) Goods and other property received;

(B) Services performed by employees, contractors, subrecipients, and other payees; and

(C) Programs for which no current services or performance are required such as annuities, insurance claims, or other benefit payments.

Federal agency means an ''agency'' as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f).

Federal Audit Clearinghouse (FAC) means the clearinghouse designated by OMB as the repository of record where non-Federal entities are required to transmit the information required by subpart F of this part.

Federal award has the meaning, depending on the context, in either paragraph (1) or (2) of this definition:

(1)(i) The Federal financial assistance that a recipient receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in § 200.101; or

(ii) The cost-reimbursement contract under the Federal Acquisition Regulations that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in § 200.101.

(2) The instrument setting forth the terms and conditions. The instrument is the grant agreement, cooperative agreement, other agreement for assistance covered in paragraph (2) of the definition of *Federal financial assistance* in this section, or the cost-reimbursement contract awarded under the Federal Acquisition Regulations.

(3) Federal award does not include other contracts that a Federal agency uses to buy goods or services from a contractor or a contract to operate Federal Government owned, contractor operated facilities (GOCOs).

(4) See also definitions of Federal financial assistance, grant agreement, and cooperative agreement.

Federal award date means the date when the Federal award is signed by the authorized official of the Federal awarding agency.

Federal financial assistance means

(1) Assistance that non-Federal entities receive or administer in the form of:

(i) Grants;

(ii) Cooperative agreements;

(iii) Non-cash contributions or donations of property (including donated surplus property);

(iv) Direct appropriations;

(v) Food commodities; and

(vi) Other financial assistance (except assistance listed in paragraph (2) of this definition).

(2) For § 200.203 and subpart F of this part, *Federal financial assistance* also includes assistance that non-Federal entities receive or administer in the form of:

(i) Loans;

(ii) Loan Guarantees;

(iii) Interest subsidies; and
(iv) Insurance.
(3) For § 200.216, Federal financial assistance includes assistance that non-Federal entities receive or administer in the form of:
(i) Grants;
(ii) Cooperative agreements;
(iii) Loans; and
(iv) Loan Guarantees.
(4) Federal financial assistance does not include amounts received as reimbursement for services rendered to individuals as described in § 200.502(h) and (i).

Federal interest means, for purposes of § 200.330 or when used in connection with the acquisition or improvement of real property, equipment, or supplies under a Federal award, the dollar amount that is the product of the:
(1) The percentage of Federal participation in the total cost of the real property, equipment, or supplies; and
(2) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

Federal program means:
(1) All Federal awards which are assigned a single Assistance Listings Number.
(2) When no Assistance Listings Number is assigned, all Federal awards from the same agency made for the same purpose must be combined and considered one program.
(3) Notwithstanding paragraphs (1) and (2) of this definition, a cluster of programs. The types of clusters of programs are:
(i) Research and development (R&D);
(ii) Student financial aid (SFA); and
(iii) ''Other clusters,'' as described in the definition of *cluster of programs* in this section.

Federal share means the portion of the Federal award costs that are paid using Federal funds.

Final cost objective means a cost objective which has allocated to it both direct and indirect costs and, in the non-Federal entity's accumulation system, is one of the final accumulation points, such as a particular award, internal project, or other direct activity of a non-Federal entity. See also the definitions of *cost objective* and *intermediate cost objective* in this section.

Financial obligations, when referencing a recipient's or subrecipient's use of funds under a Federal award, means orders placed for property and services, contracts and subawards made, and similar transactions that require payment.

Fixed amount awards means a type of grant or cooperative agreement under which the Federal awarding agency or pass-through entity provides a specific level of support without regard to actual costs incurred under the Federal award. This type of Federal award reduces some of the administrative burden and record-keeping requirements for both the non-Federal entity and Federal awarding agency or pass-through entity. Accountability is based primarily on performance and results. See §§ 200.102(c), 200.201(b), and 200.333.

Foreign organization means an entity that is:
(1) A public or private organization located in a country other than the United States and its territories that is subject to the laws of the country in which it is located, irrespective of the citizenship of project staff or place of performance;
(2) A private nongovernmental organization located in a country other than the United States that solicits and receives cash contributions from the general public;
(3) A charitable organization located in a country other than the United States that is nonprofit and tax exempt under the laws of its country of domicile and operation, and is not a university, college, accredited degree-granting institution of education, private foundation, hospital, organization engaged exclusively in research or scientific activities, church, synagogue, mosque or other similar entities organized primarily for religious purposes; or
(4) An organization located in a country other than the United States not recognized as a foreign public entity.

Foreign public entity means:
(1) A foreign government or foreign governmental entity;
(2) A public international organization, which is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f);
(3) An entity owned (in whole or in part) or controlled by a foreign government; or
(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

General purpose equipment means equipment which is not limited to research, medical, scientific or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles. See also the definitions of *equipment* and *special purpose equipment* in this section.

Generally accepted accounting principles (GAAP) has the meaning specified in accounting standards issued by the GASB and the FASB.

Generally accepted government auditing standards (GAGAS), also known as the Yellow Book, means generally accepted government auditing standards issued by the Comptroller General of the United States, which are applicable to financial audits.

Grant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that, consistent with 31 U.S.C. 6302, 6304:
(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use;
(2) Is distinguished from a cooperative agreement in that it does not provide for substantial involvement of the Federal awarding agency in carrying out the activity contemplated by the Federal award.
(3) Does not include an agreement that provides only:
(i) Direct United States Government cash assistance to an individual;
(ii) A subsidy;
(iii) A loan;
(vi) A loan guarantee; or
(v) Insurance.

Highest level owner means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest-level owner as defined in the Federal Acquisition Regulations (FAR) (48 CFR 52.204–17).

Hospital means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

Improper payment means:
(1) Any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other *legally applicable* requirements.
(i) Incorrect amounts are overpayments or underpayments that are made to eligible recipients (including inappropriate denials of payment or service, any payment that does not account for credit for applicable discounts, payments that are

for an incorrect amount, and duplicate payments). An improper payment also includes any payment that was made to an ineligible recipient or for an ineligible good or service, or payments for goods or services not received (except for such payments authorized by law).

Note 1 to paragraph (1)(i) of this definition. Applicable discounts are only those discounts where it is both advantageous and within the agency's control to claim them.

(ii) When an agency's review is unable to discern whether a payment was proper as a result of insufficient or lack of documentation, this payment should also be considered an improper payment. When establishing documentation requirements for payments, agencies should ensure that all documentation requirements are necessary and should refrain from imposing additional burdensome documentation requirements.

(iii) Interest or other fees that may result from an underpayment by an agency are not considered an improper payment if the interest was paid correctly. These payments are generally separate transactions and may be necessary under certain statutory, contractual, administrative, or other legally applicable requirements.

(iv) A ''questioned cost'' (as defined in this section) should not be considered an improper payment until the transaction has been completely reviewed and is confirmed to be improper.

(v) The term ''payment'' in this definition means any disbursement or transfer of Federal funds (including a commitment for future payment, such as cash, securities, loans, loan guarantees, and insurance subsidies) to any non-Federal person, non-Federal entity, or Federal employee, that is made by a Federal agency, a Federal contractor, a Federal grantee, or a governmental or other organization administering a Federal program or activity.

(vi) The term ''payment'' includes disbursements made pursuant to prime contracts awarded under the Federal Acquisition Regulation and Federal awards subject to this part that are expended by recipients.

(2) See definition of improper payment in OMB Circular A–123 appendix C, part I A (1) ''What is an improper payment?'' Questioned costs, including those identified in audits, are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A–123 appendix C.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

Institutions of Higher Education (IHEs) is defined at 20 U.S.C. 1001.

Indirect (facilities & administrative (F&A)) costs means those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect (F&A) costs. Indirect (F&A) cost pools must be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived.

Indirect cost rate proposal means the documentation prepared by a non-Federal entity to substantiate its request for the establishment of an indirect cost rate as described in appendices III through VII and appendix IX to this part.

Information technology systems means computing devices, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources. See also the definitions of *computing devices* and *equipment* in this section.

Intangible property means property having no physical existence, such as trademarks, copyrights, patents and patent applications and property, such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership (whether the property is tangible or intangible).

Intermediate cost objective means a cost objective that is used to accumulate indirect costs or service center costs that are subsequently allocated to one or more indirect cost pools or final cost objectives. See also the definitions of *cost objective* and *final cost objective* in this section.

Internal controls for non-Federal entities means:

(1) Processes designed and implemented by non-Federal entities to provide reasonable assurance regarding the achievement of objectives in the following categories:

(i) Effectiveness and efficiency of operations;

(ii) Reliability of reporting for internal and external use; and

(iii) Compliance with applicable laws and regulations.

(2) Federal awarding agencies are required to follow internal control compliance requirements in OMB Circular No. A–123, Management's Responsibility for Enterprise Risk Management and Internal Control.

Loan means a Federal loan or loan guarantee received or administered by a non-Federal entity, except as used in the definition of *program income* in this section.

(1) The term ''direct loan'' means a disbursement of funds by the Federal Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest. The term includes the purchase of, or participation in, a loan made by another lender and financing arrangements that defer payment for more than 90 days, including the sale of a Federal Government asset on credit terms. The term does not include the acquisition of a federally guaranteed loan in satisfaction of default claims or the price support loans of the Commodity Credit Corporation.

(2) The term ''direct loan obligation'' means a binding agreement by a Federal awarding agency to make a direct loan when specified conditions are fulfilled by the borrower.

(3) The term ''loan guarantee'' means any Federal Government guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender, but does not include the insurance of deposits, shares, or other withdrawable accounts in financial institutions.

(4) The term ''loan guarantee commitment'' means a binding agreement by a Federal awarding agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreement.

Local government means any unit of government within a state, including a:

(1) County;

(2) Borough;

(3) Municipality;

(4) City;

(5) Town;

(6) Township;

(7) Parish;

(8) Local public authority, including any public housing agency under the United States Housing Act of 1937;

(9) Special district;
(10) School district;
(11) Intrastate district;
(12) Council of governments, whether or not incorporated as a nonprofit corporation under State law; and
(13) Any other agency or instrumentality of a multi-, regional, or intra-State or local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with § 200.518 or a program identified as a major program by a Federal awarding agency or pass-through entity in accordance with § 200.503(e).

Management decision means the Federal awarding agency's or pass-through entity's written determination, provided to the auditee, of the adequacy of the auditee's proposed corrective actions to address the findings, based on its evaluation of the audit findings and proposed corrective actions.

Micro-purchase means a purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases comprise a subset of a non-Federal entity's small purchases as defined in § 200.320.

Micro-purchase threshold means the dollar amount at or below which a non-Federal entity may purchase property or services using micro-purchase procedures (see § 200.320). Generally, the micro-purchase threshold for procurement activities administered under Federal awards is not to exceed the amount set by the FAR at 48 CFR part 2, subpart 2.1, unless a higher threshold is requested by the non-Federal entity and approved by the cognizant agency for indirect costs.

Modified Total Direct Cost (MTDC) means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period of performance of the subawards under the award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of $25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.

Non-discretionary award means an award made by the Federal awarding agency to specific recipients in accordance with statutory, eligibility and compliance requirements, such that in keeping with specific statutory authority the agency has no ability to exercise judgement (''discretion''). A non-discretionary award amount could be determined specifically or by formula.

Non-Federal entity (NFE) means a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including IHEs, that:
(1) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
(2) Is not organized primarily for profit; and
(3) Uses net proceeds to maintain, improve, or expand the operations of the organization.

Notice of funding opportunity means a formal announcement of the availability of Federal funding through a financial assistance program from a Federal awarding agency. The notice of funding opportunity provides information on the award, who is eligible to apply, the evaluation criteria for selection of an awardee, required components of an application, and how to submit the application. The notice of funding opportunity is any paper or electronic issuance that an agency uses to announce a funding opportunity, whether it is called a ''program announcement,'' ''notice of funding availability,'' ''broad agency announcement,'' ''research announcement,'' ''solicitation,'' or some other term.

Office of Management and Budget (OMB) means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the schedule of expenditures of Federal awards, see § 200.510(b)) to a non-Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total Federal expenditures (as direct and sub-awards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit. When there is no direct funding, the Federal awarding agency which is the predominant source of pass-through funding must assume the oversight responsibilities. The duties of the oversight agency for audit and the process for any reassignments are described in § 200.513(b).

Participant support costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences, or training projects.

Pass-through entity (PTE) means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

Performance goal means a target level of performance expressed as a tangible, measurable objective, against which actual achievement can be compared, including a goal expressed as a quantitative standard, value, or rate. In some instances (*e.g.*, discretionary research awards), this may be limited to the requirement to submit technical performance reports (to be evaluated in accordance with agency policy).

Period of performance means the total estimated time interval between the start of an initial Federal award and the planned end date, which may include one or more funded portions, or budget periods. Identification of the period of performance in the Federal award per § 200.211(b)(5) does not commit the awarding agency to fund the award beyond the currently approved budget period.

Personal property means property other than real property. It may be tangible, having physical existence, or intangible.

Personally Identifiable Information (PII) means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual. Some information that is considered to be PII is available in public sources such as telephone books, public websites, and university listings. This type of information is considered to be Public PII and includes, for example, first and last name, address, work telephone number, email address, home telephone number, and general educational credentials. The definition of PII is not anchored to any single category of information or technology. Rather, it requires a case-by-case assessment of the specific risk that an individual can be identified. Non-PII can become PII whenever additional information is made publicly available, in any medium and from any source, that, when combined with other available information, could be used to identify an individual.

Program income means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of

performance except as provided in § 200.307(f). (See the definition of *period of performance* in this section.) Program income includes but is not limited to income from fees for services performed, the use or rental or real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. See also § 200.407. See also 35 U.S.C. 200–212 ''Disposition of Rights in Educational Awards'' applies to inventions made under Federal awards.

Project cost means total allowable costs incurred under a Federal award and all required cost sharing and voluntary committed cost sharing, including third-party contributions.

Property means real property or personal property. See also the definitions of *real property* and *personal property* in this section.

Protected Personally Identifiable Information (Protected PII) means an individual's first name or first initial and last name in combination with any one or more of types of information, including, but not limited to, social security number, passport number, credit card numbers, clearances, bank numbers, biometrics, date and place of birth, mother's maiden name, criminal, medical and financial records, educational transcripts. This does not include PII that is required by law to be disclosed. See also the definition of *Personally Identifiable Information (PII)* in this section.

Questioned cost means a cost that is questioned by the auditor because of an audit finding:

(1) Which resulted from a violation or possible violation of a statute, regulation, or the terms and conditions of a Federal award, including for funds used to match Federal funds;

(2) Where the costs, at the time of the audit, are not supported by adequate documentation; or

(3) Where the costs incurred appear unreasonable and do not reflect the actions a prudent person would take in the circumstances.

(4) Questioned costs are not an improper payment until reviewed and confirmed to be improper as defined in OMB Circular A–123 appendix C. (See also the definition of *Improper payment* in this section).

Real property means land, including land improvements, structures and appurtenances thereto, but excludes moveable machinery and equipment.

Recipient means an entity, usually but not limited to non-Federal entities that receives a Federal award directly from a Federal awarding agency. The term recipient does not include subrecipients or individuals that are beneficiaries of the award.

Renewal award means an award made subsequent to an expiring Federal award for which the start date is contiguous with, or closely follows, the end of the expiring Federal award. A renewal award's start date will begin a distinct period of performance.

Research and Development (R&D) means all research activities, both basic and applied, and all development activities that are performed by non-Federal entities. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Simplified acquisition threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods (see § 200.320). Non-Federal entities adopt small purchase procedures in order to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold for procurement activities administered under Federal awards is set by the FAR at 48 CFR part 2, subpart 2.1. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. However, in no circumstances can this threshold exceed the dollar value established in the FAR (48 CFR part 2, subpart 2.1) for the simplified acquisition threshold. Recipients should determine if local government laws on purchasing apply.

Special purpose equipment means equipment which is used only for research, medical, scientific, or other technical activities. Examples of special purpose equipment include microscopes, x-ray machines, surgical instruments, and spectrometers. See also the definitions of *equipment* and *general purpose equipment* in this section.

State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

Student Financial Aid (SFA) means Federal awards under those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1070–1099d), which are administered by the U.S. Department of Education, and similar programs provided by other Federal agencies. It does not include Federal awards under programs that provide fellowships or similar Federal awards to students on a competitive basis, or for specified studies or research.

Subaward means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

Subrecipient means an entity, usually but not limited to non-Federal entities, that receives a subaward from a pass-through entity to carry out part of a Federal award; but does not include an individual that is a beneficiary of such award. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.

Subsidiary means an entity in which more than 50 percent of the entity is owned or controlled directly by a parent corporation or through another subsidiary of a parent corporation.

Supplies means all tangible personal property other than those described in the definition of *equipment* in this section. A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or $5,000, regardless of the length of its useful life. See also the definitions of *computing devices* and *equipment* in this section.

Telecommunications cost means the cost of using communication and telephony technologies such as mobile phones, land lines, and internet.

Termination means the ending of a Federal award, in whole or in part at any time prior to the planned end of period of performance. A lack of available funds is not a termination.

Third-party in-kind contributions means the value of non-cash contributions (*i.e.*, property or services) that—

(1) Benefit a federally-assisted project or program; and

(2) Are contributed by non-Federal third parties, without charge, to a non-Federal entity under a Federal award.

Unliquidated financial obligations means, for financial reports prepared on a cash basis, financial obligations incurred by the non-Federal entity that have not been paid (liquidated). For reports prepared on an accrual expenditure basis, these are financial obligations incurred by the non-Federal entity for which an expenditure has not been recorded.

Unobligated balance means the amount of funds under a Federal award that the non-Federal entity has not obligated. The amount is computed by subtracting the cumulative amount of the non-Federal entity's unliquidated financial obligations and expenditures of funds under the Federal award from the cumulative amount of the funds that the Federal awarding agency or pass-through entity authorized the non-Federal entity to obligate.

Voluntary committed cost sharing means cost sharing specifically pledged on a voluntary basis in the proposal's budget on the part of the non-Federal entity and that becomes a binding requirement of Federal award. See also § 200.306.

· 35. Amend § 200.100 by revising paragraphs (a)(1), (c), (d), and (e) to read as follows:

§ 200.100 Purpose.

(a) *Purpose.* (1) This part establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards to non-Federal entities, as described in § 200.101. Federal awarding agencies must not impose additional or inconsistent requirements, except as provided in §§ 200.102 and 200.211, or unless specifically required by Federal statute, regulation, or Executive order.

* * * * *

(c) *Cost principles.* Subpart E of this part establishes principles for determining the allowable costs incurred by non-Federal entities under Federal awards. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal Government participation in the financing of a particular program or project. The principles are designed to provide that Federal awards bear their fair share of cost recognized under these principles except where restricted or prohibited by statute.

(d) Single Audit Requirements and Audit Follow-up. Subpart F of this part is issued pursuant to the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507). It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards. These provisions also provide the policies and procedures for Federal awarding agencies and pass-through entities when using the results of these audits.

(e) Guidance on challenges and prizes. For OMB guidance to Federal awarding agencies on challenges and prizes, please see memo M–10–11 Guidance on the Use of Challenges and Prizes to Promote Open Government, issued March 8, 2010, or its successor.

· 36. Revise § 200.101 to read as follows:

§ 200.101 Applicability.

(a) *General applicability to Federal agencies.* (1) The requirements established in this part apply to Federal agencies that make Federal awards to non-Federal entities. These requirements are applicable to all costs related to Federal awards.

(2) Federal awarding agencies may apply subparts A through E of this part to Federal agencies, for-profit entities, foreign public entities, or foreign organizations, except where the Federal awarding agency determines that the application of these subparts would be inconsistent with the international responsibilities of the United States or the statutes or regulations of a foreign government.

(b) *Applicability to different types of Federal awards.* (1) Throughout this part when the word ''must'' is used it indicates a requirement. Whereas, use of the word ''should'' or ''may'' indicates a best practice or recommended approach rather than a requirement and permits discretion.

(2) The following table describes what portions of this part apply to which types of Federal awards. The terms and conditions of Federal awards (including this part) flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with requirements in this part regardless of whether the non-Federal entity is a recipient or subrecipient of a Federal award. Pass-through entities must comply with the requirements described in subpart D of this part, §§ 200.331 through 200.333, but not any requirements in this part directed towards Federal awarding agencies unless the requirements of this part or the terms and conditions of the Federal award indicate otherwise.

TABLE 1 TO PARAGRAPH (b)

The following portions of this Part	Are applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts (except as noted in paragraphs (d) and (e) of this section):	Are NOT applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts:
Subpart A—Acronyms and Definitions	—All.	
Subpart B—General Provisions, except for §§ 200.111 English Language, 200.112 Conflict of Interest, 200.113 Mandatory Disclosures.	—All.	
§§ 200.111 English Language, 200.112 Conflict of Interest, 200.113 Mandatory Disclosures.	—Grant Agreements and cooperative agreements.	—Agreements for loans, loan guarantees, interest subsidies and insurance. —Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.

TABLE 1 TO PARAGRAPH (b)—Continued

The following portions of this Part	Are applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts (except as noted in paragraphs (d) and (e) of this section):	Are NOT applicable to the following types of Federal Awards and Fixed-Price Contracts and Subcontracts:
Subparts C–D, except for §§ 200.203 Requirement to provide public notice of Federal financial assistance programs, 200.303 Internal controls, 200.331–333 Subrecipient Monitoring and Management.	—Grant Agreements and cooperative agreements.	—Agreements for loans, loan guarantees, interest subsidies and insurance. —Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
§ 200.203 Requirement to provide public notice of Federal financial assistance programs.	—Grant Agreements and cooperative agreements. —Agreements for loans, loan guarantees, interest subsidies and insurance.	—Procurement contracts awarded by Federal Agencies under the Federal Acquisition Regulation and subcontracts under those contracts.
§§ 200.303 Internal controls, 200.331–333 Subrecipient Monitoring and Management.	—All.	
Subpart E—Cost Principles	—Grant Agreements and cooperative agreements, except those providing food commodities. —All procurement contracts under the Federal Acquisition Regulations except those that are not negotiated.	—Grant agreements and cooperative agreements providing foods commodities. —Fixed amount awards. —Agreements for loans, loans guarantees, interest subsidies and insurance. —Federal awards to hospitals (see Appendix IX Hospital Cost Principles).
Subpart F—Audit Requirements	—Grant Agreements and cooperative agreements. —Contracts and subcontracts, except for fixed price contacts and subcontracts, awarded under the Federal Acquisition Regulation. —Agreements for loans, loans guarantees, interest subsidies and insurance and other forms of Federal Financial Assistance as defined by the Single Audit Act Amendment of 1996.	—Fixed-price contracts and subcontracts awarded under the Federal Acquisition Regulation.

(c) *Federal award of cost-reimbursement contract under the FAR to a non-Federal entity.* When a non-Federal entity is awarded a cost-reimbursement contract, only subpart D, §§ 200.331 through 200.333, and subparts E and F of this part are incorporated by reference into the contract, but the requirements of subparts D, E, and F are supplementary to the FAR and the contract. When the Cost Accounting Standards (CAS) are applicable to the contract, they take precedence over the requirements of this part, including subpart F of this part, which are supplementary to the CAS requirements. In addition, costs that are made unallowable under 10 U.S.C. 2324(e) and 41 U.S.C. 4304(a) as described in the FAR 48 CFR part 31, subpart 31.2, and 48 CFR 31.603 are always unallowable. For requirements other than those covered in subpart D, §§ 200.331 through 200.333, and subparts E and F of this part, the terms of the contract and the FAR apply. Note that when a non-Federal entity is awarded a FAR contract, the FAR applies, and the terms and conditions of the contract shall prevail over the requirements of this part.

(d) *Governing provisions.* With the exception of subpart F of this part, which is required by the Single Audit Act, in any circumstances where the provisions of Federal statutes or regulations differ from the provisions of this part, the provision of the Federal statutes or regulations govern. This includes, for agreements with Indian tribes, the provisions of the Indian Self-Determination and Education and Assistance Act (ISDEAA), as amended, 25 U.S.C 450–458ddd–2.

(e) *Program applicability.* Except for §§ 200.203 and 200.331 through 200.333, the requirements in subparts C, D, and E of this part do not apply to the following programs:

(1) The block grant awards authorized by the Omnibus Budget Reconciliation Act of 1981 (including Community Services), except to the extent that subpart E of this part apply to subrecipients of Community Services Block Grant funds pursuant to 42 U.S.C. 9916(a)(1)(B);

(2) Federal awards to local education agencies under 20 U.S.C. 7702–7703b, (portions of the Impact Aid program);

(3) Payments under the Department of Veterans Affairs' State Home Per Diem Program (38 U.S.C. 1741); and

(4) Federal awards authorized under the Child Care and Development Block Grant Act of 1990, as amended:

(i) Child Care and Development Block Grant (42 U.S.C. 9858).

(ii) Child Care Mandatory and Matching Funds of the Child Care and Development Fund (42 U.S.C. 9858).

(f) *Additional program applicability.* Except for § 200.203, the guidance in subpart C of this part does not apply to the following programs:

(1) Entitlement Federal awards to carry out the following programs of the Social Security Act:

(i) Temporary Assistance for Needy Families (title IV–A of the Social Security Act, 42 U.S.C. 601–619);

(ii) Child Support Enforcement and Establishment of Paternity (title IV–D of the Social Security Act, 42 U.S.C. 651–669b);

(iii) Foster Care and Adoption Assistance (title IV–E of the Act, 42 U.S.C. 670–679c);

(iv) Aid to the Aged, Blind, and Disabled (titles I, X, XIV, and XVI–AABD of the Act, as amended);

(v) Medical Assistance (Medicaid) (title XIX of the Act, 42 U.S.C. 1396–1396w–5) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B) of the Social Security Act (42 U.S.C. 1396b(a)(6)(B)); and

(vi) Children's Health Insurance Program (title XXI of the Act, 42 U.S.C. 1397aa–1397mm).

(2) A Federal award for an experimental, pilot, or demonstration project that is also supported by a Federal award listed in paragraph (f)(1) of this section.

(3) Federal awards under subsection 412(e) of the Immigration and Nationality Act and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits (8 U.S.C. 1522(e)).

(4) Entitlement awards under the following programs of The National School Lunch Act:

(i) National School Lunch Program (section 4 of the Act, 42 U.S.C. 1753);

(ii) Commodity Assistance (section 6 of the Act, 42 U.S.C. 1755);

(iii) Special Meal Assistance (section 11 of the Act, 42 U.S.C. 1759a);

(iv) Summer Food Service Program for Children (section 13 of the Act, 42 U.S.C. 1761); and

(v) Child and Adult Care Food Program (section 17 of the Act, 42 U.S.C. 1766).

(5) Entitlement awards under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk Program (section 3 of the Act, 42 U.S.C. 1772);

(ii) School Breakfast Program (section 4 of the Act, 42 U.S.C. 1773); and

(iii) State Administrative Expenses (section 7 of the Act, 42 U.S.C. 1776).

(6) Entitlement awards for State Administrative Expenses under The Food and Nutrition Act of 2008 (section 16 of the Act, 7 U.S.C. 2025).

(7) Non-discretionary Federal awards under the following non-entitlement programs:

(i) Special Supplemental Nutrition Program for Women, Infants and Children (section 17 of the Child Nutrition Act of 1966) 42 U.S.C. 1786;

(ii) The Emergency Food Assistance Programs (Emergency Food Assistance Act of 1983) 7 U.S.C. 7501 note; and

(iii) Commodity Supplemental Food Program (section 5 of the Agriculture and Consumer Protection Act of 1973) 7 U.S.C. 612c note.

▪ 37. Revise § 200.102 to read as follows:

§ 200.102 Exceptions.

(a) With the exception of subpart F of this part, OMB may allow exceptions for classes of Federal awards or non-Federal entities subject to the requirements of this part when exceptions are not prohibited by statute. In the interest of maximum uniformity, exceptions from the requirements of this part will be permitted as described in this section.

(b) Exceptions on a case-by-case basis for individual non-Federal entities may be authorized by the Federal awarding agency or cognizant agency for indirect costs, except where otherwise required by law or where OMB or other approval is expressly required by this part.

(c) The Federal awarding agency may apply adjust requirements to a class of Federal awards or non-Federal entities when approved by OMB, or when required by Federal statutes or regulations, except for the requirements in subpart F of this part. A Federal awarding agency may apply less restrictive requirements when making fixed amount awards as defined in subpart A of this part, except for those requirements imposed by statute or in subpart F of this part.

(d) Federal awarding agencies may request exceptions in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance. See also § 200.206.

▪ 38. Revise § 200.103 to read as follows:

§ 200.103 Authorities.

This part is issued under the following authorities.

(a) Subparts B through D of this part are authorized under 31 U.S.C. 503 (the Chief Financial Officers Act, Functions of the Deputy Director for Management), 41 U.S.C. 1101–1131 (the Office of Federal Procurement Policy Act), Reorganization Plan No. 2 of 1970, and Executive Order 11541 (''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President''), the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507), as well as The Federal Program Information Act (Pub. L. 95–220 and Pub. L. 98–169, as amended, codified at 31 U.S.C. 6101–6106).

(b) Subpart E of this part is authorized under the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended (31 U.S.C. 1101–1125); the Chief Financial Officers Act of 1990 (31 U.S.C. 503–504); Reorganization Plan No. 2 of 1970; and Executive Order 11541, ''Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President.''

(c) Subpart F of this part is authorized under the Single Audit Act Amendments of 1996, (31 U.S.C. 7501–7507).

▪ 39. Amend § 200.104 by revising the introductory text and paragraphs (g) and (h) to read as follows:

§ 200.104 Supersession.

As described in § 200.110, this part supersedes the following OMB guidance documents and regulations under title 2 of the Code of Federal Regulations:

* * * * *

(g) A–133, ''Audits of States, Local Governments and Non-Profit Organizations''; and

(h) Those sections of A–50 related to audits performed under subpart F of this part.

▪ 40. Revise § 200.105 to read as follows:

§ 200.105 Effect on other issuances.

(a) *Superseding inconsistent requirements.* For Federal awards subject to this part, all administrative requirements, program manuals, handbooks and other non-regulatory materials that are inconsistent with the requirements of this part must be superseded upon implementation of this part by the Federal agency, except to the extent they are required by statute or authorized in accordance with the provisions in § 200.102.

(b) *Imposition of requirements on recipients.* Agencies may impose legally binding requirements on recipients only through the notice and public comment process through an approved agency process, including as authorized by this part, other statutes or regulations, or as incorporated into the terms of a Federal award.

▪ 41. Revise § 200.106 to read as follows:

§ 200.106 Agency implementation.

The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in this part. Federal agencies making Federal awards to non-Federal entities must implement the language in subparts C through F of this part in codified regulations unless different provisions are required by Federal statute or are approved by OMB.

▪ 42. Revise § 200.110 to read as follows:

§ 200.110 Effective/applicability date.

(a) The standards set forth in this part that affect the administration of Federal awards issued by Federal awarding agencies become effective once implemented by Federal awarding

agencies or when any future amendment to this part becomes final.

(b) Existing negotiated indirect cost rates (as of the publication date of the revisions to the guidance) will remain in place until they expire. The effective date of changes to indirect cost rates must be based upon the date that a newly re-negotiated rate goes into effect for a specific non-Federal entity's fiscal year. Therefore, for indirect cost rates and cost allocation plans, the revised Uniform Guidance (as of the publication date for revisions to the guidance) become effective in generating proposals and negotiating a new rate (when the rate is re-negotiated).

■ 43. Revise § 200.113 to read as follows:

§ 200.113 Mandatory disclosures.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Non-Federal entities that have received a Federal award including the term and condition outlined in appendix XII to this part are required to report certain civil, criminal, or administrative proceedings to SAM (currently FAPIIS). Failure to make required disclosures can result in any of the remedies described in § 200.339. (See also 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313.)

■ 44. Revise subpart C to read as follows:

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

Sec.

200.200 Purpose.
200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts.
200.202 Program planning and design.
200.203 Requirement to provide public notice of Federal financial assistance programs.
200.204 Notices of funding opportunities.
200.205 Federal awarding agency review of merit of proposals.
200.206 Federal awarding agency review of risk posed by applicants.
200.207 Standard application requirements.
200.208 Specific conditions.
200.209 Certifications and representations.
200.210 Pre-award costs.
200.211 Information contained in a Federal award.
200.212 Public access to Federal award information.
200.213 Reporting a determination that a non-Federal entity is not qualified for a Federal award.
200.214 Suspension and debarment.
200.215 Never contract with the enemy.
200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

§ 200.200 Purpose.

Sections 200.201 through 200.216 prescribe instructions and other pre-award matters to be used by Federal awarding agencies in the program planning, announcement, application and award processes.

§ 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts.

(a) *Federal award instrument.* The Federal awarding agency or pass-through entity must decide on the appropriate instrument for the Federal award (*i.e.*, grant agreement, cooperative agreement, or contract) in accordance with the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08).

(b) *Fixed amount awards.* In addition to the options described in paragraph (a) of this section, Federal awarding agencies, or pass-through entities as permitted in § 200.333, may use fixed amount awards (see *Fixed amount awards* in § 200.1) to which the following conditions apply:

(1) The Federal award amount is negotiated using the cost principles (or other pricing information) as a guide. The Federal awarding agency or pass-through entity may use fixed amount awards if the project scope has measurable goals and objectives and if adequate cost, historical, or unit pricing data is available to establish a fixed amount award based on a reasonable estimate of actual cost. Payments are based on meeting specific requirements of the Federal award. Accountability is based on performance and results. Except in the case of termination before completion of the Federal award, there is no governmental review of the actual costs incurred by the non-Federal entity in performance of the award. Some of the ways in which the Federal award may be paid include, but are not limited to:

(i) In several partial payments, the amount of each agreed upon in advance, and the ''milestone'' or event triggering the payment also agreed upon in advance, and set forth in the Federal award;

(ii) On a unit price basis, for a defined unit or units, at a defined price or prices, agreed to in advance of performance of the Federal award and set forth in the Federal award; or,

(iii) In one payment at Federal award completion.

(2) A fixed amount award cannot be used in programs which require mandatory cost sharing or match.

(3) The non-Federal entity must certify in writing to the Federal awarding agency or pass-through entity at the end of the Federal award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the Federal award must be adjusted.

(4) Periodic reports may be established for each Federal award.

(5) Changes in principal investigator, project leader, project partner, or scope of effort must receive the prior written approval of the Federal awarding agency or pass-through entity.

§ 200.202 Program planning and design.

The Federal awarding agency must design a program and create an Assistance Listing before announcing the Notice of Funding Opportunity. The program must be designed with clear goals and objectives that facilitate the delivery of meaningful results consistent with the Federal authorizing legislation of the program. Program performance shall be measured based on the goals and objectives developed during program planning and design. See § 200.301 for more information on performance measurement. Performance measures may differ depending on the type of program. The program must align with the strategic goals and objectives within the Federal awarding agency's performance plan and should support the Federal awarding agency's performance measurement, management, and reporting as required by Part 6 of OMB Circular A–11 (Preparation, Submission, and Execution of the Budget). The program must also be designed to align with the Program Management Improvement Accountability Act (Pub. L. 114–264).

§ 200.203 Requirement to provide public notice of Federal financial assistance programs.

(a) The Federal awarding agency must notify the public of Federal programs in the Federal Assistance Listings maintained by the General Services Administration (GSA).

(1) The Federal Assistance Listings is the single, authoritative, governmentwide comprehensive source of Federal financial assistance program information produced by the executive branch of the Federal Government.

(2) The information that the Federal awarding agency must submit to GSA for approval by OMB is listed in

paragraph (b) of this section. GSA must prescribe the format for the submission in coordination with OMB.

(3) The Federal awarding agency may not award Federal financial assistance without assigning it to a program that has been included in the Federal Assistance Listings as required in this section unless there are exigent circumstances requiring otherwise, such as timing requirements imposed by statute.

(b) For each program that awards discretionary Federal awards, non-discretionary Federal awards, loans, insurance, or any other type of Federal financial assistance, the Federal awarding agency must, to the extent practicable, create, update, and manage Assistance Listings entries based on the authorizing statute for the program and comply with additional guidance provided by GSA in consultation with OMB to ensure consistent, accurate information is available to prospective applicants. Accordingly, Federal awarding agencies must submit the following information to GSA:

(1) *Program Description, Purpose, Goals, and Measurement.* A brief summary of the statutory or regulatory requirements of the program and its intended outcome. Where appropriate, the Program Description, Purpose, Goals, and Measurement should align with the strategic goals and objectives within the Federal awarding agency's performance plan and should support the Federal awarding agency's performance measurement, management, and reporting as required by Part 6 of OMB Circular A–11;

(2) *Identification.* Identification of whether the program makes Federal awards on a discretionary basis or the Federal awards are prescribed by Federal statute, such as in the case of formula grants.

(3) *Projected total amount of funds available for the program.* Estimates based on previous year funding are acceptable if current appropriations are not available at the time of the submission;

(4) *Anticipated source of available funds.* The statutory authority for funding the program and, to the extent possible, agency, sub-agency, or, if known, the specific program unit that will issue the Federal awards, and associated funding identifier (*e.g.,* Treasury Account Symbol(s));

(5) *General eligibility requirements.* The statutory, regulatory or other eligibility factors or considerations that determine the applicant's qualification for Federal awards under the program (*e.g.,* type of non-Federal entity); and

(6) *Applicability of Single Audit Requirements.* Applicability of Single Audit Requirements as required by subpart F of this part.

§ 200.204 Notices of funding opportunities.

For discretionary grants and cooperative agreements that are competed, the Federal awarding agency must announce specific funding opportunities by providing the following information in a public notice:

(a) Summary information in notices of funding opportunities. The Federal awarding agency must display the following information posted on the OMB-designated governmentwide website for funding and applying for Federal financial assistance, in a location preceding the full text of the announcement:

(1) Federal Awarding Agency Name;

(2) Funding Opportunity Title;

(3) Announcement Type (whether the funding opportunity is the initial announcement of this funding opportunity or a modification of a previously announced opportunity);

(4) Funding Opportunity Number (required, if applicable). If the Federal awarding agency has assigned or will assign a number to the funding opportunity announcement, this number must be provided;

(5) Assistance Listings Number(s);

(6) Key Dates. Key dates include due dates for applications or Executive Order 12372 submissions, as well as for any letters of intent or pre-applications. For any announcement issued before a program's application materials are available, key dates also include the date on which those materials will be released; and any other additional information, as deemed applicable by the relevant Federal awarding agency.

(b) *Availability period.* The Federal awarding agency must generally make all funding opportunities available for application for at least 60 calendar days. The Federal awarding agency may make a determination to have a less than 60 calendar day availability period but no funding opportunity should be available for less than 30 calendar days unless exigent circumstances require as determined by the Federal awarding agency head or delegate.

(c) Full text of funding opportunities. The Federal awarding agency must include the following information in the full text of each funding opportunity. For specific instructions on the content required in this section, refer to appendix I to this part.

(1) Full programmatic description of the funding opportunity.

(2) Federal award information, including sufficient information to help an applicant make an informed decision about whether to submit an application. (See also § 200.414(c)(4)).

(3) Specific eligibility information, including any factors or priorities that affect an applicant's or its application's eligibility for selection.

(4) Application Preparation and Submission Information, including the applicable submission dates and time.

(5) Application Review Information including the criteria and process to be used to evaluate applications. See also §§ 200.205 and 200.206.

(6) Federal Award Administration Information. See also § 200.211.

(7) Applicable terms and conditions for resulting awards, including any exceptions from these standard terms.

§ 200.205 Federal awarding agency review of merit of proposals.

For discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications, with the objective of selecting recipients most likely to be successful in delivering results based on the program objectives outlined in section § 200.202. A merit review is an objective process of evaluating Federal award applications in accordance with written standards set forth by the Federal awarding agency. This process must be described or incorporated by reference in the applicable funding opportunity (see appendix I to this part.). See also § 200.204. The Federal awarding agency must also periodically review its merit review process.

§ 200.206 Federal awarding agency review of risk posed by applicants.

(a) *Review of OMB-designated repositories of governmentwide data.* (1) Prior to making a Federal award, the Federal awarding agency is required by the Improper Payments Elimination and Recovery Improvement Act of 2012, 31 U.S.C. 3321 note, and 41 U.S.C. 2313 to review information available through any OMB-designated repositories of governmentwide eligibility qualification or financial integrity information as appropriate. See also suspension and debarment requirements at 2 CFR part 180 as well as individual Federal agency suspension and debarment regulations in title 2 of the Code of Federal Regulations.

(2) In accordance 41 U.S.C. 2313, the Federal awarding agency is required to review the non-public segment of the OMB-designated integrity and performance system accessible through SAM (currently the Federal Awardee

Performance and Integrity Information System (FAPIIS)) prior to making a Federal award where the Federal share is expected to exceed the simplified acquisition threshold, defined in 41 U.S.C. 134, over the period of performance. As required by Public Law 112–239, National Defense Authorization Act for Fiscal Year 2013, prior to making a Federal award, the Federal awarding agency must consider all of the information available through FAPIIS with regard to the applicant and any immediate highest level owner, predecessor (*i.e.;* a non-Federal entity that is replaced by a successor), or subsidiary, identified for that applicant in FAPIIS, if applicable. At a minimum, the information in the system for a prior Federal award recipient must demonstrate a satisfactory record of executing programs or activities under Federal grants, cooperative agreements, or procurement awards; and integrity and business ethics. The Federal awarding agency may make a Federal award to a recipient who does not fully meet these standards, if it is determined that the information is not relevant to the current Federal award under consideration or there are specific conditions that can appropriately mitigate the effects of the non-Federal entity's risk in accordance with § 200.208.

(b) *Risk evaluation.* (1) The Federal awarding agency must have in place a framework for evaluating the risks posed by applicants before they receive Federal awards. This evaluation may incorporate results of the evaluation of the applicant's eligibility or the quality of its application. If the Federal awarding agency determines that a Federal award will be made, special conditions that correspond to the degree of risk assessed may be applied to the Federal award. Criteria to be evaluated must be described in the announcement of funding opportunity described in § 200.204.

(2) In evaluating risks posed by applicants, the Federal awarding agency may use a risk-based approach and may consider any items such as the following:

(i) *Financial stability.* Financial stability;

(ii) *Management systems and standards.* Quality of management systems and ability to meet the management standards prescribed in this part;

(iii) *History of performance.* The applicant's record in managing Federal awards, if it is a prior recipient of Federal awards, including timeliness of compliance with applicable reporting requirements, conformance to the terms and conditions of previous Federal awards, and if applicable, the extent to which any previously awarded amounts will be expended prior to future awards;

(iv) Audit reports and findings. Reports and findings from audits performed under subpart F of this part or the reports and findings of any other available audits; and

(v) Ability to effectively implement requirements. The applicant's ability to effectively implement statutory, regulatory, or other requirements imposed on non-Federal entities.

(c) Risk-based requirements adjustment. The Federal awarding agency may adjust requirements when a risk-evaluation indicates that it may be merited either pre-award or post-award.

(d) Suspension and debarment compliance. (1) The Federal awarding agency must comply with the guidelines on governmentwide suspension and debarment in 2 CFR part 180, and must require non-Federal entities to comply with these provisions. These provisions restrict Federal awards, subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal programs or activities.

§ 200.207 Standard application requirements.

(a) *Paperwork clearances.* The Federal awarding agency may only use application information collections approved by OMB under the Paperwork Reduction Act of 1995 and OMB's implementing regulations in 5 CFR part 1320 and in alignment with OMB-approved, governmentwide data elements available from the OMB-designated standards lead. Consistent with these requirements, OMB will authorize additional information collections only on a limited basis.

(b) *Information collection.* If applicable, the Federal awarding agency may inform applicants and recipients that they do not need to provide certain information otherwise required by the relevant information collection.

§ 200.208 Specific conditions.

(a) Federal awarding agencies are responsible for ensuring that specific Federal award conditions are consistent with the program design reflected in § 200.202 and include clear performance expectations of recipients as required in § 200.301.

(b) The Federal awarding agency or pass-through entity may adjust specific Federal award conditions as needed, in accordance with this section, based on an analysis of the following factors:

(1) Based on the criteria set forth in § 200.206;

(2) The applicant or recipient's history of compliance with the general or specific terms and conditions of a Federal award;

(3) The applicant or recipient's ability to meet expected performance goals as described in § 200.211; or

(4) A responsibility determination of an applicant or recipient.

(c) Additional Federal award conditions may include items such as the following:

(1) Requiring payments as reimbursements rather than advance payments;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given performance period;

(3) Requiring additional, more detailed financial reports;

(4) Requiring additional project monitoring;

(5) Requiring the non-Federal entity to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(d) If the Federal awarding agency or pass-through entity is imposing additional requirements, they must notify the applicant or non-Federal entity as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the action needed to remove the additional requirement, if applicable;

(4) The time allowed for completing the actions if applicable; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(e) Any additional requirements must be promptly removed once the conditions that prompted them have been satisfied.

§ 200.209 Certifications and representations.

Unless prohibited by the U.S. Constitution, Federal statutes or regulations, each Federal awarding agency or pass-through entity is authorized to require the non-Federal entity to submit certifications and representations required by Federal statutes, or regulations on an annual basis. Submission may be required more frequently if the non-Federal entity fails to meet a requirement of a Federal award.

§ 200.210 Pre-award costs.

For requirements on costs incurred by the applicant prior to the start date of the period of performance of the Federal award, see § 200.458.

§ 200.211 Information contained in a Federal award.

A Federal award must include the following information:

(a) *Federal award performance goals.* Performance goals, indicators, targets, and baseline data must be included in the Federal award, where applicable. The Federal awarding agency must also specify how performance will be assessed in the terms and conditions of the Federal award, including the timing and scope of expected performance. See §§ 200.202 and 200.301 for more information on Federal award performance goals.

(b) *General Federal award information.* The Federal awarding agency must include the following general Federal award information in each Federal award:

(1) Recipient name (which must match the name associated with its unique entity identifier as defined at 2 CFR 25.315);

(2) Recipient's unique entity identifier;

(3) Unique Federal Award Identification Number (FAIN);

(4) Federal Award Date (see Federal award date in § 200.201);

(5) Period of Performance Start and End Date;

(6) Budget Period Start and End Date;

(7) Amount of Federal Funds Obligated by this action;

(8) Total Amount of Federal Funds Obligated;

(9) Total Approved Cost Sharing or Matching, where applicable;

(10) Total Amount of the Federal Award including approved Cost Sharing or Matching;

(11) Budget Approved by the Federal Awarding Agency;

(11) Federal award description, (to comply with statutory requirements (*e.g.*, FFATA));

(12) Name of Federal awarding agency and contact information for awarding official,

(13) Assistance Listings Number and Title;

(14) Identification of whether the award is R&D; and

(15) Indirect cost rate for the Federal award (including if the de minimis rate is charged per § 200.414).

(c) *General terms and conditions.* (1) Federal awarding agencies must incorporate the following general terms and conditions either in the Federal award or by reference, as applicable:

(i) *Administrative requirements.* Administrative requirements implemented by the Federal awarding agency as specified in this part.

(ii) National policy requirements. These include statutory, executive order, other Presidential directive, or regulatory requirements that apply by specific reference and are not program-specific. See § 200.300 Statutory and national policy requirements.

(iii) *Recipient integrity and performance matters.* If the total Federal share of the Federal award may include more than $500,000 over the period of performance, the Federal awarding agency must include the term and condition available in appendix XII of this part. See also § 200.113.

(iv) *Future budget periods.* If it is anticipated that the period of performance will include multiple budget periods, the Federal awarding agency must indicate that subsequent budget periods are subject to the availability of funds, program authority, satisfactory performance, and compliance with the terms and conditions of the Federal award.

(v) *Termination provisions.* Federal awarding agencies must make recipients aware, in a clear and unambiguous manner, of the termination provisions in § 200.340, including the applicable termination provisions in the Federal awarding agency's regulations or in each Federal award.

(2) The Federal award must incorporate, by reference, all general terms and conditions of the award, which must be maintained on the agency's website.

(3) If a non-Federal entity requests a copy of the full text of the general terms and conditions, the Federal awarding agency must provide it.

(4) Wherever the general terms and conditions are publicly available, the Federal awarding agency must maintain an archive of previous versions of the general terms and conditions, with effective dates, for use by the non-Federal entity, auditors, or others.

(d) *Federal awarding agency, program, or Federal award specific terms and conditions.* The Federal awarding agency must include with each Federal award any terms and conditions necessary to communicate requirements that are in addition to the requirements outlined in the Federal awarding agency's general terms and conditions. See also § 200.208. Whenever practicable, these specific terms and conditions also should be shared on the agency's website and in notices of funding opportunities (as outlined in § 200.204) in addition to being included in a Federal award. See also § 200.207.

(e) *Federal awarding agency requirements.* Any other information required by the Federal awarding agency.

§ 200.212 Public access to Federal award information.

(a) In accordance with statutory requirements for Federal spending transparency (*e.g.*, FFATA), except as noted in this section, for applicable Federal awards the Federal awarding agency must announce all Federal awards publicly and publish the required information on a publicly available OMB-designated governmentwide website.

(b) All information posted in the designated integrity and performance system accessible through SAM (currently FAPIIS) on or after April 15, 2011 will be publicly available after a waiting period of 14 calendar days, except for:

(1) Past performance reviews required by Federal Government contractors in accordance with the Federal Acquisition Regulation (FAR) 48 CFR part 42, subpart 42.15;

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar day waiting period by the Federal Government official.

(c) Nothing in this section may be construed as requiring the publication of information otherwise exempt under the Freedom of Information Act (5 U.S.C 552), or controlled unclassified information pursuant to Executive Order 13556.

§ 200.213 Reporting a determination that a non-Federal entity is not qualified for a Federal award.

(a) If a Federal awarding agency does not make a Federal award to a non-Federal entity because the official determines that the non-Federal entity does not meet either or both of the minimum qualification standards as described in § 200.206(a)(2), the Federal awarding agency must report that determination to the designated integrity and performance system accessible through SAM (currently FAPIIS), only if all of the following apply:

(1) The only basis for the determination described in this paragraph (a) is the non-Federal entity's prior record of executing programs or activities under Federal awards or its record of integrity and business ethics, as described in § 200.206(a)(2) (*i.e.*, the entity was determined to be qualified based on all factors other than those two standards); and

(2) The total Federal share of the Federal award that otherwise would be made to the non-Federal entity is expected to exceed the simplified

acquisition threshold over the period of performance.

(b) The Federal awarding agency is not required to report a determination that a non-Federal entity is not qualified for a Federal award if they make the Federal award to the non-Federal entity and include specific award terms and conditions, as described in § 200.208.

(c) If a Federal awarding agency reports a determination that a non-Federal entity is not qualified for a Federal award, as described in paragraph (a) of this section, the Federal awarding agency also must notify the non-Federal entity that—

(1) The determination was made and reported to the designated integrity and performance system accessible through SAM, and include with the notification an explanation of the basis for the determination;

(2) The information will be kept in the system for a period of five years from the date of the determination, as required by section 872 of Public Law 110–417, as amended (41 U.S.C. 2313), then archived;

(3) Each Federal awarding agency that considers making a Federal award to the non-Federal entity during that five year period must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award when the total Federal share of the Federal award is expected to include an amount of Federal funding in excess of the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may go to the awardee integrity and performance portal accessible through SAM (currently the Contractor Performance Assessment Reporting System (CPARS)) and comment on any information the system contains about the non-Federal entity itself; and

(5) Federal awarding agencies will consider that non-Federal entity's comments in determining whether the non-Federal entity is qualified for a future Federal award.

(d) If a Federal awarding agency enters information into the designated integrity and performance system accessible through SAM about a determination that a non-Federal entity is not qualified for a Federal award and subsequently:

(1) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days; and

(2) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(e) Federal awarding agencies must not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the recipient asserts within seven calendar days to the Federal awarding agency that posted the information that some or all of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency that posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal awarding agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

§ 200.214 Suspension and debarment.

Non-Federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. The regulations in 2 CFR part 180 restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 200.215 Never contract with the enemy.

Federal awarding agencies and recipients are subject to the regulations implementing Never Contract with the Enemy in 2 CFR part 183. The regulations in 2 CFR part 183 affect covered contracts, grants and cooperative agreements that are expected to exceed $50,000 within the period of performance, are performed outside the United States and its territories, and are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

§ 200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

(1) Procure or obtain;

(2) Extend or renew a contract to procure or obtain; or

(3) Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Public Law 115–232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

(i) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

(ii) Telecommunications or video surveillance services provided by such entities or using such equipment.

(iii) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

(b) In implementing the prohibition under Public Law 115–232, section 889, subsection (f), paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(c) See Public Law 115–232, section 889 for additional information.

(d) See also § 200.471.

■ 45. Revise subpart D to read as follows:

Subpart D—Post Federal Award Requirements

Sec.

200.300 Statutory and national policy requirements.
200.301 Performance measurement.
200.302 Financial management.
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Property Standards

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200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
200.322 Domestic preferences for procurements.
200.323 Procurement of recovered materials.
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200.326 Bonding requirements.
200.327 Contract provisions.

Performance and Financial Monitoring and Reporting

200.328 Financial reporting.
200.329 Monitoring and reporting program performance.
200. 330 Reporting on real property.

Subrecipient Monitoring and Management

200.331 Subrecipient and contractor determinations.
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Record Retention and Access

200.334 Retention requirements for records.
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200.336 Methods for collection, transmission, and storage of information.
200.337 Access to records.
200.338 Restrictions on public access to records.

Remedies for Noncompliance

200.339 Remedies for noncompliance.
200.340 Termination.
200.341 Notification of termination requirement.
200.342 Opportunities to object, hearings, and appeals.
200.343 Effects of suspension and termination.

Closeout

200.344 Closeout.

Post-Closeout Adjustments and Continuing Responsibilities

200.345 Post-closeout adjustments and continuing responsibilities.

Collection of Amounts Due

200.346 Collection of amounts due.

Subpart D—Post Federal Award Requirements

§ 200.300 Statutory and national policy requirements.

(a) The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, Federal Law, and public policy requirements: Including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination. The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.

(b) The non-Federal entity is responsible for complying with all requirements of the Federal award. For all Federal awards, this includes the provisions of FFATA, which includes requirements on executive compensation, and also requirements implementing the Act for the non-Federal entity at 2 CFR parts 25 and 170. See also statutory requirements for whistleblower protections at 10 U.S.C. 2409, 41 U.S.C. 4712, and 10 U.S.C. 2324, 41 U.S.C. 4304 and 4310.

§ 200.301 Performance measurement.

(a) The Federal awarding agency must measure the recipient's performance to show achievement of program goals and objectives, share lessons learned, improve program outcomes, and foster adoption of promising practices. Program goals and objectives should be derived from program planning and design. See § 200.202 for more information. Where appropriate, the Federal award may include specific program goals, indicators, targets, baseline data, data collection, or expected outcomes (such as outputs, or services performance or public impacts of any of these) with an expected timeline for accomplishment. Where applicable, this should also include any performance measures or independent sources of data that may be used to measure progress. The Federal awarding agency will determine how performance progress is measured, which may differ by program. Performance measurement progress must be both measured and reported. See § 200.329 for more information on monitoring program performance. The Federal awarding agency may include program-specific requirements, as applicable. These requirements must be aligned, to the extent permitted by law, with the Federal awarding agency strategic goals, strategic objectives or performance goals that are relevant to the program. See also OMB Circular A–11, Preparation, Submission, and Execution of the Budget Part 6.

(b) The Federal awarding agency should provide recipients with clear performance goals, indicators, targets, and baseline data as described in § 200.211. Performance reporting frequency and content should be established to not only allow the Federal awarding agency to understand the recipient progress but also to facilitate identification of promising practices among recipients and build the evidence upon which the Federal awarding agency's program and performance decisions are made. See § 200.328 for more information on reporting program performance.

(c) This provision is designed to operate in tandem with evidence-related statutes (*e.g.;* The Foundations for Evidence-Based Policymaking Act of 2018, which emphasizes collaboration and coordination to advance data and evidence-building functions in the Federal government). The Federal awarding agency should also specify any requirements of award recipients' participation in a federally funded evaluation, and any evaluation activities required to be conducted by the Federal award.

§ 200.302 Financial management.

(a) Each state must expend and account for the Federal award in accordance with state laws and procedures for expending and accounting for the state's own funds. In addition, the state's and the other non-Federal entity's financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the Federal award, must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award. See also § 200.450.

(b) The financial management system of each non-Federal entity must provide for the following (see also §§ 200.334, 200.335, 200.336, and 200.337):

(1) Identification, in its accounts, of all Federal awards received and expended and the Federal programs under which they were received. Federal program and Federal award

identification must include, as applicable, the Assistance Listings title and number, Federal award identification number and year, name of the Federal agency, and name of the pass-through entity, if any.

(2) Accurate, current, and complete disclosure of the financial results of each Federal award or program in accordance with the reporting requirements set forth in §§ 200.328 and 200.329. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient must not be required to establish an accrual accounting system. This recipient may develop accrual data for its reports on the basis of an analysis of the documentation on hand. Similarly, a pass-through entity must not require a subrecipient to establish an accrual accounting system and must allow the subrecipient to develop accrual data for its reports on the basis of an analysis of the documentation on hand.

(3) Records that identify adequately the source and application of funds for federally-funded activities. These records must contain information pertaining to Federal awards, authorizations, financial obligations, unobligated balances, assets, expenditures, income and interest and be supported by source documentation.

(4) Effective control over, and accountability for, all funds, property, and other assets. The non-Federal entity must adequately safeguard all assets and assure that they are used solely for authorized purposes. See § 200.303.

(5) Comparison of expenditures with budget amounts for each Federal award.

(6) Written procedures to implement the requirements of § 200.305.

(7) Written procedures for determining the allowability of costs in accordance with subpart E of this part and the terms and conditions of the Federal award.

§ 200.303 Internal controls.

The non-Federal entity must:

(a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance in ''Standards for Internal Control in the Federal Government'' issued by the Comptroller General of the United States or the ''Internal Control Integrated Framework'', issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(b) Comply with the U.S. Constitution, Federal statutes, regulations, and the terms and conditions of the Federal awards.

(c) Evaluate and monitor the non-Federal entity's compliance with statutes, regulations and the terms and conditions of Federal awards.

(d) Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings.

(e) Take reasonable measures to safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or the non-Federal entity considers sensitive consistent with applicable Federal, State, local, and tribal laws regarding privacy and responsibility over confidentiality.

§ 200.304 Bonds.

The Federal awarding agency may include a provision on bonding, insurance, or both in the following circumstances:

(a) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the non-Federal entity are not deemed adequate to protect the interest of the Federal Government.

(b) The Federal awarding agency may require adequate fidelity bond coverage where the non-Federal entity lacks sufficient coverage to protect the Federal Government's interest.

(c) Where bonds are required in the situations described above, the bonds must be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223.

§ 200.305 Federal payment.

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

(b) For non-Federal entities other than states, payments methods must minimize the time elapsing between the transfer of funds from the United States Treasury or the pass-through entity and the disbursement by the non-Federal entity whether the payment is made by electronic funds transfer, or issuance or redemption of checks, warrants, or payment by other means. See also § 200.302(b)(6). Except as noted elsewhere in this part, Federal agencies must require recipients to use only OMB-approved, governmentwide information collection requests to request payment.

(1) The non-Federal entity must be paid in advance, provided it maintains or demonstrates the willingness to maintain both written procedures that minimize the time elapsing between the transfer of funds and disbursement by the non-Federal entity, and financial management systems that meet the standards for fund control and accountability as established in this part. Advance payments to a non-Federal entity must be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the non-Federal entity in carrying out the purpose of the approved program or project. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the non-Federal entity for direct program or project costs and the proportionate share of any allowable indirect costs. The non-Federal entity must make timely payment to contractors in accordance with the contract provisions.

(2) Whenever possible, advance payments must be consolidated to cover anticipated cash needs for all Federal awards made by the Federal awarding agency to the recipient.

(i) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer and must comply with applicable guidance in 31 CFR part 208.

(ii) Non-Federal entities must be authorized to submit requests for advance payments and reimbursements at least monthly when electronic fund transfers are not used, and as often as they like when electronic transfers are used, in accordance with the provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693–1693r).

(3) Reimbursement is the preferred method when the requirements in this paragraph (b) cannot be met, when the Federal awarding agency sets a specific condition per § 200.208, or when the non-Federal entity requests payment by reimbursement. This method may be used on any Federal award for construction, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal award constitutes a minor portion of the project. When the reimbursement method is used, the Federal awarding

agency or pass-through entity must make payment within 30 calendar days after receipt of the billing, unless the Federal awarding agency or pass-through entity reasonably believes the request to be improper.

(4) If the non-Federal entity cannot meet the criteria for advance payments and the Federal awarding agency or pass-through entity has determined that reimbursement is not feasible because the non-Federal entity lacks sufficient working capital, the Federal awarding agency or pass-through entity may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency or pass-through entity must advance cash payments to the non-Federal entity to cover its estimated disbursement needs for an initial period generally geared to the non-Federal entity's disbursing cycle. Thereafter, the Federal awarding agency or pass-through entity must reimburse the non-Federal entity for its actual cash disbursements. Use of the working capital advance method of payment requires that the pass-through entity provide timely advance payments to any subrecipients in order to meet the subrecipient's actual cash disbursements. The working capital advance method of payment must not be used by the pass-through entity if the reason for using this method is the unwillingness or inability of the pass-through entity to provide timely advance payments to the subrecipient to meet the subrecipient's actual cash disbursements.

(5) To the extent available, the non-Federal entity must disburse funds available from program income (including repayments to a revolving fund), rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(6) Unless otherwise required by Federal statutes, payments for allowable costs by non-Federal entities must not be withheld at any time during the period of performance unless the conditions of § 200.208, subpart D of this part, including § 200.339, or one or more of the following applies:

(i) The non-Federal entity has failed to comply with the project objectives, Federal statutes, regulations, or the terms and conditions of the Federal award.

(ii) The non-Federal entity is delinquent in a debt to the United States as defined in OMB Circular A–129, ''Policies for Federal Credit Programs and Non-Tax Receivables.'' Under such conditions, the Federal awarding agency or pass-through entity may, upon reasonable notice, inform the non-Federal entity that payments must not be made for financial obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(iii) A payment withheld for failure to comply with Federal award conditions, but without suspension of the Federal award, must be released to the non-Federal entity upon subsequent compliance. When a Federal award is suspended, payment adjustments will be made in accordance with § 200.343.

(iv) A payment must not be made to a non-Federal entity for amounts that are withheld by the non-Federal entity from payment to contractors to assure satisfactory completion of work. A payment must be made when the non-Federal entity actually disburses the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(7) Standards governing the use of banks and other institutions as depositories of advance payments under Federal awards are as follows.

(i) The Federal awarding agency and pass-through entity must not require separate depository accounts for funds provided to a non-Federal entity or establish any eligibility requirements for depositories for funds provided to the non-Federal entity. However, the non-Federal entity must be able to account for funds received, obligated, and expended.

(ii) Advance payments of Federal funds must be deposited and maintained in insured accounts whenever possible.

(8) The non-Federal entity must maintain advance payments of Federal awards in interest-bearing accounts, unless the following apply:

(i) The non-Federal entity receives less than $250,000 in Federal awards per year.

(ii) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $500 per year on Federal cash balances.

(iii) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(iv) A foreign government or banking system prohibits or precludes interest-bearing accounts.

(9) Interest earned amounts up to $500 per year may be retained by the non-Federal entity for administrative expense. Any additional interest earned on Federal advance payments deposited in interest-bearing accounts must be remitted annually to the Department of Health and Human Services Payment Management System (PMS) through an electronic medium using either Automated Clearing House (ACH) network or a Fedwire Funds Service payment.

(i) For returning interest on Federal awards paid through PMS, the refund should:

(A) Provide an explanation stating that the refund is for interest;

(B) List the PMS Payee Account Number(s) (PANs);

(C) List the Federal award number(s) for which the interest was earned; and

(D) Make returns payable to: Department of Health and Human Services.

(ii) For returning interest on Federal awards not paid through PMS, the refund should:

(A) Provide an explanation stating that the refund is for interest;

(B) Include the name of the awarding agency;

(C) List the Federal award number(s) for which the interest was earned; and

(D) Make returns payable to: Department of Health and Human Services.

(10) Funds, principal, and excess cash returns must be directed to the original Federal agency payment system. The non-Federal entity should review instructions from the original Federal agency payment system. Returns should include the following information:

(i) Payee Account Number (PAN), if the payment originated from PMS, or Agency information to indicate whom to credit the funding if the payment originated from ASAP, NSF, or another Federal agency payment system.

(ii) PMS document number and subaccount(s), if the payment originated from PMS, or relevant account numbers if the payment originated from another Federal agency payment system.

(iii) The reason for the return (*e.g.*, excess cash, funds not spent, interest, part interest part other, etc.)

(11) When returning funds or interest to PMS you must include the following as applicable:

(i) For ACH Returns:
Routing Number: 051036706
Account number: 303000
Bank Name and Location: Credit Gateway—ACH Receiver St. Paul, MN

(ii) For Fedwire Returns [1]:
Routing Number: 021030004
Account number: 75010501
Bank Name and Location: Federal Reserve Bank Treas NYC/Funds Transfer Division New York, NY

[1] Please note that the organization initiating payment is likely to incur a charge from their Financial Institution for this type of payment.

(iii) For International ACH Returns:
Beneficiary Account: Federal Reserve Bank of New York/ITS (FRBNY/ITS)
Bank: Citibank N.A. (New York)
Swift Code: CITIUS33
Account Number: 36838868
Bank Address: 388 Greenwich Street, New York, NY 10013 USA
Payment Details (Line 70): Agency Locator Code (ALC): 75010501
Name (abbreviated when possible) and ALC Agency POC

(iv) For recipients that do not have electronic remittance capability, please make check [2] payable to: ''The Department of Health and Human Services.''
Mail Check to Treasury approved lockbox:
HHS Program Support Center, P.O. Box 530231, Atlanta, GA 30353–0231

[2] Please allow 4–6 weeks for processing of a payment by check to be applied to the appropriate PMS account.

(v) Questions can be directed to PMS at 877–614–5533 or *PMSSupport@psc.hhs.gov.*

§ 200.306 Cost sharing or matching.

(a) Under Federal research proposals, voluntary committed cost sharing is not expected. It cannot be used as a factor during the merit review of applications or proposals, but may be considered if it is both in accordance with Federal awarding agency regulations and specified in a notice of funding opportunity. Criteria for considering voluntary committed cost sharing and any other program policy factors that may be used to determine who may receive a Federal award must be explicitly described in the notice of funding opportunity. See also §§ 200.414 and 200.204 and appendix I to this part.

(b) For all Federal awards, any shared costs or matching funds and all contributions, including cash and third-party in-kind contributions, must be accepted as part of the non-Federal entity's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the non-Federal entity's records;

(2) Are not included as contributions for any other Federal award;

(3) Are necessary and reasonable for accomplishment of project or program objectives;

(4) Are allowable under subpart E of this part;

(5) Are not paid by the Federal Government under another Federal award, except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to matching or cost sharing requirements of other Federal programs;

(6) Are provided for in the approved budget when required by the Federal awarding agency; and

(7) Conform to other provisions of this part, as applicable.

(c) Unrecovered indirect costs, including indirect costs on cost sharing or matching may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency. Unrecovered indirect cost means the difference between the amount charged to the Federal award and the amount which could have been charged to the Federal award under the non-Federal entity's approved negotiated indirect cost rate.

(d) Values for non-Federal entity contributions of services and property must be established in accordance with the cost principles in subpart E of this part. If a Federal awarding agency authorizes the non-Federal entity to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching must be the lesser of paragraph (d)(1) or (2) of this section.

(1) The value of the remaining life of the property recorded in the non-Federal entity's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the value described in paragraph (d)(1) of this section at the time of donation.

(e) Volunteer services furnished by third-party professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for third-party volunteer services must be consistent with those paid for similar work by the non-Federal entity. In those instances in which the required skills are not found in the non-Federal entity, rates must be consistent with those paid for similar work in the labor market in which the non-Federal entity competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, necessary, allocable, and otherwise allowable may be included in the valuation.

(f) When a third-party organization furnishes the services of an employee, these services must be valued at the employee's regular rate of pay plus an amount of fringe benefits that is reasonable, necessary, allocable, and otherwise allowable, and indirect costs at either the third-party organization's approved federally-negotiated indirect cost rate or, a rate in accordance with § 200.414(d) provided these services employ the same skill(s) for which the employee is normally paid. Where donated services are treated as indirect costs, indirect cost rates will separate the value of the donated services so that reimbursement for the donated services will not be made.

(g) Donated property from third parties may include such items as equipment, office supplies, laboratory supplies, or workshop and classroom supplies. Value assessed to donated property included in the cost sharing or matching share must not exceed the fair market value of the property at the time of the donation.

(h) The method used for determining cost sharing or matching for third-party-donated equipment, buildings and land for which title passes to the non-Federal entity may differ according to the purpose of the Federal award, if paragraph (h)(1) or (2) of this section applies.

(1) If the purpose of the Federal award is to assist the non-Federal entity in the acquisition of equipment, buildings or land, the aggregate value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the Federal award is to support activities that require the use of equipment, buildings or land, normally only depreciation charges for equipment and buildings may be made. However, the fair market value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges. See also § 200.420.

(i) The value of donated property must be determined in accordance with the usual accounting policies of the non-Federal entity, with the following qualifications:

(1) The value of donated land and buildings must not exceed its fair market value at the time of donation to the non-Federal entity as established by an independent appraiser (*e.g.*, certified real property appraiser or General Services Administration representative) and certified by a responsible official of the non-Federal entity as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601–4655) (Uniform Act) except as provided in the implementing regulations at 49 CFR part 24, ''Uniform Relocation Assistance And Real Property

Acquisition For Federal And Federally-Assisted Programs''.

(2) The value of donated equipment must not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space must not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment must not exceed its fair rental value.

(j) For third-party in-kind contributions, the fair market value of goods and services must be documented and to the extent feasible supported by the same methods used internally by the non-Federal entity.

(k) For IHEs, see also OMB memorandum M–01–06, dated January 5, 2001, Clarification of OMB A–21 Treatment of Voluntary Uncommitted Cost Sharing and Tuition Remission Costs.

§ 200.307 Program income.

(a) *General.* Non-Federal entities are encouraged to earn income to defray program costs where appropriate.

(b) Cost of generating program income. If authorized by Federal regulations or the Federal award, costs incidental to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the Federal award.

(c) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a non-Federal entity are not program income unless the revenues are specifically identified in the Federal award or Federal awarding agency regulations as program income.

(d) *Property.* Proceeds from the sale of real property, equipment, or supplies are not program income; such proceeds will be handled in accordance with the requirements of the Property Standards §§ 200.311, 200.313, and 200.314, or as specifically identified in Federal statutes, regulations, or the terms and conditions of the Federal award.

(e) *Use of program income.* If the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award, or give prior approval for how program income is to be used, paragraph (e)(1) of this section must apply. For Federal awards made to IHEs and nonprofit research institutions, if the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award how program income is to be used, paragraph (e)(2) of this section must apply. In specifying alternatives to paragraphs (e)(1) and (2) of this section, the Federal awarding agency may distinguish between income earned by the recipient and income earned by subrecipients and between the sources, kinds, or amounts of income. When the Federal awarding agency authorizes the approaches in paragraphs (e)(2) and (3) of this section, program income in excess of any amounts specified must also be deducted from expenditures.

(1) *Deduction.* Ordinarily program income must be deducted from total allowable costs to determine the net allowable costs. Program income must be used for current costs unless the Federal awarding agency authorizes otherwise. Program income that the non-Federal entity did not anticipate at the time of the Federal award must be used to reduce the Federal award and non-Federal entity contributions rather than to increase the funds committed to the project.

(2) *Addition.* With prior approval of the Federal awarding agency (except for IHEs and nonprofit research institutions, as described in this paragraph (e)) program income may be added to the Federal award by the Federal agency and the non-Federal entity. The program income must be used for the purposes and under the conditions of the Federal award.

(3) *Cost sharing or matching.* With prior approval of the Federal awarding agency, program income may be used to meet the cost sharing or matching requirement of the Federal award. The amount of the Federal award remains the same.

(f) Income after the period of performance. There are no Federal requirements governing the disposition of income earned after the end of the period of performance for the Federal award, unless the Federal awarding agency regulations or the terms and conditions of the Federal award provide otherwise. The Federal awarding agency may negotiate agreements with recipients regarding appropriate uses of income earned after the period of performance as part of the grant closeout process. See also § 200.344.

(g) *License fees and royalties.* Unless the Federal statute, regulations, or terms and conditions for the Federal award provide otherwise, the non-Federal entity is not accountable to the Federal awarding agency with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions made under a Federal award to which 37 CFR part 401 is applicable.

§ 200.308 Revision of budget and program plans.

(a) The approved budget for the Federal award summarizes the financial aspects of the project or program as approved during the Federal award process. It may include either the Federal and non-Federal share (see definition for *Federal share* in § 200.1) or only the Federal share, depending upon Federal awarding agency requirements. The budget and program plans include considerations for performance and program evaluation purposes whenever required in accordance with the terms and conditions of the award.

(b) Recipients are required to report deviations from budget or project scope or objective, and request prior approvals from Federal awarding agencies for budget and program plan revisions, in accordance with this section.

(c) For non-construction Federal awards, recipients must request prior approvals from Federal awarding agencies for the following program or budget-related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or the Federal award.

(3) The disengagement from the project for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with subpart E of this part as applicable.

(5) The transfer of funds budgeted for participant support costs to other categories of expense.

(6) Unless described in the application and funded in the approved Federal awards, the subawarding, transferring or contracting out of any work under a Federal award, including fixed amount subawards as described in § 200.333. This provision does not apply to the acquisition of supplies, material, equipment or general support services.

(7) Changes in the approved cost-sharing or matching provided by the non-Federal entity.

(8) The need arises for additional Federal funds to complete the project.

(d) No other prior approval requirements for specific items may be imposed unless an exception has been approved by OMB. See also §§ 200.102 and 200.407.

(e) Except for requirements listed in paragraphs (c)(1) through (8) of this section, the Federal awarding agency is

authorized, at its option, to waive other cost-related and administrative prior written approvals contained in subparts D and E of this part. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur project costs 90 calendar days before the Federal awarding agency makes the Federal award. Expenses more than 90 calendar days pre-award require prior approval of the Federal awarding agency. All costs incurred before the Federal awarding agency makes the Federal award are at the recipient's risk (*i.e.,* the Federal awarding agency is not required to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover such costs). See also § 200.458.

(2) Initiate a one-time extension of the period of performance by up to 12 months unless one or more of the conditions outlined in paragraphs (e)(2)(i) through (iii) of this section apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing with the supporting reasons and revised period of performance at least 10 calendar days before the end of the period of performance specified in the Federal award. This one-time extension must not be exercised merely for the purpose of using unobligated balances. Extensions require explicit prior Federal awarding agency approval when:

(i) The terms and conditions of the Federal award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent budget periods.

(4) For Federal awards that support research, unless the Federal awarding agency provides otherwise in the Federal award or in the Federal awarding agency's regulations, the prior approval requirements described in this paragraph (e) are automatically waived (*i.e.,* recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) of this section applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for Federal awards in which the Federal share of the project exceeds the simplified acquisition threshold and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. The Federal awarding agency cannot permit a transfer that would cause any Federal appropriation to be used for purposes other than those consistent with the appropriation.

(g) All other changes to non-construction budgets, except for the changes described in paragraph (c) of this section, do not require prior approval (see also § 200.407).

(h) For construction Federal awards, the recipient must request prior written approval promptly from the Federal awarding agency for budget revisions whenever paragraph (h)(1), (2), or (3) of this section applies:

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in subpart E.

(4) No other prior approval requirements for budget revisions may be imposed unless an exception has been approved by OMB.

(5) When a Federal awarding agency makes a Federal award that provides support for construction and non-construction work, the Federal awarding agency may require the recipient to obtain prior approval from the Federal awarding agency before making any fund or budget transfers between the two types of work supported.

(i) When requesting approval for budget revisions, the recipient must use the same format for budget information that was used in the application, unless the Federal awarding agency indicates a letter of request suffices.

(j) Within 30 calendar days from the date of receipt of the request for budget revisions, the Federal awarding agency must review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency must inform the recipient in writing of the date when the recipient may expect the decision.

§ 200.309 Modifications to Period of Performance.

If a Federal awarding agency or pass-through entity approves an extension, or if a recipient extends under § 200.308(e)(2), the Period of Performance will be amended to end at the completion of the extension. If a termination occurs, the Period of Performance will be amended to end upon the effective date of termination. If a renewal award is issued, a distinct Period of Performance will begin.

Property Standards

§ 200.310 Insurance coverage.

The non-Federal entity must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved with Federal funds as provided to property owned by the non-Federal entity. Federally-owned property need not be insured unless required by the terms and conditions of the Federal award.

§ 200.311 Real property.

(a) *Title.* Subject to the requirements and conditions set forth in this section, title to real property acquired or improved under a Federal award will vest upon acquisition in the non-Federal entity.

(b) *Use.* Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose, during which time the non-Federal entity must not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency or pass-through entity. The instructions must provide for one of the following alternatives:

(1) Retain title after compensating the Federal awarding agency. The amount paid to the Federal awarding agency will be computed by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and costs of any improvements) to the fair market value of the property. However, in those situations where the non-Federal entity is disposing of real property acquired or improved with a Federal award and acquiring replacement real property under the same Federal award, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sell the property and compensate the Federal awarding agency. The amount due to the Federal awarding agency will be calculated by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and cost of any improvements) to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the Federal award has not been closed out, the net proceeds from sale may be offset against the original cost of the property. When the non-

Federal entity is directed to sell property, sales procedures must be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer title to the Federal awarding agency or to a third party designated/approved by the Federal awarding agency. The non-Federal entity is entitled to be paid an amount calculated by applying the non-Federal entity's percentage of participation in the purchase of the real property (and cost of any improvements) to the current fair market value of the property.

§ 200.312 Federally-owned and exempt property.

(a) Title to federally-owned property remains vested in the Federal Government. The non-Federal entity must submit annually an inventory listing of federally-owned property in its custody to the Federal awarding agency. Upon completion of the Federal award or when the property is no longer needed, the non-Federal entity must report the property to the Federal awarding agency for further Federal agency utilization.

(b) If the Federal awarding agency has no further need for the property, it must declare the property excess and report it for disposal to the appropriate Federal disposal authority, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (*e.g.*, the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (i)) to donate research equipment to educational and nonprofit organizations in accordance with Executive Order 12999, ''Educational Technology: Ensuring Opportunity for All Children in the Next Century.''). The Federal awarding agency must issue appropriate instructions to the non-Federal entity.

(c) Exempt property means property acquired under a Federal award where the Federal awarding agency has chosen to vest title to the property to the non-Federal entity without further responsibility to the Federal Government, based upon the explicit terms and conditions of the Federal award. The Federal awarding agency may exercise this option when statutory authority exists. Absent statutory authority and specific terms and conditions of the Federal award, title to exempt property acquired under the Federal award remains with the Federal Government.

§ 200.313 Equipment.

See also § 200.439.

(a) *Title.* Subject to the requirements and conditions set forth in this section, title to equipment acquired under a Federal award will vest upon acquisition in the non-Federal entity. Unless a statute specifically authorizes the Federal agency to vest title in the non-Federal entity without further responsibility to the Federal Government, and the Federal agency elects to do so, the title must be a conditional title. Title must vest in the non-Federal entity subject to the following conditions:

(1) Use the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the Federal awarding agency or pass-through entity.

(3) Use and dispose of the property in accordance with paragraphs (b), (c), and (e) of this section.

(b) *General.* A state must use, manage and dispose of equipment acquired under a Federal award by the state in accordance with state laws and procedures. Other non-Federal entities must follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. The Federal awarding agency may require the submission of the applicable common form for equipment. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority:

(i) Activities under a Federal award from the Federal awarding agency which funded the original program or project, then

(ii) Activities under Federal awards from other Federal awarding agencies. This includes consolidated equipment for information technology systems.

(2) During the time that equipment is used on the project or program for which it was acquired, the non-Federal entity must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects supported by Federal awarding agency that financed the equipment and second preference must be given to programs or projects under Federal awards from other Federal awarding agencies. Use for non-federally-funded programs or projects is also permissible. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 200.307 to earn program income, the non-Federal entity must not use equipment acquired with the Federal award to provide services for a fee that is less than private companies charge for equivalent services unless specifically authorized by Federal statute for as long as the Federal Government retains an interest in the equipment.

(4) When acquiring replacement equipment, the non-Federal entity may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

(d) Management requirements. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part under a Federal award, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of funding for the property (including the FAIN), who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the project costs for the Federal award under which the property was acquired, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the non-Federal entity is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a Federal award is no longer needed for the original project or program or for other activities currently or previously supported by a Federal awarding agency, except as otherwise provided in

Federal statutes, regulations, or Federal awarding agency disposition instructions, the non-Federal entity must request disposition instructions from the Federal awarding agency if required by the terms and conditions of the Federal award. Disposition of the equipment will be made as follows, in accordance with Federal awarding agency disposition instructions:

(1) Items of equipment with a current per unit fair market value of $5,000 or less may be retained, sold or otherwise disposed of with no further responsibility to the Federal awarding agency.

(2) Except as provided in § 200.312(b), or if the Federal awarding agency fails to provide requested disposition instructions within 120 days, items of equipment with a current per-unit fair market value in excess of $5,000 may be retained by the non-Federal entity or sold. The Federal awarding agency is entitled to an amount calculated by multiplying the current market value or proceeds from sale by the Federal awarding agency's percentage of participation in the cost of the original purchase. If the equipment is sold, the Federal awarding agency may permit the non-Federal entity to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for its selling and handling expenses.

(3) The non-Federal entity may transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the non-Federal entity must be entitled to compensation for its attributable percentage of the current fair market value of the property.

(4) In cases where a non-Federal entity fails to take appropriate disposition actions, the Federal awarding agency may direct the non-Federal entity to take disposition actions.

§ 200.314 Supplies.

See also § 200.453.

(a) Title to supplies will vest in the non-Federal entity upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other Federal award, the non-Federal entity must retain the supplies for use on other activities or sell them, but must, in either case, compensate the Federal Government for its share. The amount of compensation must be computed in the same manner as for equipment. See § 200.313 (e)(2) for the calculation methodology.

(b) As long as the Federal Government retains an interest in the supplies, the non-Federal entity must not use supplies acquired under a Federal award to provide services to other organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute.

§ 200.315 Intangible property.

(a) Title to intangible property (see definition for *Intangible property* in § 200.1) acquired under a Federal award vests upon acquisition in the non-Federal entity. The non-Federal entity must use that property for the originally-authorized purpose, and must not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property must occur in accordance with the provisions in § 200.313(e).

(b) The non-Federal entity may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a Federal award. The Federal awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(c) The non-Federal entity is subject to applicable regulations governing patents and inventions, including governmentwide regulations issued by the Department of Commerce at 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Awards, Contracts and Cooperative Agreements.''

(d) The Federal Government has the right to:

(1) Obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(e)(1) In response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under a Federal award that were used by the Federal Government in developing an agency action that has the force and effect of law, the Federal awarding agency must request, and the non-Federal entity must provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the research data solely in response to a FOIA request, the Federal awarding agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the Federal agency and the non-Federal entity. This fee is in addition to any fees the Federal awarding agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) Published research findings means when:

(i) Research findings are published in a peer-reviewed scientific or technical journal; or

(ii) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law. ''Used by the Federal Government in developing an agency action that has the force and effect of law'' is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(3) Research data means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: Preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This ''recorded'' material excludes physical objects (*e.g.,* laboratory samples). Research data also do not include:

(i) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and

(ii) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

§ 200.316 Property trust relationship.

Real property, equipment, and intangible property, that are acquired or improved with a Federal award must be held in trust by the non-Federal entity as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Federal awarding agency may require the non-Federal entity to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a Federal award and that use and disposition conditions apply to the property.

Procurement Standards

§ 200.317 Procurements by states.

When procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will comply with §§ 200.321, 200.322, and 200.323 and ensure that every purchase order or other contract includes any clauses required by § 200.327. All other non-Federal entities, including subrecipients of a State, must follow the procurement standards in §§ 200.318 through 200.327.

§ 200.318 General procurement standards.

(a) The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in §§ 200.317 through 200.327.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements will be met with applied to documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also § 200.214.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§ 200.319 Competition.

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320.

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded

from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(d) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equivalent'' description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(e) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

(f) Noncompetitive procurements can only be awarded in accordance with § 200.320(c).

§ 200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award.

(a) Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the *simplified acquisition threshold (SAT),* as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) Micro-purchases—(i) *Distribution.* The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of *micro-purchase* in § 200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

(ii) *Micro-purchase awards.* Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.

(iii) *Micro-purchase thresholds.* The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

(iv) Non-Federal entity increase to the micro-purchase threshold up to $50,000. Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to $50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with § 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

(A) A qualification as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit;

(B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,

(C) For public institutions, a higher threshold consistent with State law.

(v) *Non-Federal entity increase to the micro-purchase threshold over $50,000.* Micro-purchase thresholds higher than $50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

(2) Small purchases—(i) *Small purchase procedures.* The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) *Simplified acquisition thresholds.* The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified

acquisition threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

(b) *Formal procurement methods.* When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with § 200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) *Sealed bids.* A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction, if the conditions.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;

(B) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(C) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(D) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(2) *Proposals.* A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(ii) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and making selections;

(iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered; and

(iv) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.

(c) *Noncompetitive procurement.* There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

(1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);

(2) The item is available only from a single source;

(3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;

(4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or

(5) After solicitation of a number of sources, competition is determined inadequate.

§ 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (b)(1) through (5) of this section.

§ 200.322 Domestic preferences for procurements.

(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) ''Produced in the United States'' means, for iron and steel products, that

all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) ''Manufactured products'' means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

§ 200.323 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 200.324 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under subpart E of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§ 200.325 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a ''brand name'' product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§ 200.326 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The ''bid guarantee'' must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of

all persons supplying labor and material in the execution of the work provided for in the contract.

§ 200.327 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in appendix II to this part.

Performance and Financial Monitoring and Reporting

§ 200.328 Financial reporting.

Unless otherwise approved by OMB, the Federal awarding agency must solicit only the OMB-approved governmentwide data elements for collection of financial information (at time of publication the Federal Financial Report or such future, OMB-approved, governmentwide data elements available from the OMB-designated standards lead. This information must be collected with the frequency required by the terms and conditions of the Federal award, but no less frequently than annually nor more frequently than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes, and preferably in coordination with performance reporting. The Federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information.

§ 200.329 Monitoring and reporting program performance.

(a) *Monitoring by the non-Federal entity.* The non-Federal entity is responsible for oversight of the operations of the Federal award supported activities. The non-Federal entity must monitor its activities under Federal awards to assure compliance with applicable Federal requirements and performance expectations are being achieved. Monitoring by the non-Federal entity must cover each program, function or activity. See also § 200.332.

(b) Reporting program performance. The Federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information. As appropriate and in accordance with above mentioned information collections, the Federal awarding agency must require the recipient to relate financial data and accomplishments to performance goals and objectives of the Federal award. Also, in accordance with above mentioned common information collections, and when required by the terms and conditions of the Federal award, recipients must provide cost information to demonstrate cost effective practices (*e.g.*, through unit cost data). In some instances (*e.g.*, discretionary research awards), this will be limited to the requirement to submit technical performance reports (to be evaluated in accordance with Federal awarding agency policy). Reporting requirements must be clearly articulated such that, where appropriate, performance during the execution of the Federal award has a standard against which non-Federal entity performance can be measured.

(c) *Non-construction performance reports.* The Federal awarding agency must use standard, governmentwide OMB-approved data elements for collection of performance information including performance progress reports, Research Performance Progress Reports.

(1) The non-Federal entity must submit performance reports at the interval required by the Federal awarding agency or pass-through entity to best inform improvements in program outcomes and productivity. Intervals must be no less frequent than annually nor more frequent than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes. Reports submitted annually by the non-Federal entity and/or pass-through entity must be due no later than 90 calendar days after the reporting period. Reports submitted quarterly or semiannually must be due no later than 30 calendar days after the reporting period. Alternatively, the Federal awarding agency or pass-through entity may require annual reports before the anniversary dates of multiple year Federal awards. The final performance report submitted by the non-Federal entity and/or pass-through entity must be due no later than 120 calendar days after the period of performance end date. A subrecipient must submit to the pass-through entity, no later than 90 calendar days after the period of performance end date, all final performance reports as required by the terms and conditions of the Federal award. See also § 200.344. If a justified request is submitted by a non-Federal entity, the Federal agency may extend the due date for any performance report.

(2) As appropriate in accordance with above mentioned performance reporting, these reports will contain, for each Federal award, brief information on the following unless other data elements are approved by OMB in the agency information collection request:

(i) A comparison of actual accomplishments to the objectives of the Federal award established for the period. Where the accomplishments of the Federal award can be quantified, a computation of the cost (for example, related to units of accomplishment) may be required if that information will be useful. Where performance trend data and analysis would be informative to the Federal awarding agency program, the Federal awarding agency should include this as a performance reporting requirement.

(ii) The reasons why established goals were not met, if appropriate.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(d) Construction performance reports. For the most part, onsite technical inspections and certified percentage of completion data are relied on heavily by Federal awarding agencies and pass-through entities to monitor progress under Federal awards and subawards for construction. The Federal awarding agency may require additional performance reports only when considered necessary.

(e) *Significant developments.* Events may occur between the scheduled performance reporting dates that have significant impact upon the supported activity. In such cases, the non-Federal entity must inform the Federal awarding agency or pass-through entity as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the Federal award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more or different beneficial results than originally planned.

(f) *Site visits.* The Federal awarding agency may make site visits as warranted by program needs.

(g) Performance report requirement waiver. The Federal awarding agency may waive any performance report required by this part if not needed.

§ 200. 330 Reporting on real property.

The Federal awarding agency or pass-through entity must require a non-Federal entity to submit reports at least annually on the status of real property in which the Federal Government retains an interest, unless the Federal interest in the real property extends 15

years or longer. In those instances where the Federal interest attached is for a period of 15 years or more, the Federal awarding agency or pass-through entity, at its option, may require the non-Federal entity to report at various multi-year frequencies (*e.g.*, every two years or every three years, not to exceed a five-year reporting period; or a Federal awarding agency or pass-through entity may require annual reporting for the first three years of a Federal award and thereafter require reporting every five years).

Subrecipient Monitoring and Management

§ 200.331 Subrecipient and contractor determinations.

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.

(a) *Subrecipients.* A subaward is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the subrecipient. See definition for *Subaward* in § 200.1 of this part. Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity:

(1) Determines who is eligible to receive what Federal assistance;

(2) Has its performance measured in relation to whether objectives of a Federal program were met;

(3) Has responsibility for programmatic decision-making;

(4) Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and

(5) In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.

(b) *Contractors.* A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor. See the definition of *contract* in § 200.1 of this part. Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the contractor:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Normally operates in a competitive environment;

(4) Provides goods or services that are ancillary to the operation of the Federal program; and

(5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

(c) *Use of judgment in making determination.* In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.

§ 200.332 Requirements for pass-through entities.

All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes:

(1) Federal award identification.

(i) Subrecipient name (which must match the name associated with its unique entity identifier);

(ii) Subrecipient's unique entity identifier;

(iii) Federal Award Identification Number (FAIN);

(iv) Federal Award Date (see the definition of *Federal award date* in § 200.1 of this part) of award to the recipient by the Federal agency;

(v) Subaward Period of Performance Start and End Date;

(vi) Subaward Budget Period Start and End Date;

(vii) Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient;

(viii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current financial obligation;

(ix) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;

(x) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA);

(xi) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity;

(xii) Assistance Listings number and Title; the pass-through entity must identify the dollar amount made available under each Federal award and the Assistance Listings Number at time of disbursement;

(xiii) Identification of whether the award is R&D; and

(xiv) Indirect cost rate for the Federal award (including if the de minimis rate is charged) per § 200.414.

(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports;

(4)(i) An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government. If no approved rate exists, the pass-through entity must determine the appropriate rate in collaboration with the subrecipient, which is either:

(A) The negotiated indirect cost rate between the pass-through entity and the subrecipient; which can be based on a prior negotiated rate between a different PTE and the same subrecipient. If basing the rate on a previously negotiated rate, the pass-through entity is not required to collect information justifying this rate, but may elect to do so;

(B) The de minimis indirect cost rate.

(ii) The pass-through entity must not require use of a de minimis indirect cost rate if the subrecipient has a Federally approved rate. Subrecipients can elect to use the cost allocation method to account for indirect costs in accordance with § 200.405(d).

(5) A requirement that the subrecipient permit the pass-through entity and auditors to have access to the subrecipient's records and financial

statements as necessary for the pass-through entity to meet the requirements of this part; and

(6) Appropriate terms and conditions concerning closeout of the subaward.

(b) Evaluate each subrecipient's risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:

(1) The subrecipient's prior experience with the same or similar subawards;

(2) The results of previous audits including whether or not the subrecipient receives a Single Audit in accordance with Subpart F of this part, and the extent to which the same or similar subaward has been audited as a major program;

(3) Whether the subrecipient has new personnel or new or substantially changed systems; and

(4) The extent and results of Federal awarding agency monitoring (*e.g.*, if the subrecipient also receives Federal awards directly from a Federal awarding agency).

(c) Consider imposing specific subaward conditions upon a subrecipient if appropriate as described in § 200.208.

(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include:

(1) Reviewing financial and performance reports required by the pass-through entity.

(2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and written confirmation from the subrecipient, highlighting the status of actions planned or taken to address Single Audit findings related to the particular subaward.

(3) Issuing a management decision for applicable audit findings pertaining only to the Federal award provided to the subrecipient from the pass-through entity as required by § 200.521.

(4) The pass-through entity is responsible for resolving audit findings specifically related to the subaward and not responsible for resolving cross-cutting findings. If a subrecipient has a current Single Audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding (*e.g.*, has been debarred or suspended), the pass-through entity may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform audit follow-up and make management decisions related to cross-cutting findings in accordance with section § 300.513(a)(3)(vii). Such reliance does not eliminate the responsibility of the pass-through entity to issue subawards that conform to agency and award-specific requirements, to manage risk through ongoing subaward monitoring, and to monitor the status of the findings that are specifically related to the subaward.

(e) Depending upon the pass-through entity's assessment of risk posed by the subrecipient (as described in paragraph (b) of this section), the following monitoring tools may be useful for the pass-through entity to ensure proper accountability and compliance with program requirements and achievement of performance goals:

(1) Providing subrecipients with training and technical assistance on program-related matters; and

(2) Performing on-site reviews of the subrecipient's program operations;

(3) Arranging for agreed-upon-procedures engagements as described in § 200.425.

(f) Verify that every subrecipient is audited as required by Subpart F of this part when it is expected that the subrecipient's Federal awards expended during the respective fiscal year equaled or exceeded the threshold set forth in § 200.501.

(g) Consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity's own records.

(h) Consider taking enforcement action against noncompliant subrecipients as described in § 200.339 of this part and in program regulations.

§ 200.333 Fixed amount subawards.

With prior written approval from the Federal awarding agency, a pass-through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold, provided that the subawards meet the requirements for fixed amount awards in § 200.201.

Record Retention and Access

§ 200.334 Retention requirements for records.

Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a subrecipient. Federal awarding agencies and pass-through entities must not impose any other record retention requirements upon non-Federal entities. The only exceptions are the following:

(a) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

(b) When the non-Federal entity is notified in writing by the Federal awarding agency, cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or pass-through entity to extend the retention period.

(c) Records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.

(d) When records are transferred to or maintained by the Federal awarding agency or pass-through entity, the 3-year retention requirement is not applicable to the non-Federal entity.

(e) Records for program income transactions after the period of performance. In some cases recipients must report program income after the period of performance. Where there is such a requirement, the retention period for the records pertaining to the earning of the program income starts from the end of the non-Federal entity's fiscal year in which the program income is earned.

(f) Indirect cost rate proposals and cost allocations plans. This paragraph applies to the following types of documents and their supporting records: Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the proposal, plan, or other computation is

required to be submitted to the Federal Government (or to the pass-through entity) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(2) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the pass-through entity) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

§ 200.335 Requests for transfer of records.

The Federal awarding agency must request transfer of certain records to its custody from the non-Federal entity when it determines that the records possess long-term retention value. However, in order to avoid duplicate recordkeeping, the Federal awarding agency may make arrangements for the non-Federal entity to retain any records that are continuously needed for joint use.

§ 200.336 Methods for collection, transmission, and storage of information.

The Federal awarding agency and the non-Federal entity should, whenever practicable, collect, transmit, and store Federal award-related information in open and machine-readable formats rather than in closed formats or on paper in accordance with applicable legislative requirements. A machine-readable format is a format in a standard computer language (not English text) that can be read automatically by a web browser or computer system. The Federal awarding agency or pass-through entity must always provide or accept paper versions of Federal award-related information to and from the non-Federal entity upon request. If paper copies are submitted, the Federal awarding agency or pass-through entity must not require more than an original and two copies. When original records are electronic and cannot be altered, there is no need to create and retain paper copies. When original records are paper, electronic versions may be substituted through the use of duplication or other forms of electronic media provided that they are subject to periodic quality control reviews, provide reasonable safeguards against alteration, and remain readable.

§ 200.337 Access to records.

(a) *Records of non-Federal entities.* The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.

(b) Extraordinary and rare circumstances. Only under extraordinary and rare circumstances would such access include review of the true name of victims of a crime. Routine monitoring cannot be considered extraordinary and rare circumstances that would necessitate access to this information. When access to the true name of victims of a crime is necessary, appropriate steps to protect this sensitive information must be taken by both the non-Federal entity and the Federal awarding agency. Any such access, other than under a court order or subpoena pursuant to a bona fide confidential investigation, must be approved by the head of the Federal awarding agency or delegate.

(c) *Expiration of right of access.* The rights of access in this section are not limited to the required retention period but last as long as the records are retained. Federal awarding agencies and pass-through entities must not impose any other access requirements upon non-Federal entities.

§ 200.338 Restrictions on public access to records.

No Federal 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, except for protected personally identifiable information (PII) or when the Federal 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 Federal 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 § 200.315. Unless required by Federal, state, local, and tribal statute, non-Federal entities are not required to permit public access to their records. The non-Federal entity's records provided to a Federal agency generally will be subject to FOIA and applicable exemptions.

Remedies for Noncompliance

§ 200.339 Remedies for noncompliance.

If a non-Federal entity fails to comply with the U.S. Constitution, Federal statutes, regulations or the terms and conditions of a Federal award, the Federal awarding agency or pass-through entity may impose additional conditions, as described in § 200.208. If the Federal awarding agency or pass-through entity determines that noncompliance cannot be remedied by imposing additional conditions, the Federal awarding agency or pass-through entity may take one or more of the following actions, as appropriate in the circumstances:

(a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal 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 not in compliance.

(c) Wholly or partly suspend or terminate the Federal award.

(d) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and Federal awarding agency regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency).

(e) Withhold further Federal awards for the project or program.

(f) Take other remedies that may be legally available.

§ 200.340 Termination.

(a) The Federal award may be terminated in whole or in part as follows:

(1) By the Federal awarding agency or pass-through entity, if a non-Federal entity fails to comply with the terms and conditions of a Federal award;

(2) By the Federal awarding agency or pass-through entity, to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities;

(3) By the Federal awarding agency or pass-through entity with the consent of the non-Federal entity, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated;

(4) By the non-Federal entity upon sending to the Federal awarding agency or pass-through entity written notification setting forth the reasons for

such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency or pass-through entity determines in the case of partial termination that the reduced or modified portion of the Federal award or subaward will not accomplish the purposes for which the Federal award was made, the Federal awarding agency or pass-through entity may terminate the Federal award in its entirety; or

(5) By the Federal awarding agency or pass-through entity pursuant to termination provisions included in the Federal award.

(b) A Federal awarding agency should clearly and unambiguously specify termination provisions applicable to each Federal award, in applicable regulations or in the award, consistent with this section.

(c) When a Federal awarding agency terminates a Federal award prior to the end of the period of performance due to the non-Federal entity's material failure to comply with the Federal award terms and conditions, the Federal awarding agency must report the termination to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS).

(1) The information required under paragraph (c) of this section is not to be reported to designated integrity and performance system until the non-Federal entity either—

(i) Has exhausted its opportunities to object or challenge the decision, see § 200.342; or

(ii) Has not, within 30 calendar days after being notified of the termination, informed the Federal awarding agency that it intends to appeal the Federal awarding agency's decision to terminate.

(2) If a Federal awarding agency, after entering information into the designated integrity and performance system about a termination, subsequently:

(i) Learns that any of that information is erroneous, the Federal awarding agency must correct the information in the system within three business days;

(ii) Obtains an update to that information that could be helpful to other Federal awarding agencies, the Federal awarding agency is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(3) Federal awarding agencies, must not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the non-Federal entity asserts within seven calendar days to the Federal awarding agency who posted the information, that some of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, the Federal awarding agency who posted the information must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, the Federal agency must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

(d) When a Federal award is terminated or partially terminated, both the Federal awarding agency or pass-through entity and the non-Federal entity remain responsible for compliance with the requirements in §§ 200.344 and 200.345.

§ 200.341 Notification of termination requirement.

(a) The Federal agency or pass-through entity must provide to the non-Federal entity a notice of termination.

(b) If the Federal award is terminated for the non-Federal entity's material failure to comply with the U.S. Constitution, Federal statutes, regulations, or terms and conditions of the Federal award, the notification must state that—

(1) The termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS);

(2) The information will be available in the OMB-designated integrity and performance system for a period of five years from the date of the termination, then archived;

(3) Federal awarding agencies that consider making a Federal award to the non-Federal entity during that five year period must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may comment on any information the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by Federal awarding agencies. The non-Federal entity may submit comments to the awardee integrity and performance portal accessible through SAM (currently (CPARS).

(5) Federal awarding agencies will consider non-Federal entity comments when determining whether the non-Federal entity is qualified for a future Federal award.

(c) Upon termination of a Federal award, the Federal awarding agency must provide the information required under FFATA to the Federal website established to fulfill the requirements of FFATA, and update or notify any other relevant governmentwide systems or entities of any indications of poor performance as required by 41 U.S.C. 417b and 31 U.S.C. 3321 and implementing guidance at 2 CFR part 77 (forthcoming at time of publication). See also the requirements for Suspension and Debarment at 2 CFR part 180.

§ 200.342 Opportunities to object, hearings, and appeals.

Upon taking any remedy for non-compliance, the Federal awarding agency must provide the non-Federal entity an opportunity to object and provide information and documentation challenging the suspension or termination action, in accordance with written processes and procedures published by the Federal awarding agency. The Federal awarding agency or pass-through entity must comply with any requirements for hearings, appeals or other administrative proceedings to which the non-Federal entity is entitled under any statute or regulation applicable to the action involved.

§ 200.343 Effects of suspension and termination.

Costs to the non-Federal entity resulting from financial obligations incurred by the non-Federal entity during a suspension or after termination of a Federal award or subaward are not allowable unless the Federal awarding agency or pass-through entity expressly authorizes them in the notice of suspension or termination or subsequently. However, costs during suspension or after termination are allowable if:

(a) The costs result from financial obligations which were properly incurred by the non-Federal entity before the effective date of suspension or termination, are not in anticipation of it; and

(b) The costs would be allowable if the Federal award was not suspended or expired normally at the end of the period of performance in which the termination takes effect.

Closeout

§ 200.344 Closeout.

The Federal awarding agency or pass-through entity will close out the Federal award when it determines that all applicable administrative actions and all required work of the Federal award have been completed by the non-Federal entity. If the non-Federal entity fails to

complete the requirements, the Federal awarding agency or pass-through entity will proceed to close out the Federal award with the information available. This section specifies the actions the non-Federal entity and Federal awarding agency or pass-through entity must take to complete this process at the end of the period of performance.

(a) The recipient must submit, no later than 120 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. A subrecipient must submit to the pass-through entity, no later than 90 calendar days (or an earlier date as agreed upon by the pass-through entity and subrecipient) after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. The Federal awarding agency or pass-through entity may approve extensions when requested and justified by the non-Federal entity, as applicable.

(b) Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all financial obligations incurred under the Federal award no later than 120 calendar days after the end date of the period of performance as specified in the terms and conditions of the Federal award.

(c) The Federal awarding agency or pass-through entity must make prompt payments to the non-Federal entity for costs meeting the requirements in Subpart E of this part under the Federal award being closed out.

(d) The non-Federal entity must promptly refund any balances of unobligated cash that the Federal awarding agency or pass-through entity paid in advance or paid and that are not authorized to be retained by the non-Federal entity for use in other projects. See OMB Circular A–129 and see § 200.346, for requirements regarding unreturned amounts that become delinquent debts.

(e) Consistent with the terms and conditions of the Federal award, the Federal awarding agency or pass-through entity must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The non-Federal entity must account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 200.310 through 200.316 and 200.330.

(g) When a recipient or subrecipient completes all closeout requirements, the Federal awarding agency or pass-through entity must promptly complete all closeout actions for Federal awards. The Federal awarding agency must make every effort to complete closeout actions no later than one year after the end of the period of performance unless otherwise directed by authorizing statutes. Closeout actions include Federal awarding agency actions in the grants management and payment systems.

(h) If the non-Federal entity does not submit all reports in accordance with this section and the terms and conditions of the Federal Award, the Federal awarding agency must proceed to close out with the information available within one year of the period of performance end date.

(i) If the non-Federal entity does not submit all reports in accordance with this section within one year of the period of performance end date, the Federal awarding agency must report the non-Federal entity's material failure to comply with the terms and conditions of the award with the OMB-designated integrity and performance system (currently FAPIIS). Federal awarding agencies may also pursue other enforcement actions per § 200.339.

Post-Closeout Adjustments and Continuing Responsibilities

§ 200.345 Post-closeout adjustments and continuing responsibilities.

(a) The closeout of a Federal award does not affect any of the following:

(1) The right of the Federal awarding agency or pass-through entity to disallow costs and recover funds on the basis of a later audit or other review. The Federal awarding agency or pass-through entity must make any cost disallowance determination and notify the non-Federal entity within the record retention period.

(2) The requirement for the non-Federal entity to return any funds due as a result of later refunds, corrections, or other transactions including final indirect cost rate adjustments.

(3) The ability of the Federal awarding agency to make financial adjustments to a previously closed award such as resolving indirect cost payments and making final payments.

(4) Audit requirements in subpart F of this part.

(5) Property management and disposition requirements in §§ 200.310 through 200.316 of this subpart.

(6) Records retention as required in §§ 200.334 through 200.337 of this subpart.

(b) After closeout of the Federal award, a relationship created under the Federal award may be modified or ended in whole or in part with the consent of the Federal awarding agency or pass-through entity and the non-Federal entity, provided the responsibilities of the non-Federal entity referred to in paragraph (a) of this section, including those for property management as applicable, are considered and provisions made for continuing responsibilities of the non-Federal entity, as appropriate.

Collection of Amounts Due

§ 200.346 Collection of amounts due.

(a) Any funds paid to the non-Federal entity in excess of the amount to which the non-Federal entity is finally determined to be entitled under the terms of the Federal award constitute a debt to the Federal Government. If not paid within 90 calendar days after demand, the Federal awarding agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements;

(2) Withholding advance payments otherwise due to the non-Federal entity; or

(3) Other action permitted by Federal statute.

(b) Except where otherwise provided by statutes or regulations, the Federal awarding agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (31 CFR parts 900 through 999). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Cost Principles

- 46. Amend § 200.400 by revising paragraph (e) and (g) to read as follows:

§ 200.400 Policy guide.

* * * * *

(e) In reviewing, negotiating and approving cost allocation plans or indirect cost proposals, the cognizant agency for indirect costs should generally assure that the non-Federal entity is applying these cost accounting principles on a consistent basis during their review and negotiation of indirect cost proposals. Where wide variations exist in the treatment of a given cost item by the non-Federal entity, the reasonableness and equity of such treatments should be fully considered. See the definition of *indirect (facilities & administrative (F&A)) costs* in § 200.1 of this part.

* * * * *

(g) The non-Federal entity may not earn or keep any profit resulting from Federal financial assistance, unless

explicitly authorized by the terms and conditions of the Federal award. See also § 200.307.

- 47. Amend § 200.401 by revising paragraphs (a)(3) and (4), (b), and (c) to read as follows:

§ 200.401 Application.

(a) * * *

(3) Fixed amount awards. See also § 200.1 Definitions and 200.201.

(4) Federal awards to hospitals (see appendix IX to this part).

* * * * *

(b) *Federal contract.* Where a Federal contract awarded to a non-Federal entity is subject to the Cost Accounting Standards (CAS), it incorporates the applicable CAS clauses, Standards, and CAS administration requirements per the 48 CFR Chapter 99 and 48 CFR part 30 (FAR Part 30). CAS applies directly to the CAS-covered contract and the Cost Accounting Standards at 48 CFR parts 9904 or 9905 takes precedence over the cost principles in this subpart E with respect to the allocation of costs. When a contract with a non-Federal entity is subject to full CAS coverage, the allowability of certain costs under the cost principles will be affected by the allocation provisions of the Cost Accounting Standards (*e.g.*, CAS 414—48 CFR 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, and CAS 417—48 CFR 9904.417, Cost of Money as an Element of the Cost of Capital Assets Under Construction), apply rather the allowability provisions of § 200.449. In complying with those requirements, the non-Federal entity's application of cost accounting practices for estimating, accumulating, and reporting costs for other Federal awards and other cost objectives under the CAS-covered contract still must be consistent with its cost accounting practices for the CAS-covered contracts. In all cases, only one set of accounting records needs to be maintained for the allocation of costs by the non-Federal entity.

(c) *Exemptions.* Some nonprofit organizations, because of their size and nature of operations, can be considered to be similar to for-profit entities for purpose of applicability of cost principles. Such nonprofit organizations must operate under Federal cost principles applicable to for-profit entities located at 48 CFR 31.2. A listing of these organizations is contained in appendix VIII to this part. Other organizations, as approved by the cognizant agency for indirect costs, may be added from time to time.

- 48. Amend § 200.403 by revising paragraphs (f) and (g) and adding paragraph (h) to read as follows:

§ 200.403 Factors affecting allowability of costs.

* * * * *

(f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period. See also § 200.306(b).

(g) Be adequately documented. See also §§ 200.300 through 200.309 of this part.

(h) Cost must be incurred during the approved budget period. The Federal awarding agency is authorized, at its discretion, to waive prior written approvals to carry forward unobligated balances to subsequent budget periods pursuant to § 200.308(e)(3).

- 49. Amend § 200.405 by revising paragraph (d) to read as follows:

§ 200.405 Allocable costs.

* * * * *

(d) Direct cost allocation principles: If a cost benefits two or more projects or activities in proportions that can be determined without undue effort or cost, the cost must be allocated to the projects based on the proportional benefit. If a cost benefits two or more projects or activities in proportions that cannot be determined because of the interrelationship of the work involved, then, notwithstanding paragraph (c) of this section, the costs may be allocated or transferred to benefitted projects on any reasonable documented basis. Where the purchase of equipment or other capital asset is specifically authorized under a Federal award, the costs are assignable to the Federal award regardless of the use that may be made of the equipment or other capital asset involved when no longer needed for the purpose for which it was originally required. See also §§ 200.310 through 200.316 and 200.439.

* * * * *

- 50. Amend § 200.406 by revising paragraph (b) to read as follows:

§ 200.406 Applicable credits.

* * * * *

(b) In some instances, the amounts received from the Federal Government to finance activities or service operations of the non-Federal entity should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing or matching requirements) must be recognized in determining the rates or amounts to be charged to the Federal award. (See §§ 200.436 and 200.468, for areas of potential application in the matter of Federal financing of activities.)

- 51. Amend § 200.407 by revising paragraphs (g) and (y) to read as follows:

§ 200.407 Prior written approval (prior approval).

* * * * *

(g) § 200.333 Fixed amount subawards;

* * * * *

(y) § 200.475 Travel costs.

- 52. Revise § 200.409 to read as follows:

§ 200.409 Special considerations.

In addition to the basic considerations regarding the allowability of costs highlighted in this subtitle, other subtitles in this part describe special considerations and requirements applicable to states, local governments, Indian tribes, and IHEs. In addition, certain provisions among the items of cost in this subpart are only applicable to certain types of non-Federal entities, as specified in the following sections:

(a) Direct and Indirect (F&A) Costs (§§ 200.412–200.415) of this subpart;

(b) Special Considerations for States, Local Governments and Indian Tribes (§§ 200.416 and 200.417) of this subpart; and

(c) Special Considerations for Institutions of Higher Education (§§ 200.418 and 200.419) of this subpart.

- 53. Revise § 200.410 to read as follows:

§ 200.410 Collection of unallowable costs.

Payments made for costs determined to be unallowable by either the Federal awarding agency, cognizant agency for indirect costs, or pass-through entity, either as direct or indirect costs, must be refunded (including interest) to the Federal Government in accordance with instructions from the Federal agency that determined the costs are unallowable unless Federal statute or regulation directs otherwise. See also §§ 200.300 through 200.309 in subpart D of this part.

- 54. Amend § 200.413 by revising paragraphs (a), (b), and (f) to read as follows:

§ 200.413 Direct costs.

(a) *General.* Direct costs are those costs that can be identified specifically with a particular final cost objective, such as a Federal award, or other internally or externally funded activity, or that can be directly assigned to such activities relatively easily with a high degree of accuracy. Costs incurred for the same purpose in like circumstances must be treated consistently as either

direct or indirect (F&A) costs. See also § 200.405.

(b) *Application to Federal awards.* Identification with the Federal award rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect (F&A) costs of Federal awards. Typical costs charged directly to a Federal award are the compensation of employees who work on that award, their related fringe benefit costs, the costs of materials and other items of expense incurred for the Federal award. If directly related to a specific award, certain costs that otherwise would be treated as indirect costs may also be considered direct costs. Examples include extraordinary utility consumption, the cost of materials supplied from stock or services rendered by specialized facilities, program evaluation costs, or other institutional service operations.

* * * * *

(f) For nonprofit organizations, the costs of activities performed by the non-Federal entity primarily as a service to members, clients, or the general public when significant and necessary to the non-Federal entity's mission must be treated as direct costs whether or not allowable, and be allocated an equitable share of indirect (F&A) costs. Some examples of these types of activities include:

(1) Maintenance of membership rolls, subscriptions, publications, and related functions. See also § 200.454.

(2) Providing services and information to members, legislative or administrative bodies, or the public. See also §§ 200.454 and 200.450.

(3) Promotion, lobbying, and other forms of public relations. See also §§ 200.421 and 200.450.

(4) Conferences except those held to conduct the general administration of the non-Federal entity. See also § 200.432.

(5) Maintenance, protection, and investment of special funds not used in operation of the non-Federal entity. See also § 200.442.

(6) Administration of group benefits on behalf of members or clients, including life and hospital insurance, annuity or retirement plans, and financial aid. See also § 200.431.

- 55. Amend § 200.414 by revising paragraphs (a), (c) introductory text, (c)(3) and (4), (d), (f), and (g) and adding paragraph (h) to read as follows:

§ 200.414 Indirect (F&A) costs.

(a) *Facilities and administration classification.* For major Institutions of Higher Education (IHE) and major nonprofit organizations, indirect (F&A) costs must be classified within two broad categories: ''Facilities'' and ''Administration.'' ''Facilities'' is defined as depreciation on buildings, equipment and capital improvement, interest on debt associated with certain buildings, equipment and capital improvements, and operations and maintenance expenses. ''Administration'' is defined as general administration and general expenses such as the director's office, accounting, personnel and all other types of expenditures not listed specifically under one of the subcategories of ''Facilities'' (including cross allocations from other pools, where applicable). For nonprofit organizations, library expenses are included in the ''Administration'' category; for IHEs, they are included in the ''Facilities'' category. Major IHEs are defined as those required to use the Standard Format for Submission as noted in appendix III to this part, and Rate Determination for Institutions of Higher Education paragraph C. 11. Major nonprofit organizations are those which receive more than $10 million dollars in direct Federal funding.

* * * * *

(c) *Federal Agency Acceptance of Negotiated Indirect Cost Rates.* (See also § 200.306.)

* * * * *

(3) The Federal awarding agency must implement, and make publicly available, the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates.

(4) As required under § 200.204, the Federal awarding agency must include in the notice of funding opportunity the policies relating to indirect cost rate reimbursement, matching, or cost share as approved under paragraph (e)(1) of this section. As appropriate, the Federal agency should incorporate discussion of these policies into Federal awarding agency outreach activities with non-Federal entities prior to the posting of a notice of funding opportunity.

(d) Pass-through entities are subject to the requirements in § 200.332(a)(4).

* * * * *

(f) In addition to the procedures outlined in the appendices in paragraph (e) of this section, any non-Federal entity that does not have a current negotiated (including provisional) rate, except for those non-Federal entities described in appendix VII to this part, paragraph D.1.b, may elect to charge a de minimis rate of 10% of modified total direct costs (MTDC) which may be used indefinitely. No documentation is required to justify the 10% de minimis indirect cost rate. As described in § 200.403, costs must be consistently charged as either indirect or direct costs, but may not be double charged or inconsistently charged as both. If chosen, this methodology once elected must be used consistently for all Federal awards until such time as a non-Federal entity chooses to negotiate for a rate, which the non-Federal entity may apply to do at any time.

(g) Any non-Federal entity that has a current federally-negotiated indirect cost rate may apply for a one-time extension of the rates in that agreement for a period of up to four years. This extension will be subject to the review and approval of the cognizant agency for indirect costs. If an extension is granted the non-Federal entity may not request a rate review until the extension period ends. At the end of the 4-year extension, the non-Federal entity must re-apply to negotiate a rate. Subsequent one-time extensions (up to four years) are permitted if a renegotiation is completed between each extension request.

(h) The federally negotiated indirect rate, distribution base, and rate type for a non-Federal entity (except for the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) must be available publicly on an OMB-designated Federal website.

- 56. Amend § 200.415 by revising paragraphs (b)(1) and (2), (c), and (d) to read as follows:

§ 200.415 Required certifications.

* * * * *

(b) * * *

(1) A proposal to establish a cost allocation plan or an indirect (F&A) cost rate, whether submitted to a Federal cognizant agency for indirect costs or maintained on file by the non-Federal entity, must be certified by the non-Federal entity using the Certificate of Cost Allocation Plan or Certificate of Indirect Costs as set forth in appendices III through VII, and IX of this part. The certificate must be signed on behalf of the non-Federal entity by an individual at a level no lower than vice president or chief financial officer of the non-Federal entity that submits the proposal.

(2) Unless the non-Federal entity has elected the option under § 200.414(f), the Federal Government may either disallow all indirect (F&A) costs or unilaterally establish such a plan or rate when the non-Federal entity fails to submit a certified proposal for establishing such a plan or rate in accordance with the requirements. Such

a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant agency for indirect costs and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because the non-Federal entity failed to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

(c) Certifications by nonprofit organizations as appropriate that they did not meet the definition of a major nonprofit organization as defined in § 200.414(a).

(d) See also § 200.450 for another required certification.

- 57. Revise § 200.417 to read as follows:

§ 200.417 Interagency service.

The cost of services provided by one agency to another within the governmental unit may include allowable direct costs of the service plus a pro-rated share of indirect costs. A standard indirect cost allowance equal to ten percent of the direct salary and wage cost of providing the service (excluding overtime, shift premiums, and fringe benefits) may be used in lieu of determining the actual indirect costs of the service. These services do not include centralized services included in central service cost allocation plans as described in Appendix V to Part 200.

- 58. Amend § 200.418 by revising paragraph (a) to read as follows:

§ 200.418 Costs incurred by states and local governments.

* * * * *

(a) The costs meet the requirements of § 200.402–411 of this subpart;

* * * * *

- 59. Amend § 200.419 by revising paragraphs (a), (b) introductory text, and (b)(1) and (2) to read as follows:

§ 200.419 Cost accounting standards and disclosure statement.

(a) An IHE that receive an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in § 200.101) in its most recently completed fiscal year must comply with the Cost Accounting Standards Board's cost accounting standards located at 48 CFR 9905.501, 9905.502, 9905.505, and 9905.506. CAS-covered contracts and subcontracts awarded to the IHEs are subject to the broader range of CAS requirements at 48 CFR 9900 through 9999 and 48 CFR part 30 (FAR Part 30).

(b) *Disclosure statement.* An IHE that receives an aggregate total $50 million or more in Federal awards and instruments subject to this subpart (as specified in § 200.101) during its most recently completed fiscal year must disclose their cost accounting practices by filing a Disclosure Statement (DS–2), which is reproduced in Appendix III to Part 200. With the approval of the cognizant agency for indirect costs, an IHE may meet the DS–2 submission by submitting the DS–2 for each business unit that received $50 million or more in Federal awards and instruments.

(1) The DS–2 must be submitted to the cognizant agency for indirect costs with a copy to the IHE's cognizant agency for audit. The initial DS–2 and revisions to the DS–2 must be submitted in coordination with the IHE's indirect (F&A) rate proposal, unless an earlier submission is requested by the cognizant agency for indirect costs. IHEs with CAS-covered contracts or subcontracts meeting the dollar threshold in 48 CFR 9903.202–1(f) must submit their initial DS–2 or revisions no later than prior to the award of a CAS-covered contract or subcontract.

(2) An IHE must maintain an accurate DS–2 and comply with disclosed cost accounting practices. An IHE must file amendments to the DS–2 to the cognizant agency for indirect costs in advance of a disclosed practice being changed to comply with a new or modified standard, or when a practice is changed for other reasons. An IHE may proceed with implementing the change after it has notified the Federal cognizant agency for indirect costs. If the change represents a variation from 2 CFR part 200, the change may require approval by the Federal cognizant agency for indirect costs, in accordance with § 200.102(b). Amendments of a DS–2 may be submitted at any time. Resubmission of a complete, updated DS–2 is discouraged except when there are extensive changes to disclosed practices.

* * * * *

- 60. Revise § 200.420 to read as follows:

§ 200.420 Considerations for selected items of cost.

This section provides principles to be applied in establishing the allowability of certain items involved in determining cost, in addition to the requirements of Subtitle II of this subpart. These principles apply whether or not a particular item of cost is properly treated as direct cost or indirect (F&A) cost. Failure to mention a particular item of cost is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment provided for similar or related items of cost, and based on the principles described in §§ 200.402 through 200.411. In case of a discrepancy between the provisions of a specific Federal award and the provisions below, the Federal award governs. Criteria outlined in § 200.403 must be applied in determining allowability. See also § 200.102.

- 61. Amend § 200.421 by revising paragraphs (b)(1) and (e)(2) to read as follows:

§ 200.421 Advertising and public relations.

* * * * *

(b) * * *

(1) The recruitment of personnel required by the non-Federal entity for performance of a Federal award (See also § 200.463);

* * * * *

(e) * * *

(2) Costs of meetings, conventions, convocations, or other events related to other activities of the entity (see also § 200.432), including:

* * * * *

- 62. Revise § 200.422 to read as follows:

§ 200.422 Advisory councils.

Costs incurred by advisory councils or committees are unallowable unless authorized by statute, the Federal awarding agency or as an indirect cost where allocable to Federal awards. See § 200.444, applicable to States, local governments, and Indian tribes.

- 63. Amend § 200.425 by revising paragraphs (a)(1) and (2) and (c) introductory text to read as follows:

§ 200.425 Audit services.

* * * * *

(a) * * *

(1) Any costs when audits required by the Single Audit Act and subpart F of this part have not been conducted or have been conducted but not in accordance therewith; and

(2) Any costs of auditing a non-Federal entity that is exempted from having an audit conducted under the Single Audit Act and subpart F of this part because its expenditures under Federal awards are less than $750,000 during the non-Federal entity's fiscal year.

* * * * *

(c) Pass-through entities may charge Federal awards for the cost of agreed-upon-procedures engagements to monitor subrecipients (in accordance with subpart D, §§ 200.331–333) who are exempted from the requirements of

the Single Audit Act and subpart F of this part. This cost is allowable only if the agreed-upon-procedures engagements are:
* * * * *

- 64. Revise § 200.426 to read as follows:

§ 200.426 Bad debts.

Bad debts (debts which have been determined to be uncollectable), including losses (whether actual or estimated) arising from uncollectable accounts and other claims, are unallowable. Related collection costs, and related legal costs, arising from such debts after they have been determined to be uncollectable are also unallowable. See also § 200.428.

- 65. Revise § 200.428 to read as follows:

§ 200.428 Collections of improper payments.

The costs incurred by a non-Federal entity to recover improper payments are allowable as either direct or indirect costs, as appropriate. Amounts collected may be used by the non-Federal entity in accordance with cash management standards set forth in § 200.305.

- 66. Revise § 200.429 to read as follows:

§ 200.429 Commencement and convocation costs.

For IHEs, costs incurred for commencements and convocations are unallowable, except as provided for in (B)(9) Student Administration and Services, in appendix III to this part, as activity costs.

- 67. Amend § 200.430 by revising paragraphs (a) introductory text and (a)(3), the paragraph (h) subject heading, and paragraphs (h)(3), (h)(8)(iv), and (h)(8)(viii)(C) to read as follows:

§ 200.430 Compensation—personal services.

(a) *General.* Compensation for personal services includes all remuneration, paid currently or accrued, for services of employees rendered during the period of performance under the Federal award, including but not necessarily limited to wages and salaries. Compensation for personal services may also include fringe benefits which are addressed in § 200.431. Costs of compensation are allowable to the extent that they satisfy the specific requirements of this part, and that the total compensation for individual employees:
* * * * *

(3) Is determined and supported as provided in paragraph (i) of this section, when applicable.
* * * * *

(h) *Institutions of Higher Education (IHEs).* * * *

(3) *Intra-Institution of Higher Education (IHE) consulting.* Intra-IHE consulting by faculty should be undertaken as an IHE responsibility requiring no compensation in addition to IBS. However, in unusual cases where consultation is across departmental lines or involves a separate or remote operation, and the work performed by the faculty member is in addition to his or her regular responsibilities, any charges for such work representing additional compensation above IBS are allowable provided that such consulting arrangements are specifically provided for in the Federal award or approved in writing by the Federal awarding agency.
* * * * *

(iv) Encompass federally-assisted and all other activities compensated by the non-Federal entity on an integrated basis, but may include the use of subsidiary records as defined in the non-Federal entity's written policy;
* * * * *

(viii) * * *

(C) The non-Federal entity's system of internal controls includes processes to review after-the-fact interim charges made to a Federal award based on budget estimates. All necessary adjustment must be made such that the final amount charged to the Federal award is accurate, allowable, and properly allocated.
* * * * *

- 68. Revise § 200.431 to read as follows:

§ 200.431 Compensation—fringe benefits.

(a) *General.* Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave (vacation, family-related, sick or military), employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable provided that the benefits are reasonable and are required by law, non-Federal entity-employee agreement, or an established policy of the non-Federal entity.

(b) *Leave.* The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, family-related leave, sick leave, holidays, court leave, military leave, administrative leave, and other similar benefits, are allowable if all of the following criteria are met:

(1) They are provided under established written leave policies;

(2) The costs are equitably allocated to all related activities, including Federal awards; and,

(3) The accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the non-Federal entity or specified grouping of employees.

(i) When a non-Federal entity uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment.

(ii) The accrual basis may be only used for those types of leave for which a liability as defined by GAAP exists when the leave is earned. When a non-Federal entity uses the accrual basis of accounting, allowable leave costs are the lesser of the amount accrued or funded.

(c) *Fringe benefits.* The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in § 200.447); pension plan costs (see paragraph (i) of this section); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, must be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities, and charged as direct or indirect costs in accordance with the non-Federal entity's accounting practices.

(d) *Cost objectives.* Fringe benefits may be assigned to cost objectives by identifying specific benefits to specific individual employees or by allocating on the basis of entity-wide salaries and wages of the employees receiving the benefits. When the allocation method is used, separate allocations must be made to selective groupings of employees, unless the non-Federal entity demonstrates that costs in relationship to salaries and wages do not differ significantly for different groups of employees.

(e) *Insurance.* See also § 200.447(d)(1) and (2).

(1) Provisions for a reserve under a self-insurance program for unemployment compensation or

workers' compensation are allowable to the extent that the provisions represent reasonable estimates of the liabilities for such compensation, and the types of coverage, extent of coverage, and rates and premiums would have been allowable had insurance been purchased to cover the risks. However, provisions for self-insured liabilities which do not become payable for more than one year after the provision is made must not exceed the present value of the liability.

(2) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibility are allowable only to the extent that the insurance represents additional compensation. The costs of such insurance when the non-Federal entity is named as beneficiary are unallowable.

(3) Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (*e.g.*, post-retirement health benefits), are allowable in the year of payment provided that the non-Federal entity follows a consistent costing policy.

(f) *Automobiles.* That portion of automobile costs furnished by the non-Federal entity that relates to personal use by employees (including transportation to and from work) is unallowable as fringe benefit or indirect (F&A) costs regardless of whether the cost is reported as taxable income to the employees.

(g) *Pension plan costs.* Pension plan costs which are incurred in accordance with the established policies of the non-Federal entity are allowable, provided that:

(1) Such policies meet the test of reasonableness.

(2) The methods of cost allocation are not discriminatory.

(3) Except for State and Local Governments, the cost assigned to each fiscal year should be determined in accordance with GAAP.

(4) The costs assigned to a given fiscal year are funded for all plan participants within six months after the end of that year. However, increases to normal and past service pension costs caused by a delay in funding the actuarial liability beyond 30 calendar days after each quarter of the year to which such costs are assignable are unallowable. Non-Federal entity may elect to follow the ''Cost Accounting Standard for Composition and Measurement of Pension Costs'' (48 CFR 9904.412).

(5) Pension plan termination insurance premiums paid pursuant to the Employee Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. 1301–1461) are allowable. Late payment charges on such premiums are unallowable. Excise taxes on accumulated funding deficiencies and other penalties imposed under ERISA are unallowable.

(6) Pension plan costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity.

(i) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(ii) Pension costs calculated using an actuarial cost-based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency for indirect costs) are allowable in the year funded. The cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the non-Federal entity's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund.

(iii) Amounts funded by the non-Federal entity in excess of the actuarially determined amount for a fiscal year may be used as the non-Federal entity's contribution in future periods.

(iv) When a non-Federal entity converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion is allowable if amortized over a period of years in accordance with GAAP.

(v) The Federal Government must receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(h) *Post-retirement health.* Post-retirement health plans (PRHP) refers to costs of health insurance or health services not included in a pension plan covered by paragraph (g) of this section for retirees and their spouses, dependents, and survivors. PRHP costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the non-Federal entity.

(1) For PRHP financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) PRHP costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six-month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The Federal cognizant agency for indirect costs may agree to an extension of the six-month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the non-Federal entity's contributions to the PRHP fund. Adjustments may be made by cash refund, reduction in current year's PRHP costs, or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHP fund.

(3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the non-Federal entity contribution in a future period.

(4) When a non-Federal entity converts to an acceptable actuarial cost method and funds PRHP costs in accordance with this method, the initial unfunded liability attributable to prior years is allowable if amortized over a period of years in accordance with GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency for indirect costs.

(5) To be allowable in the current year, the PRHP costs must be paid either to:

(i) An insurer or other benefit provider as current year costs or premiums, or

(ii) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries.

(6) The Federal Government must receive an equitable share of any amounts of previously allowed post-retirement benefit costs (including earnings thereon) which revert or inure to the non-Federal entity in the form of a refund, withdrawal, or other credit.

(i) *Severance pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by non-Federal entities to workers whose

employment is being terminated. Costs of severance pay are allowable only to the extent that in each case, it is required by

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes, in effect, an implied agreement on the non-Federal entity's part; or

(iv) Circumstances of the particular employment.

(2) Costs of severance payments are divided into two categories as follows:

(i) Actual normal turnover severance payments must be allocated to all activities; or, where the non-Federal entity provides for a reserve for normal severances, such method will be acceptable if the charge to current operations is reasonable in light of payments actually made for normal severances over a representative past period, and if amounts charged are allocated to all activities of the non-Federal entity.

(ii) Measurement of costs of abnormal or mass severance pay by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Federal Government recognizes its responsibility to participate, to the extent of its fair share, in any specific payment. Prior approval by the Federal awarding agency or cognizant agency for indirect cost, as appropriate, is required.

(3) Costs incurred in certain severance pay packages which are in an amount in excess of the normal severance pay paid by the non-Federal entity to an employee upon termination of employment and are paid to the employee contingent upon a change in management control over, or ownership of, the non-Federal entity's assets, are unallowable.

(4) Severance payments to foreign nationals employed by the non-Federal entity outside the United States, to the extent that the amount exceeds the customary or prevailing practices for the non-Federal entity in the United States, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(5) Severance payments to foreign nationals employed by the non-Federal entity outside the United States due to the termination of the foreign national as a result of the closing of, or curtailment of activities by, the non-Federal entity in that country, are unallowable, unless they are necessary for the performance of Federal programs and approved by the Federal awarding agency.

(j) *For IHEs only.* (1) Fringe benefits in the form of undergraduate and graduate tuition or remission of tuition for individual employees are allowable, provided such benefits are granted in accordance with established non-Federal entity policies, and are distributed to all non-Federal entity activities on an equitable basis. Tuition benefits for family members other than the employee are unallowable.

(2) Fringe benefits in the form of tuition or remission of tuition for individual employees not employed by IHEs are limited to the tax-free amount allowed per section 127 of the Internal Revenue Code as amended.

(3) IHEs may offer employees tuition waivers or tuition reductions, provided that the benefit does not discriminate in favor of highly compensated employees. Employees can exercise these benefits at other institutions according to institutional policy. See § 200.466, for treatment of tuition remission provided to students.

(k) Fringe benefit programs and other benefit costs. For IHEs whose costs are paid by state or local governments, fringe benefit programs (such as pension costs and FICA) and any other benefits costs specifically incurred on behalf of, and in direct benefit to, the non-Federal entity, are allowable costs of such non-Federal entities whether or not these costs are recorded in the accounting records of the non-Federal entities, subject to the following:

(1) The costs meet the requirements of Basic Considerations in §§ 200.402 through 200.411;

(2) The costs are properly supported by approved cost allocation plans in accordance with applicable Federal cost accounting principles; and

(3) The costs are not otherwise borne directly or indirectly by the Federal Government.

- 69. Revise § 200.432 to read as follows:

§ 200.432 Conferences.

A conference is defined as a meeting, retreat, seminar, symposium, workshop or event whose primary purpose is the dissemination of technical information beyond the non-Federal entity and is necessary and reasonable for successful performance under the Federal award. Allowable conference costs paid by the non-Federal entity as a sponsor or host of the conference may include rental of facilities, speakers' fees, costs of meals and refreshments, local transportation, and other items incidental to such conferences unless further restricted by the terms and conditions of the Federal award. As needed, the costs of identifying, but not providing, locally available dependent-care resources are allowable. Conference hosts/sponsors must exercise discretion and judgment in ensuring that conference costs are appropriate, necessary and managed in a manner that minimizes costs to the Federal award. The Federal awarding agency may authorize exceptions where appropriate for programs including Indian tribes, children, and the elderly. See also §§ 200.438, 200.456, and 200.475.

- 70. Amend § 200.433 by revising paragraphs (b) and (c) to read as follows:

§ 200.433 Contingency provisions.

* * * * *

(b) It is permissible for contingency amounts other than those excluded in paragraph (a) of this section to be explicitly included in budget estimates, to the extent they are necessary to improve the precision of those estimates. Amounts must be estimated using broadly-accepted cost estimating methodologies, specified in the budget documentation of the Federal award, and accepted by the Federal awarding agency. As such, contingency amounts are to be included in the Federal award. In order for actual costs incurred to be allowable, they must comply with the cost principles and other requirements in this part (see also §§ 200.300 and 200.403 of this part); be necessary and reasonable for proper and efficient accomplishment of project or program objectives, and be verifiable from the non-Federal entity's records.

(c) Payments made by the Federal awarding agency to the non-Federal entity's ''contingency reserve'' or any similar payment made for events the occurrence of which cannot be foretold with certainty as to the time or intensity, or with an assurance of their happening, are unallowable, except as noted in §§ 200.431 and 200.447.

- 71. Amend § 200.434 by revising paragraphs (b), (c), (f), and (g)(2) to read as follows:

§ 200.434 Contributions and donations.

* * * * *

(b) The value of services and property donated to the non-Federal entity may not be charged to the Federal award either as a direct or indirect (F&A) cost. The value of donated services and property may be used to meet cost sharing or matching requirements (see § 200.306). Depreciation on donated assets is permitted in accordance with § 200.436, as long as the donated property is not counted towards cost sharing or matching requirements.

(c) Services donated or volunteered to the non-Federal entity may be furnished to a non-Federal entity by professional

and technical personnel, consultants, and other skilled and unskilled labor. The value of these services may not be charged to the Federal award either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of § 200.306.

* * * * *

(f) Fair market value of donated services must be computed as described in § 200.306.

* * * * *

(g) * * *

(2) The value of the donations may be used to meet cost sharing or matching share requirements under the conditions described in § 200.300 of this part. The value of the donations must be determined in accordance with § 200.300. Where donations are treated as indirect costs, indirect cost rates will separate the value of the donations so that reimbursement will not be made.

▪ 72. Amend § 200.436 by revising paragraphs (c) introductory text, (c)(3) and (4), and (e) to read as follows:

§ 200.436 Depreciation.

* * * * *

(c) Depreciation is computed applying the following rules. The computation of depreciation must be based on the acquisition cost of the assets involved. For an asset donated to the non-Federal entity by a third party, its fair market value at the time of the donation must be considered as the acquisition cost. Such assets may be depreciated or claimed as matching but not both. For the computation of depreciation, the acquisition cost will exclude:

* * * * *

(3) Any portion of the cost of buildings and equipment contributed by or for the non-Federal entity that are already claimed as matching or where law or agreement prohibits recovery;

(4) Any asset acquired solely for the performance of a non-Federal award; and

* * * * *

(e) Charges for depreciation must be supported by adequate property records, and physical inventories must be taken at least once every two years to ensure that the assets exist and are usable, used, and needed. Statistical sampling techniques may be used in taking these inventories. In addition, adequate depreciation records showing the amount of depreciation must be maintained.

▪ 73. Amend § 200.439 by revising paragraphs (a) and (b)(3) and (7) to read as follows:

§ 200.439 Equipment and other capital expenditures.

(a) See § 200.1 for the definitions of *capital expenditures, equipment, special purpose equipment, general purpose equipment, acquisition cost,* and *capital assets.*

* * * * *

(b) * * *

(3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior written approval of the Federal awarding agency, or pass-through entity. See § 200.436, for rules on the allowability of depreciation on buildings, capital improvements, and equipment. See also § 200.465.

* * * * *

(7) Equipment and other capital expenditures are unallowable as indirect costs. See § 200.436.

▪ 74. Revise § 200.441 to read as follows:

§ 200.441 Fines, penalties, damages and other settlements.

Costs resulting from non-Federal entity violations of, alleged violations of, or failure to comply with, Federal, state, tribal, local or foreign laws and regulations are unallowable, except when incurred as a result of compliance with specific provisions of the Federal award, or with prior written approval of the Federal awarding agency. See also § 200.435.

▪ 75. Revise § 200.442 to read as follows:

§ 200.442 Fund raising and investment management costs.

(a) Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable. Fund raising costs for the purposes of meeting the Federal program objectives are allowable with prior written approval from the Federal awarding agency. Proposal costs are covered in § 200.460.

(b) Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable except when associated with investments covering pension, self-insurance, or other funds which include Federal participation allowed by this part.

(c) Costs related to the physical custody and control of monies and securities are allowable.

(d) Both allowable and unallowable fund-raising and investment activities must be allocated as an appropriate share of indirect costs under the conditions described in § 200.413.

▪ 76. Amend § 200.443 by revising paragraphs (b)(1) and (3) and (d) to read as follows:

§ 200.443 Gains and losses on disposition of depreciable assets.

* * * * *

(b) * * *

(1) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under §§ 200.436 and 200.439.

* * * * *

(3) A loss results from the failure to maintain permissible insurance, except as otherwise provided in § 200.447.

* * * * *

(d) When assets acquired with Federal funds, in part or wholly, are disposed of, the distribution of the proceeds must be made in accordance with §§ 200.310 through 200.316 of this part.

▪ 77. Amend § 200.444 by revising paragraphs (a) introductory text, (a)(4), and (b) to read as follows:

§ 200.444 General costs of government.

(a) For states, local governments, and Indian Tribes, the general costs of government are unallowable (except as provided in § 200.475). Unallowable costs include:

* * * * *

(4) Costs of prosecutorial activities unless treated as a direct cost to a specific program if authorized by statute or regulation (however, this does not preclude the allowability of other legal activities of the Attorney General as described in § 200.435); and

* * * * *

(b) For Indian tribes and Councils of Governments (COGs) (see definition for *Local government* in § 200.1 of this part), up to 50% of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his or her staff can be included in the indirect cost calculation without documentation.

▪ 78. Amend § 200.447 by revising paragraph (a)(4) to read as follows:

§ 200.447 Insurance and indemnification.

(a) * * *

(4) Costs of insurance on the lives of trustees, officers, or other employees holding positions of similar responsibilities are allowable only to the extent that the insurance represents additional compensation (see § 200.431). The cost of such insurance when the non-Federal entity is

identified as the beneficiary is unallowable.

* * * * *

■ 79. Amend § 200.448 by revising paragraph (a)(1)(iii) to read as follows:

§ 200.448 Intellectual property.

(a) * * *

(1) * * *

(iii) General counseling services relating to patent and copyright matters, such as advice on patent and copyright laws, regulations, clauses, and employee intellectual property agreements (See also § 200.459).

* * * * *

■ 80. Amend § 200.449 by revising paragraphs (b)(1) and (c)(4) to read as follows:

§ 200.449 Interest.

* * * * *

(b) *Capital assets*. (1) Capital assets is defined as noted in § 200.1 of this part. An asset cost includes (as applicable) acquisition costs, construction costs, and other costs capitalized in accordance with GAAP.

* * * * *

(c) * * *

(4) The non-Federal entity limits claims for Federal reimbursement of interest costs to the least expensive alternative. For example, a lease contract that transfers ownership by the end of the contract may be determined less costly than purchasing through other types of debt financing, in which case reimbursement must be limited to the amount of interest determined if leasing had been used.

* * * * *

■ 81. Amend § 200.450 by revising paragraphs (a), (c)(2)(v) and (vi), (c)(2)(vii)(A) introductory text to read as follows:

§ 200.450 Lobbying.

(a) The cost of certain influencing activities associated with obtaining grants, contracts, or cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans is governed by relevant statutes, including among others, the provisions of 31 U.S.C. 1352, as well as the common rule, ''New Restrictions on Lobbying'' published on February 26, 1990, including definitions, and the Office of Management and Budget ''Governmentwide Guidance for New Restrictions on Lobbying'' and notices published on December 20, 1989, June 15, 1990, January 15, 1992, and January 19, 1996.

* * * * *

(c) * * *

(2) * * *

(v) When a non-Federal entity seeks reimbursement for indirect (F&A) costs, total lobbying costs must be separately identified in the indirect (F&A) cost rate proposal, and thereafter treated as other unallowable activity costs in accordance with the procedures of § 200.413.

(vi) The non-Federal entity must submit as part of its annual indirect (F&A) cost rate proposal a certification that the requirements and standards of this section have been complied with. (See also § 200.415.)

(vii)(A) Time logs, calendars, or similar records are not required to be created for purposes of complying with the record keeping requirements in § 200.302 with respect to lobbying costs during any particular calendar month when:

* * * * *

■ 82. Revise § 200.452 to read as follows:

§ 200.452 Maintenance and repair costs.

Costs incurred for utilities, insurance, security, necessary maintenance, janitorial services, repair, or upkeep of buildings and equipment (including Federal property unless otherwise provided for) which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable. Costs incurred for improvements which add to the permanent value of the buildings and equipment or appreciably prolong their intended life must be treated as capital expenditures (see § 200.439). These costs are only allowable to the extent not paid through rental or other agreements.

■ 83. Amend § 200.454 by revising paragraph (e) to read as follows:

§ 200.454 Memberships, subscriptions, and professional activity costs.

* * * * *

(e) Costs of membership in organizations whose primary purpose is lobbying are unallowable. See also § 200.450.

■ 84. Revise § 200.456 to read as follows:

§ 200.456 Participant support costs.

Participant support costs as defined in § 200.1 are allowable with the prior approval of the Federal awarding agency.

■ 85. Revise § 200.457 to read as follows:

§ 200.457 Plant and security costs.

Necessary and reasonable expenses incurred for protection and security of facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; protective (non-military) gear, devices, and equipment; contractual security services; and consultants. Capital expenditures for plant security purposes are subject to § 200.439.

■ 86. Revise § 200.458 to read as follows:

§ 200.458 Pre-award costs.

Pre-award costs are those incurred prior to the effective date of the Federal award or subaward directly pursuant to the negotiation and in anticipation of the Federal award where such costs are necessary for efficient and timely performance of the scope of work. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency. If charged to the award, these costs must be charged to the initial budget period of the award, unless otherwise specified by the Federal awarding agency or pass-through entity.

■ 87. Amend § 200.459 by revising paragraph (a) to read as follows:

§ 200.459 Professional service costs.

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the non-Federal entity, are allowable, subject to paragraphs (b) and (c) of this section when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government. In addition, legal and related services are limited under § 200.435.

* * * * *

■ 88. Amend § 200.461 by revising paragraph (b)(3) to read as follows:

§ 200.461 Publication and printing costs.

* * * * *

(b) * * *

(3) The non-Federal entity may charge the Federal award during closeout for the costs of publication or sharing of research results if the costs are not incurred during the period of performance of the Federal award. If charged to the award, these costs must be charged to the final budget period of the award, unless otherwise specified by the Federal awarding agency.

■ 89. Amend § 200.463 by revising paragraph (c) to read as follows:

§ 200.463 Recruiting costs.

* * * * *

(c) Where relocation costs incurred incident to recruitment of a new employee have been funded in whole or in part to a Federal award, and the newly hired employee resigns for reasons within the employee's control within 12 months after hire, the non-Federal entity will be required to refund or credit the Federal share of such relocation costs to the Federal Government. See also § 200.464.

* * * * *

- 90. Amend § 200.464 by revising paragraph (c) to read as follows:

§ 200.464 Relocation costs of employees.

* * * * *

(c) Allowable relocation costs for new employees are limited to those described in paragraphs (b)(1) and (2) of this section. When relocation costs incurred incident to the recruitment of new employees have been charged to a Federal award and the employee resigns for reasons within the employee's control within 12 months after hire, the non-Federal entity must refund or credit the Federal Government for its share of the cost. If dependents are not permitted at the location for any reason and the costs do not include costs of transporting household goods, the costs of travel to an overseas location must be considered travel costs in accordance with § 200.474 Travel costs, and not this relocations costs of employees (See also § 200.464).

* * * * *

- 91. Amend § 200.465 by adding paragraphs (d) through (f) to read as follows:

§ 200.465 Rental costs of real property and equipment.

* * * * *

(d) Rental costs under leases which are required to be accounted for as a financed purchase under GASB standards or a finance lease under FASB standards under GAAP are allowable only up to the amount (as explained in paragraph (b) of this section) that would be allowed had the non-Federal entity purchased the property on the date the lease agreement was executed. Interest costs related to these leases are allowable to the extent they meet the criteria in § 200.449. Unallowable costs include amounts paid for profit, management fees, and taxes that would not have been incurred had the non-Federal entity purchased the property.

(e) Rental or lease payments are allowable under lease contracts where the non-Federal entity is required to recognize an intangible right-to-use lease asset (per GASB) or right of use operating lease asset (per FASB) for purposes of financial reporting in accordance with GAAP.

(f) The rental of any property owned by any individuals or entities affiliated with the non-Federal entity, to include commercial or residential real estate, for purposes such as the home office workspace is unallowable.

- 92. Amend § 200.466 by revising paragraph (b) to read as follows:

§ 200.466 Scholarships and student aid costs.

* * * * *

(b) Charges for tuition remission and other forms of compensation paid to students as, or in lieu of, salaries and wages must be subject to the reporting requirements in § 200.430, and must be treated as direct or indirect cost in accordance with the actual work being performed. Tuition remission may be charged on an average rate basis. See also § 200.431.

- 93. Revise § 200.467 to read as follows:

§ 200.467 Selling and marketing costs.

Costs of selling and marketing any products or services of the non-Federal entity (unless allowed under § 200.421) are unallowable, except as direct costs, with prior approval by the Federal awarding agency when necessary for the performance of the Federal award.

- 94. Amend § 200.468 by revising paragraph (a) and (b)(2) to read as follows:

§ 200.468 Specialized service facilities.

(a) The costs of services provided by highly complex or specialized facilities operated by the non-Federal entity, such as computing facilities, wind tunnels, and reactors are allowable, provided the charges for the services meet the conditions of either paragraph (b) or (c) of this section, and, in addition, take into account any items of income or Federal financing that qualify as applicable credits under § 200.406.

* * * * *

(b) * * *

(2) Is designed to recover only the aggregate costs of the services. The costs of each service must consist normally of both its direct costs and its allocable share of all indirect (F&A) costs. Rates must be adjusted at least biennially, and must take into consideration over/under-applied costs of the previous period(s).

* * * * *

§§ 200.471 through 200.475 [Redesignated as §§ 200.472 through 200.476]

- 95. Redesignate §§ 200.471 through 200.475 as §§ 200.472 through 200.476.

- 96. Add new § 200.471 to read as follows:

§ 200.471 Telecommunication costs and video surveillance costs

(a) Costs incurred for telecommunications and video surveillance services or equipment such as phones, internet, video surveillance, cloud servers are allowable except for the following circumstances:

(b) Obligating or expending covered telecommunications and video surveillance services or equipment or services as described in § 200.216 to:

(1) Procure or obtain, extend or renew a contract to procure or obtain;

(2) Enter into a contract (or extend or renew a contract) to procure; or

(3) Obtain the equipment, services, or systems.

- 97. Amend newly redesignated § 200.472 by revising paragraphs (c)(2), (e)(1)(i), and (f) to read as follows:

§ 200.472 Termination costs.

* * * * *

(c) * * *

(2) The interest of the Federal Government is protected by transfer of title or by other means deemed appropriate by the Federal awarding agency (see also § 200.313 (d)), and

* * * * *

(e) * * *

(1) * * *

(i) The preparation and presentation to the Federal awarding agency of settlement claims and supporting data with respect to the terminated portion of the Federal award, unless the termination is for cause (see subpart D, including §§ 200.339–200.343); and

* * * * *

(f) Claims under subawards, including the allocable portion of claims which are common to the Federal award and to other work of the non-Federal entity, are generally allowable. An appropriate share of the non-Federal entity's indirect costs may be allocated to the amount of settlements with contractors and/or subrecipients, provided that the amount allocated is otherwise consistent with the basic guidelines contained in § 200.414. The indirect costs so allocated must exclude the same and similar costs claimed directly or indirectly as settlement expenses.

- 98. Amend newly redesignated § 200.475 by revising paragraphs (a) and (c)(2) to read as follows:

§ 200.475 Travel costs.

(a) *General.* Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-Federal entity. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-Federal entity's non-federally-funded activities and in accordance with non-Federal entity's written travel reimbursement policies. Notwithstanding the provisions of § 200.444, travel costs of officials covered by that section are allowable with the prior written approval of the Federal awarding agency or pass-through entity when they are specifically related to the Federal award.

* * * * *

(c) * * *

(2) Travel costs for dependents are unallowable, except for travel of duration of six months or more with prior approval of the Federal awarding agency. See also § 200.432.

* * * * *

· 99. Revise newly redesignated § 200.476 to read as follows:

§ 200.476 Trustees.

Travel and subsistence costs of trustees (or directors) at IHEs and nonprofit organizations are allowable. See also § 200.475.

Subpart F—Audit Requirements

· 100. Amend § 200.501 by revising paragraphs (b), (c), (d), (f), and (h) to read as follows:

§ 200.501 Audit requirements.

* * * * *

(b) *Single audit.* A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal awards must have a single audit conducted in accordance with § 200.514 except when it elects to have a program-specific audit conducted in accordance with paragraph (c) of this section.

(c) Program-specific audit election. When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's statutes, regulations, or the terms and conditions of the Federal award do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted in accordance with § 200.507. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) Exemption when Federal awards expended are less than $750,000. A non-Federal entity that expends less than $750,000 during the non-Federal entity's fiscal year in Federal awards is exempt from Federal audit requirements for that year, except as noted in § 200.503, but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and Government Accountability Office (GAO).

* * * * *

(f) *Subrecipients and contractors.* An auditee may simultaneously be a recipient, a subrecipient, and a contractor. Federal awards expended as a recipient or a subrecipient are subject to audit under this part. The payments received for goods or services provided as a contractor are not Federal awards. Section § 200.331 sets forth the considerations in determining whether payments constitute a Federal award or a payment for goods or services provided as a contractor.

* * * * *

(h) *For-profit subrecipient.* Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The agreement with the for-profit subrecipient must describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the agreement, and post-award audits. See also § 200.332.

· 101. Amend § 200.503 by revising paragraph (e) to read as follows:

§ 200.503 Relation to other audit requirements.

* * * * *

(e) Request for a program to be audited as a major program. A Federal awarding agency may request that an auditee have a particular Federal program audited as a major program in lieu of the Federal awarding agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 calendar days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such a request by informing the Federal awarding agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in § 200.518 and, if not, the estimated incremental cost. The Federal awarding agency must then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal awarding agency request, and the Federal awarding agency agrees to pay the full incremental costs, then the auditee must have the program audited as a major program. A pass-through entity may use the provisions of this paragraph for a subrecipient.

· 102. Revise § 200.505 to read as follows:

§ 200.505 Sanctions.

In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, Federal agencies and pass-through entities must take appropriate action as provided in § 200.339.

· 103. Revise § 200.506 to read as follows:

§ 200.506 Audit costs.

See § 200.425.

· 104. Amend § 200.507 by revising paragraphs (a), (b)(2), (b)(3)(ii) through (v), (b)(4)(iv), (c)(2) and (3), and (d)(8) to read as follows:

§ 200.507 Program-specific audits.

(a) *Program-specific audit guide available.* In some cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to internal controls, compliance requirements, suggested audit procedures, and audit reporting requirements. A listing of current program-specific audit guides can be found in the compliance supplement, Part 8, Appendix VI, Program-Specific Audit Guides, which includes a website where a copy of the guide can be obtained. When a current program-specific audit guide is available, the auditor must follow GAGAS and the guide when performing a program-specific audit.

* * * * *

(b) * * *

(2) The auditee must prepare the financial statement(s) for the Federal program that includes, at a minimum, a schedule of expenditures of Federal awards for the program and notes that

describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of § 200.511(b), and a corrective action plan consistent with the requirements of § 200.511(c).

(3) * * *

(ii) Obtain an understanding of internal controls and perform tests of internal controls over the Federal program consistent with the requirements of § 200.514(c) for a major program;

(iii) Perform procedures to determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that could have a direct and material effect on the Federal program consistent with the requirements of § 200.514(d) for a major program;

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of § 200.511, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding; and

(v) Report any audit findings consistent with the requirements of § 200.516.

(4) * * *

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with § 200.515(d)(1) and findings and questioned costs consistent with the requirements of § 200.515(d)(3).

(c) * * *

(2) When a program-specific audit guide is available, the auditee must electronically submit to the FAC the data collection form prepared in accordance with § 200.512(b), as applicable to a program-specific audit, and the reporting required by the program-specific audit guide.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit must consist of the financial statement(s) of the Federal program, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The data collection form prepared in accordance with § 200.512(b), as applicable to a program-specific audit, and one copy of this reporting package must be electronically submitted to the FAC.

(d) * * *

(8) 200.521 Management decision; and

* * * * *

· 105. Amend § 200.508 by revising paragraphs (a), (b), and (c) to read as follows:

§ 200.508 Auditee responsibilities.

* * * * *

(a) Procure or otherwise arrange for the audit required by this part in accordance with § 200.509, and ensure it is properly performed and submitted when due in accordance with § 200.512.

(b) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with § 200.510.

(c) Promptly follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with § 200.511(b) and (c), respectively.

* * * * *

· 106. Amend § 200.509 by revising paragraph (a) to read as follows:

§ 200.509 Auditor selection.

(a) *Auditor procurement.* In procuring audit services, the auditee must follow the procurement standards prescribed by the Procurement Standards in §§ 200.317 through 200.326 of subpart D of this part or the FAR (48 CFR part 42), as applicable. When procuring audit services, the objective is to obtain high-quality audits. In requesting proposals for audit services, the objectives and scope of the audit must be made clear and the non-Federal entity must request a copy of the audit organization's peer review report which the auditor is required to provide under GAGAS. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of peer and external quality control reviews, and price. Whenever possible, the auditee must make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in § 200.321, or the FAR (48 CFR part 42), as applicable.

* * * * *

· 107. Amend § 200.510 by revising paragraphs (a), (b) introductory text, and (b)(3), (5), and (6) to read as follows:

§ 200.510 Financial statements.

(a) *Financial statements.* The auditee must prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements must be for the same organizational unit and fiscal year that is chosen to meet the requirements of this part. However, non-Federal entity-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with § 200.514(a) and prepare separate financial statements.

(b) *Schedule of expenditures of Federal awards.* The auditee must also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements which must include the total Federal awards expended as determined in accordance with § 200.502. While not required, the auditee may choose to provide information requested by Federal awarding agencies and pass-through entities to make the schedule easier to use. For example, when a Federal program has multiple Federal award years, the auditee may list the amount of Federal awards expended for each Federal award year separately. At a minimum, the schedule must:

* * * * *

(3) Provide total Federal awards expended for each individual Federal program and the Assistance Listings Number or other identifying number when the Assistance Listings information is not available. For a cluster of programs also provide the total for the cluster.

* * * * *

(5) For loan or loan guarantee programs described in § 200.502(b), identify in the notes to the schedule the balances outstanding at the end of the audit period. This is in addition to including the total Federal awards expended for loan or loan guarantee programs in the schedule.

(6) Include notes that describe that significant accounting policies used in preparing the schedule, and note whether or not the auditee elected to use the 10% de minimis cost rate as covered in § 200.414.

· 108. Amend § 200.511 by revising paragraphs (a) and (c) to read as follows:

§ 200.511 Audit findings follow-up.

(a) *General.* The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee must prepare a summary schedule of prior audit findings. The auditee must also prepare a corrective action plan for current year audit findings. The summary schedule

of prior audit findings and the corrective action plan must include the reference numbers the auditor assigns to audit findings under §200.516(c). Since the summary schedule may include audit findings from multiple years, it must include the fiscal year in which the finding initially occurred. The corrective action plan and summary schedule of prior audit findings must include findings relating to the financial statements which are required to be reported in accordance with GAGAS.

* * * * *

(c) *Corrective action plan.* At the completion of the audit, the auditee must prepare, in a document separate from the auditor's findings described in § 200.516, a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan must provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan must include an explanation and specific reasons.

· 109. Amend § 200.512 by revising paragraphs (b) introductory text, (b)(1), (c)(1) through (4), and (g) to read as follows:

§ 200.512 Report submission.

* * * * *

(b) *Data collection.* The FAC is the repository of record for subpart F of this part reporting packages and the data collection form. All Federal agencies, pass-through entities and others interested in a reporting package and data collection form must obtain it by accessing the FAC.

(1) The auditee must submit required data elements described in Appendix X to Part 200, which state whether the audit was completed in accordance with this part and provides information about the auditee, its Federal programs, and the results of the audit. The data must include information available from the audit required by this part that is necessary for Federal agencies to use the audit to ensure integrity for Federal programs. The data elements and format must be approved by OMB, available from the FAC, and include collections of information from the reporting package described in paragraph (c) of this section. A senior level representative of the auditee (*e.g.*, state controller, director of finance, chief executive officer, or chief financial officer) must sign a statement to be included as part of the data collection that says that the auditee complied with the requirements of this part, the data were prepared in accordance with this part (and the instructions accompanying the form), the reporting package does not include protected personally identifiable information, the information included in its entirety is accurate and complete, and that the FAC is authorized to make the reporting package and the form publicly available on a website.

* * * * *

(c) * * *

(1) Financial statements and schedule of expenditures of Federal awards discussed in § 200.510(a) and (b), respectively;

(2) Summary schedule of prior audit findings discussed in § 200.511(b);

(3) Auditor's report(s) discussed in § 200.515; and

(4) Corrective action plan discussed in § 200.511(c).

* * * * *

(g) *FAC responsibilities.* The FAC must make available the reporting packages received in accordance with paragraph (c) of this section and § 200.507(c) to the public, except for Indian tribes exercising the option in (b)(2) of this section, and maintain a data base of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees that have not submitted the required data collection forms and reporting packages.

* * * * *

· 110. Amend § 200.513 by revising paragraphs (a)(1) and (2), (a)(3)(ii) and (vii), (b) introductory text, (c) introductory text, and (c)(3)(i) and (iii) to read as follows:

§ 200.513 Responsibilities.

(a)(1) *Cognizant agency for audit responsibilities.* A non-Federal entity expending more than $50 million a year in Federal awards must have a cognizant agency for audit. The designated cognizant agency for audit must be the Federal awarding agency that provides the predominant amount of funding directly (direct funding) (as listed on the Schedule of expenditures of Federal awards, see § 200.510(b)) to a non-Federal entity unless OMB designates a specific cognizant agency for audit. When the direct funding represents less than 25 percent of the total expenditures (as direct and subawards) by the non-Federal entity, then the Federal agency with the predominant amount of total funding is the designated cognizant agency for audit.

(2) To provide for continuity of cognizance, the determination of the predominant amount of direct funding must be based upon direct Federal awards expended in the non-Federal entity's fiscal years ending in 2019, and every fifth year thereafter.

(3) * * *

(ii) Obtain or conduct quality control reviews on selected audits made by non-Federal auditors, and provide the results to other interested organizations. Cooperate and provide support to the Federal agency designated by OMB to lead a governmentwide project to determine the quality of single audits by providing a reliable estimate of the extent that single audits conform to applicable requirements, standards, and procedures; and to make recommendations to address noted audit quality issues, including recommendations for any changes to applicable requirements, standards and procedures indicated by the results of the project. The governmentwide project can rely on the current and on-going quality control review work performed by the agencies, State auditors, and professional audit associations. This governmentwide audit quality project must be performed once every 6 years (or at such other interval as determined by OMB), and the results must be public.

* * * * *

(vii) Coordinate a management decision for cross-cutting audit findings (see in § 200.1 of this part) that affect the Federal programs of more than one agency when requested by any Federal awarding agency whose awards are included in the audit finding of the auditee.

* * * * *

(b) *Oversight agency for audit responsibilities.* An auditee who does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with § 200.1 *oversight agency for audit.* A Federal agency with oversight for an auditee may reassign oversight to another Federal agency that agrees to be the oversight agency for audit. Within 30 calendar days after any reassignment, both the old and the new oversight agency for audit must provide notice of the change to the FAC, the auditee, and, if known, the auditor. The oversight agency for audit:

* * * * *

(c) *Federal awarding agency responsibilities.* The Federal awarding agency must perform the following for the Federal awards it makes (See also the requirements of § 200.211):

(3) * * *

(i) Issue a management decision as prescribed in § 200.521;

* * * * *

(iii) Use cooperative audit resolution mechanisms (see the definition of *cooperative audit resolution* in § 200.1 of this part) to improve Federal program outcomes through better audit resolution, follow-up, and corrective action; and

* * * * *

■ 111. Amend § 200.514 by revising paragraphs (d)(4), (e), and (f) to read as follows:

§ 200.514 Scope of audit.

* * * * *

(d) * * *

(4) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(3) of this section are not required for those compliance requirements. However, the auditor must report a significant deficiency or material weakness in accordance with § 200.516, assess the related control risk at the

(e) *Audit follow-up.* The auditor must follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with § 200.511(b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor must perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.

(f) *Data collection form.* As required in § 200.512(b)(3), the auditor must complete and sign specified sections of the data collection form.

■ 112. Amend § 200.515 by revising paragraphs (a), (d)(1)(vi) through (ix), (d)(3), and (e) to read as follows:

§ 200.515 Audit reporting.

* * * * *

(a) *Financial statements.* The auditor must determine and provide an opinion (or disclaimer of opinion) whether the financial statements of the auditee are presented fairly in all materials respects in accordance with generally accepted accounting principles (or a special purpose framework such as cash, modified cash, or regulatory as required by state law). The auditor must also decide whether the schedule of expenditures of Federal awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

* * * * *

(d) * * *

(1) * * *

(vi) A statement as to whether the audit disclosed any audit findings that the auditor is required to report under § 200.516(a);

(vii) An identification of major programs by listing each individual major program; however, in the case of a cluster of programs, only the cluster name as shown on the Schedule of Expenditures of Federal Awards is required;

(viii) The dollar threshold used to distinguish between Type A and Type B programs, as described in § 200.518(b)(1) or (3) when a recalculation of the Type A threshold is required for large loan or loan guarantees; and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under § 200.520.

* * * * *

(3) Findings and questioned costs for Federal awards which must include audit findings as defined in § 200.516(a).

* * * * *

(e) Nothing in this part precludes combining of the audit reporting required by this section with the reporting required by § 200.512(b) when allowed by GAGAS and appendix X to this part.

■ 113. Amend § 200.516 by revising paragraphs (a)(1) and (7), (b)(1) and (6), and (c) to read as follows:

§ 200.516 Audit findings.

(a) * * *

(1) Significant deficiencies and material weaknesses in internal control over major programs and significant instances of abuse relating to major programs. The auditor's determination of whether a deficiency in internal control is a significant deficiency or a material weakness for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the Compliance Supplement.

* * * * *

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with § 200.511(b) materially misrepresents the status of any prior audit finding.

(b) * * *

(1) Federal program and specific Federal award identification including the Assistance Listings title and number, Federal award identification number and year, name of Federal agency, and name of the applicable pass-through entity. When information, such as the Assistance Listings title and number or Federal award identification number, is not available, the auditor must provide the best information available to describe the Federal award.

* * * * *

(6) Identification of questioned costs and how they were computed. Known questioned costs must be identified by applicable Assistance Listings number(s) and applicable Federal award identification number(s).

* * * * *

(c) *Reference numbers.* Each audit finding in the schedule of findings and questioned costs must include a reference number in the format meeting the requirements of the data collection form submission required by § 200.512(b) to allow for easy referencing of the audit findings during follow-up.

■ 114. Amend § 200.518 by revising paragraphs (b)(3) and (4), (c)(1) introductory text, (c)(1)(i) and (ii), (d)(1), and (f) to read as follows:

§ 200.518 Major program determination.

* * * * *

(b) * * *

(3) The inclusion of large loan and loan guarantees (loans) must not result in the exclusion of other programs as Type A programs. When a Federal program providing loans exceeds four times the largest non-loan program it is considered a large loan program, and the auditor must consider this Federal program as a Type A program and exclude its values in determining other Type A programs. This recalculation of the Type A program is performed after removing the total of all large loan programs. For the purposes of this paragraph a program is only considered to be a Federal program providing loans if the value of Federal awards expended for loans within the program comprises fifty percent or more of the total Federal awards expended for the program. A cluster of programs is treated as one program and the value of Federal awards expended under a loan program is determined as described in § 200.502.

(4) For biennial audits permitted under § 200.504, the determination of Type A and Type B programs must be based upon the Federal awards expended during the two-year period.

(c) * * *

(1) The auditor must identify Type A programs which are low-risk. In making

this determination, the auditor must consider whether the requirements in § 200.519(c), the results of audit follow-up, or any changes in personnel or systems affecting the program indicate significantly increased risk and preclude the program from being low risk. For a Type A program to be considered low-risk, it must have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, the program must have not had:

(i) Internal control deficiencies which were identified as material weaknesses in the auditor's report on internal control for major programs as required under § 200.515(c);

(ii) A modified opinion on the program in the auditor's report on major programs as required under § 200.515(c); or

* * * * *

(d) * * *

(1) The auditor must identify Type B programs which are high-risk using professional judgment and the criteria in § 200.519. However, the auditor is not required to identify more high-risk Type B programs than at least one fourth the number of low-risk Type A programs identified as low-risk under Step 2 (paragraph (c) of this section). Except for known material weakness in internal control or compliance problems as discussed in § 200.519(b)(1) and (2) and (c)(1), a single criterion in risk would seldom cause a Type B program to be considered high-risk. When identifying which Type B programs to risk assess, the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time.

* * * * *

(f) *Percentage of coverage rule.* If the auditee meets the criteria in § 200.520, the auditor need only audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 20 percent (0.20) of total Federal awards expended. Otherwise, the auditor must audit the major programs identified in Step 4 (paragraphs (e)(1) and (2) of this section) and such additional Federal programs with Federal awards expended that, in aggregate, all major programs encompass at least 40 percent (0.40) of total Federal awards expended.

* * * * *

■ 115. Amend § 200.519 by revising paragraph (d)(1) to read as follows:

§ 200.519 Criteria for Federal program risk.

* * * * *

(d) * * *

(1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third-party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have high risk for noncompliance with requirements of § 200.430, but otherwise be at low risk.

* * * * *

■ 116. Amend § 200.520 by revising the introductory text and paragraphs (a) and (e)(1) and (2) to read as follows:

§ 200.520 Criteria for a low-risk auditee.

An auditee that meets all of the following conditions for each of the preceding two audit periods must qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with § 200.518.

(a) Single audits were performed on an annual basis in accordance with the provisions of this Subpart, including submitting the data collection form and the reporting package to the FAC within the timeframe specified in § 200.512. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee.

* * * * *

(e) * * *

(1) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control for major programs as required under § 200.515(c);

(2) A modified opinion on a major program in the auditor's report on major programs as required under § 200.515(c); or

* * * * *

■ 117. Amend § 200.521 by revising paragraph (b), (c), and (e) to read as follows:

§ 200.521 Management decision.

* * * * *

(b) *Federal agency.* As provided in § 200.513(a)(3)(vii), the cognizant agency for audit must be responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency. As provided in § 200.513(c)(3)(i), a Federal awarding agency is responsible for issuing a management decision for findings that relate to Federal awards it makes to non-Federal entities.

(c) *Pass-through entity.* As provided in § 200.332(d), the pass-through entity must be responsible for issuing a management decision for audit findings that relate to Federal awards it makes to subrecipients.

* * * * *

(e) *Reference numbers.* Management decisions must include the reference numbers the auditor assigned to each audit finding in accordance with § 200.516(c).

■ 118. Amend appendix I to part 200 by revising sections A, B, C paragraph 2, D paragraphs 3 through 5, E paragraph 3 introductory text, E paragraph 3.iii, and F paragraphs 1 and 3 to read as follows:

Appendix I to Part 200—Full Text of Notice of Funding Opportunity

* * * * *

A. Program Description—Required

This section contains the full program description of the funding opportunity. It may be as long as needed to adequately communicate to potential applicants the areas in which funding may be provided. It describes the Federal awarding agency's funding priorities or the technical or focus areas in which the Federal awarding agency intends to provide assistance. As appropriate, it may include any program history (*e.g.*, whether this is a new program or a new or changed area of program emphasis). This section must include program goals and objectives, a reference to the relevant Assistance Listings, a description of how the award will contribute to the achievement of the program's goals and objectives, and the expected performance goals, indicators, targets, baseline data, data collection, and other outcomes such Federal awarding agency expects to achieve, and may include examples of successful projects that have been funded previously. This section also may include other information the Federal awarding agency deems necessary, and must at a minimum include citations for authorizing statutes and regulations for the funding opportunity.

B. Federal Award Information—Required

This section provides sufficient information to help an applicant make an informed decision about whether to submit a proposal. Relevant information could include the total amount of funding that the Federal awarding agency expects to award through the announcement; the expected performance indicators, targets, baseline data, and data collection; the anticipated number of Federal awards;

the expected amounts of individual Federal awards (which may be a range); the amount of funding per Federal award, on average, experienced in previous years; and the anticipated start dates and periods of performance for new Federal awards. This section also should address whether applications for renewal or supplementation of existing projects are eligible to compete with applications for new Federal awards.

This section also must indicate the type(s) of assistance instrument (*e.g.,* grant, cooperative agreement) that may be awarded if applications are successful. If cooperative agreements may be awarded, this section either should describe the ''substantial involvement'' that the Federal awarding agency expects to have or should reference where the potential applicant can find that information (*e.g.,* in the funding opportunity description in Section A. or Federal award administration information in Section D. If procurement contracts also may be awarded, this must be stated.

C. Eligibility Information

* * * * *

2. *Cost Sharing or Matching—Required.* Announcements must state whether there is required cost sharing, matching, or cost participation without which an application would be ineligible (if cost sharing is not required, the announcement must explicitly say so). Required cost sharing may be a certain percentage or amount, or may be in the form of contributions of specified items or activities (*e.g.,* provision of equipment). It is important that the announcement be clear about any restrictions on the types of cost (*e.g.,* in-kind contributions) that are acceptable as cost sharing. Cost sharing as an eligibility criterion includes requirements based in statute or regulation, as described in § 200.306 of this Part. This section should refer to the appropriate portion(s) of section D. stating any pre-award requirements for submission of letters or other documentation to verify commitments to meet cost-sharing requirements if a Federal award is made.

* * * * *

D. Application and Submission Information

* * * * *

3. *Unique entity identifier and System for Award Management (SAM)—Required.* This paragraph must state clearly that each applicant (unless the applicant is an individual or Federal awarding agency that is excepted from those requirements under 2 CFR 25.110(b) or (c), or has an exception approved by the Federal awarding agency under 2 CFR 25.110(d)) is required to: (i) Be registered in SAM before submitting its application; (ii) Provide a valid unique entity identifier in its application; and (iii) Continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency. It also must state that the Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable unique entity identifier and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. Submission Dates and Times—Required. Announcements must identify due dates and times for all submissions. This includes not only the full applications but also any preliminary submissions (*e.g.,* letters of intent, white papers, or pre-applications). It also includes any other submissions of information before Federal award that are separate from the full application. If the funding opportunity is a general announcement that is open for a period of time with no specific due dates for applications, this section should say so. Note that the information on dates that is included in this section also must appear with other overview information in a location preceding the full text of the announcement (see § 200.204 of this part).

5. Intergovernmental Review—Required, if applicable. If the funding opportunity is subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' the notice must say so and applicants must contact their state's Single Point of Contact (SPOC) to find out about and comply with the state's process under Executive Order 12372, it may be useful to inform potential applicants that the names and addresses of the SPOCs are listed in the Office of Management and Budget's website.

* * * * *

E. Application Review Information

* * * * *

3. For any Federal award under a notice of funding opportunity, if the Federal awarding agency anticipates that the total Federal share will be greater than the simplified acquisition threshold on any Federal award under a notice of funding opportunity may include, over the period of performance, this section must also inform applicants:

* * * * *

iii. That the Federal awarding agency will consider any comments by the applicant, in addition to the other information in the designated integrity and performance system, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in § 200.206.

* * * * *

F. Federal Award Administration Information

1. Federal Award Notices—Required. This section must address what a successful applicant can expect to receive following selection. If the Federal awarding agency's practice is to provide a separate notice stating that an application has been selected before it actually makes the Federal award, this section would be the place to indicate that the letter is not an authorization to begin performance (to the extent that it allows charging to Federal awards of pre-award costs at the non-Federal entity's own risk). This section should indicate that the notice of Federal award signed by the grants officer (or equivalent) is the authorizing document, and whether it is provided through postal mail or by electronic means and to whom. It also may address the timing, form, and content of notifications to unsuccessful applicants. See also § 200.211.

* * * * *

3. *Reporting—Required.* This section must include general information about the type (*e.g.,* financial or performance), frequency, and means of submission (paper or electronic) of post-Federal award reporting requirements. Highlight any special reporting requirements for Federal awards under this funding opportunity that differ (*e.g.,* by report type, frequency, form/format, or circumstances for use) from what the Federal awarding agency's Federal awards usually require. Federal awarding agencies must also describe in this section all relevant requirements such as those at 2 CFR 180.335 and 180.350.

If the Federal share of any Federal award may include more than $500,000 over the period of performance, this section must inform potential applicants about the post award reporting

requirements reflected in appendix XII to this part.

* * * * *

■ 119. Amend appendix II to part 200 by revising paragraphs (A) and (J) and adding paragraphs (K) and (L) to read as follows:

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

* * * * *

(A) Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

* * * * *

(J) See § 200.323.

(K) See § 200.216.

(L) See § 200.322.

■ 120. Amend appendix III to part 200:

■ a. Under section A by revising the introductory text and paragraphs 1.d introductory text, 2.b, 2.d(4) introductory text, 2.d.(4)(b), 2.d.(5), and 2.e.(1); and

■ b. Under section B by revising paragraphs 1, 2.a and b introductory text, 3, 4.c.(2)(ii)B, 5.a, 6.a.(2)(a), 6.b.(1), 8.a., and 9.a;

■ c. Under section C by revising paragraphs 1.a.(1) and (3), 2., 7, 8.a., 9.a., 11.a. introductory text, 11.a.(1), 11.a.(2)b;

■ d. By revising section E;

■ e. Under section F by revising paragraph 2.c.

The revisions read as follows:

Appendix III to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Institutions of Higher Education (IHEs)

A. General

This appendix provides criteria for identifying and computing indirect (or indirect (F&A)) rates at IHEs (institutions). Indirect (F&A) costs are those that are incurred for common or joint objectives and therefore cannot be identified readily and specifically with a particular sponsored project, an instructional activity, or any other institutional activity. See subsection B.1 for a discussion of the components of indirect (F&A) costs.

1. Major Functions of an Institution

* * * * *

d. *Other institutional activities* means all activities of an institution except for instruction, departmental research, organized research, and other sponsored activities, as defined in this section; indirect (F&A) cost activities identified in this Appendix paragraph B, Identification and assignment of indirect (F&A) costs; and specialized services facilities described in § 200.468 of this part.

* * * * *

2. Criteria for Distribution

* * * * *

b. *Need for cost groupings.* The overall objective of the indirect (F&A) cost allocation process is to distribute the indirect (F&A) costs described in Section B, Identification and assignment of indirect (F&A) costs, to the major functions of the institution in proportions reasonably consistent with the nature and extent of their use of the institution's resources. In order to achieve this objective, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the indirect (F&A) cost categories referred to in subsection B.1. In general, the cost groupings established within a category should constitute, in each case, a pool of those items of expense that are considered to be of like nature in terms of their relative contribution to (or degree of remoteness from) the particular cost objectives to which distribution is appropriate. Cost groupings should be established considering the general guides provided in subsection c of this section. Each such pool or cost grouping should then be distributed individually to the related cost objectives, using the distribution base or method most appropriate in light of the guidelines set forth in subsection d of this section.

* * * * *

d. * * *

(4) If a cost analysis study is not performed, or if the study does not result in an equitable distribution of the costs, the distribution must be made in accordance with the appropriate base cited in Section B, unless one of the following conditions is met:

* * * * *

(b) The institution qualifies for, and elects to use, the simplified method for computing indirect (F&A) cost rates described in Section D.

(5) Notwithstanding subsection (3), effective July 1, 1998, a cost analysis or base other than that in Section B must not be used to distribute utility or student services costs. Instead, subsection B.4.c, may be used in the recovery of utility costs.

e. * * *

(1) Indirect (F&A) costs are the broad categories of costs discussed in Section B.1.

* * * * *

B. Identification and Assignment of Indirect (F&A) Costs

1. Definition of Facilities and Administration

See § 200.414 which provides the basis for these indirect cost requirements.

2. Depreciation

a. The expenses under this heading are the portion of the costs of the institution's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with § 200.436.

b. In the absence of the alternatives provided for in Section A.2.d, the expenses included in this category must be allocated in the following manner:

3. Interest

Interest on debt associated with certain buildings, equipment and capital improvements, as defined in § 200.449, must be classified as an expenditure under the category Facilities. These costs must be allocated in the same manner as the depreciation on the buildings, equipment and capital improvements to which the interest relates.

4. Operation and Maintenance Expenses

* * * * *

c. * * *

(2) * * *

(ii) * * *

B. In July 2012, values for these two indices (taken respectively from the Lawrence Berkeley Laboratory ''Labs for the 21st Century'' benchmarking tool and the US Department of Energy ''Buildings Energy Databook'' and were 310 kBtu/sq ft-yr. and 155 kBtu/sq ft-yr., so that the adjustment ratio is 2.0 by this methodology. To retain currency, OMB will adjust the EUI numbers from time to time (no more often than annually nor less often than every 5 years), using reliable and publicly disclosed data. Current values of both the EUIs and the REUI will be posted on the OMB website.

5. General Administration and General Expenses

a. The expenses under this heading are those that have been incurred for the general executive and administrative

offices of educational institutions and other expenses of a general character which do not relate solely to any major function of the institution; *i.e.*, solely to (1) instruction, (2) organized research, (3) other sponsored activities, or (4) other institutional activities. The general administration and general expense category should also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of general administration and general expenses include: Those expenses incurred by administrative offices that serve the entire university system of which the institution is a part; central offices of the institution such as the President's or Chancellor's office, the offices for institution-wide financial management, business services, budget and planning, personnel management, and safety and risk management; the office of the General Counsel; and the operations of the central administrative management information systems. General administration and general expenses must not include expenses incurred within non-university-wide deans' offices, academic departments, organized research units, or similar organizational units. (See subsection 6.)

* * * * *

6. Departmental Administration Expenses

a. * * *

(2) * * *

(a) Salaries and fringe benefits attributable to the administrative work (including bid and proposal preparation) of faculty (including department heads) and other professional personnel conducting research and/or instruction, must be allowed at a rate of 3.6 percent of modified total direct costs. This category does not include professional business or professional administrative officers. This allowance must be added to the computation of the indirect (F&A) cost rate for major functions in Section C; the expenses covered by the allowance must be excluded from the departmental administration cost pool. No documentation is required to support this allowance.

* * * * *

b. The following guidelines apply to the determination of departmental administrative costs as direct or indirect (F&A) costs.

(1) In developing the departmental administration cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect (F&A) costs. For example, salaries of technical staff, laboratory supplies (*e.g.*, chemicals), telephone toll charges, animals, animal care costs, computer costs, travel costs, and specialized shop costs must be treated as direct costs wherever identifiable to a particular cost objective. Direct charging of these costs may be accomplished through specific identification of individual costs to benefitting cost objectives, or through recharge centers or specialized service facilities, as appropriate under the circumstances. See §§ 200.413(c) and 200.468.

* * * * *

8. Library Expenses

a. The expenses under this heading are those that have been incurred for the operation of the library, including the cost of books and library materials purchased for the library, less any items of library income that qualify as applicable credits under § 200.406. The library expense category should also include the fringe benefits applicable to the salaries and wages included therein, an appropriate share of general administration and general expense, operation and maintenance expense, and depreciation. Costs incurred in the purchases of rare books (museum-type books) with no value to Federal awards should not be allocated to them.

* * * * *

9. Student Administration and Services

a. The expenses under this heading are those that have been incurred for the administration of student affairs and for services to students, including expenses of such activities as deans of students, admissions, registrar, counseling and placement services, student advisers, student health and infirmary services, catalogs, and commencements and convocations. The salaries of members of the academic staff whose responsibilities to the institution require administrative work that benefits sponsored projects may also be included to the extent that the portion charged to student administration is determined in accordance with subpart E of this Part. This expense category also includes the fringe benefit costs applicable to the salaries and wages included therein, an appropriate share of general administration and general expenses, operation and maintenance, interest expense, and depreciation.

* * * * *

C. Determination and Application of Indirect (F&A) Cost Rate or Rates

1. Indirect (F&A) Cost Pools

a. (1) Subject to subsection b, the separate categories of indirect (F&A) costs allocated to each major function of the institution as prescribed in Section B, must be aggregated and treated as a common pool for that function. The amount in each pool must be divided by the distribution base described in subsection 2 to arrive at a single indirect (F&A) cost rate for each function.

* * * * *

(3) Each institution's indirect (F&A) cost rate process must be appropriately designed to ensure that Federal sponsors do not in any way subsidize the indirect (F&A) costs of other sponsors, specifically activities sponsored by industry and foreign governments. Accordingly, each allocation method used to identify and allocate the indirect (F&A) cost pools, as described in Sections A.2 and B.2 through B.9, must contain the full amount of the institution's modified total costs or other appropriate units of measurement used to make the computations. In addition, the final rate distribution base (as defined in subsection 2) for each major function (organized research, instruction, etc., as described in Section A.1 functions of an institution) must contain all the programs or activities which utilize the indirect (F&A) costs allocated to that major function. At the time an indirect (F&A) cost proposal is submitted to a cognizant agency for indirect costs, each institution must describe the process it uses to ensure that Federal funds are not used to subsidize industry and foreign government funded programs.

2. The Distribution Basis

Indirect (F&A) costs must be distributed to applicable Federal awards and other benefitting activities within each major function (see section A.1) on the basis of modified total direct costs (MTDC), consisting of all salaries and wages, fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period covered by the subaward). MTDC is defined in § 200.1. For this purpose, an indirect (F&A) cost rate should be determined for each of the separate indirect (F&A) cost pools developed pursuant to subsection 1. The rate in each case should be stated as the percentage which the amount of the particular indirect (F&A) cost pool is of the modified total direct costs identified with such pool.

* * * * *

7. Fixed Rates for the Life of the Sponsored Agreement

a. Except as provided in paragraph (c)(1) of § 200.414, Federal agencies must use the negotiated rates in effect at the time of the initial award throughout the life of the Federal award. Award levels for Federal awards may not be adjusted in future years as a result of changes in negotiated rates. ''Negotiated rates'' per the rate agreement include final, fixed, and predetermined rates and exclude provisional rates. ''Life'' for the purpose of this subsection means each competitive segment of a project. A competitive segment is a period of years approved by the Federal awarding agency at the time of the Federal award. If negotiated rate agreements do not extend through the life of the Federal award at the time of the initial award, then the negotiated rate for the last year of the Federal award must be extended through the end of the life of the Federal award.

b. Except as provided in §200.414, when an educational institution does not have a negotiated rate with the Federal Government at the time of an award (because the educational institution is a new recipient or the parties cannot reach agreement on a rate), the provisional rate used at the time of the award must be adjusted once a rate is negotiated and approved by the cognizant agency for indirect costs.

8. Limitation on Reimbursement of Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, the administrative costs charged to Federal awards awarded or amended (including continuation and renewal awards) with effective dates beginning on or after the start of the institution's first fiscal year which begins on or after October 1, 1991, must be limited to 26% of modified total direct costs (as defined in subsection 2) for the total of General Administration and General Expenses, Departmental Administration, Sponsored Projects Administration, and Student Administration and Services (including their allocable share of depreciation, interest costs, operation and maintenance expenses, and fringe benefits costs, as provided by Section B, and all other types of expenditures not listed specifically under one of the subcategories of facilities in Section B.

* * * * *

9. Alternative Method for Administrative Costs

a. Notwithstanding the provisions of subsection C.1.a, an institution may elect to claim a fixed allowance for the ''Administration'' portion of indirect (F&A) costs. The allowance could be either 24% of modified total direct costs or a percentage equal to 95% of the most recently negotiated fixed or predetermined rate for the cost pools included under ''Administration'' as defined in Section B.1, whichever is less. Under this alternative, no cost proposal need be prepared for the ''Administration'' portion of the indirect (F&A) cost rate nor is further identification or documentation of these costs required (see subsection c). Where a negotiated indirect (F&A) cost agreement includes this alternative, an institution must make no further charges for the expenditure categories described in Section B.5, Section B.6, Section B.7, and Section B.9.

* * * * *

11. Negotiation and Approval of Indirect (F&A) Rate

a. Cognizant agency for indirect costs is defined in Subpart A.

(1) Cost negotiation cognizance is assigned to the Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD), normally depending on which of the two agencies (HHS or DOD) provides more funds directly to the educational institution for the most recent three years. Information on funding must be derived from relevant data gathered by the National Science Foundation. In cases where neither HHS nor DOD provides Federal funding directly to an educational institution, the cognizant agency for indirect costs assignment must default to HHS. Notwithstanding the method for cognizance determination described in this section, other arrangements for cognizance of a particular educational institution may also be based in part on the types of research performed at the educational institution and must be decided based on mutual agreement between HHS and DOD. Where a non-Federal entity only receives funds as a subrecipient, see § 200.332.

(2) * * *

b. Acceptance of rates. See § 200.414.

* * * * *

E. Documentation Requirements

The standard format for documentation requirements for indirect (indirect (F&A)) rate proposals for claiming costs under the regular method is available on the OMB website.

F. Certification

* * * * *

2. * * *

c. *Certificate.* The certificate required by this section must be in the following form:

Certificate of Indirect (F&A) Costs

This is to certify that to the best of my knowledge and belief:

(1) I have reviewed the indirect (F&A) cost proposal submitted herewith;

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal agreement(s) to which they apply and with the cost principles applicable to those agreements.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

(4) All costs included in this proposal are properly allocable to Federal agreements on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements.

I declare that the foregoing is true and correct.

Institution of Higher Education:
Signature: [redacted]
Name of Official: [redacted]
Title: [redacted]
Date of Execution: [redacted]

- 121. Amend appendix IV to part 200:
- a. By revising section A;
- b. Under section B by revising paragraphs 2.b through e, 3.b(1), (2), and (4), 3.c.(4), 3.f and g, and 4.b and c;
- c. Under section C by revising paragraphs 2.a through c; and
- d. Under section D by revising (D)(1), and under the center heading ''Certificate of Indirect (F&A) Costs'', paragraphs (2) and (3).

The revisions read as follows:

Appendix IV to Part 200—Indirect (F&A) Costs Identification and Assignment, and Rate Determination for Nonprofit Organizations

A. General

1. Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Direct cost of minor amounts may be treated as indirect costs under the conditions described in § 200.413(d). After direct costs have been determined and assigned directly

to awards or other work as appropriate, indirect costs are those remaining to be allocated to benefitting cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. ''Major nonprofit organizations'' are defined in paragraph (a) of § 200.414. See indirect cost rate reporting requirements in sections B.2.e and B.3.g of this Appendix.

B. Allocation of Indirect Costs and Determination of Indirect Cost Rates

* * * * *

2. Simplified Allocation Method

* * * * *

b. Both the direct costs and the indirect costs must exclude capital expenditures and unallowable costs. However, unallowable costs which represent activities must be included in the direct costs under the conditions described in § 200.413(e).

c. The distribution base may be total direct costs (excluding capital expenditures and other distorting items, such as subawards for $25,000 or more), direct salaries and wages, or other base which results in an equitable distribution. The distribution base must exclude participant support costs as defined in § 200.1.

d. Except where a special rate(s) is required in accordance with section B.5 of this Appendix, the indirect cost rate developed under the above principles is applicable to all Federal awards of the organization. If a special rate(s) is required, appropriate modifications must be made in order to develop the special rate(s).

e. For an organization that receives more than $10 million in direct Federal funding in a fiscal year, a breakout of the indirect cost component into two broad categories, Facilities and Administration as defined in paragraph (a) of § 200.414, is required. The rate in each case must be stated as the percentage which the amount of the particular indirect cost category (*i.e.*, Facilities or Administration) is of the distribution base identified with that category.

3. Multiple Allocation Base Method

* * * * *

(b) * * *

(1) Depreciation. The expenses under this heading are the portion of the costs of the organization's buildings, capital improvements to land and buildings, and equipment which are computed in accordance with § 200.436.

(2) Interest. Interest on debt associated with certain buildings, equipment and capital improvements are computed in accordance with § 200.449.

* * * * *

(4) General administration and general expenses. The expenses under this heading are those that have been incurred for the overall general executive and administrative offices of the organization and other expenses of a general nature which do not relate solely to any major function of the organization. This category must also include its allocable share of fringe benefit costs, operation and maintenance expense, depreciation, and interest costs. Examples of this category include central offices, such as the director's office, the office of finance, business services, budget and planning, personnel, safety and risk management, general counsel, management information systems, and library costs.

In developing this cost pool, special care should be exercised to ensure that costs incurred for the same purpose in like circumstances are treated consistently as either direct or indirect costs. For example, salaries of technical staff, project supplies, project publication, telephone toll charges, computer costs, travel costs, and specialized services costs must be treated as direct costs wherever identifiable to a particular program. The salaries and wages of administrative and pooled clerical staff should normally be treated as indirect costs. Direct charging of these costs may be appropriate as described in § 200.413. Items such as office supplies, postage, local telephone costs, periodicals and memberships should normally be treated as indirect costs.

(c) * * *

(4) General administration and general expenses. General administration and general expenses must be allocated to benefitting functions based on modified total costs (MTC). The MTC is the modified total direct costs (MTDC), as described in § 200.1, plus the allocated indirect cost proportion. The expenses included in this category could be grouped first according to major functions of the organization to which they render services or provide benefits. The aggregate expenses of each group must then be allocated to benefitting functions based on MTC.

* * * * *

f. Distribution basis. Indirect costs must be distributed to applicable Federal awards and other benefitting activities within each major function on the basis of MTDC (see definition in § 200.1).

g. Individual Rate Components. An indirect cost rate must be determined for each separate indirect cost pool developed. The rate in each case must be stated as the percentage which the amount of the particular indirect cost pool is of the distribution base identified with that pool. Each indirect cost rate negotiation or determination agreement must include development of the rate for each indirect cost pool as well as the overall indirect cost rate. The indirect cost pools must be classified within two broad categories: ''Facilities'' and ''Administration,'' as described in § 200.414(a).

4. Direct Allocation Method

* * * * *

b. This method is acceptable, provided each joint cost is prorated using a base which accurately measures the benefits provided to each Federal award or other activity. The bases must be established in accordance with reasonable criteria and be supported by current data. This method is compatible with the Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations issued jointly by the National Health Council, Inc., the National Assembly of Voluntary Health and Social Welfare Organizations, and the United Way of America.

c. Under this method, indirect costs consist exclusively of general administration and general expenses. In all other respects, the organization's indirect cost rates must be computed in the same manner as that described in section B.2 of this Appendix.

* * * * *

C. Negotiation and Approval of Indirect Cost Rates

* * * * *

2. Negotiation and Approval of Rates

a. Unless different arrangements are agreed to by the Federal agencies concerned, the Federal agency with the largest dollar value of Federal awards directly funded to an organization will be designated as the cognizant agency for indirect costs for the negotiation and approval of the indirect cost rates and, where necessary, other rates such as fringe benefit and computer charge-out rates. Once an agency is assigned cognizance for a particular nonprofit organization, the assignment will not be changed unless there is a shift in the dollar volume of the Federal awards directly funded to the organization for at least three years. All concerned Federal agencies must be given the opportunity

to participate in the negotiation process but, after a rate has been agreed upon, it will be accepted by all Federal agencies. When a Federal agency has reason to believe that special operating factors affecting its Federal awards necessitate special indirect cost rates in accordance with section B.5 of this Appendix, it will, prior to the time the rates are negotiated, notify the cognizant agency for indirect costs. (See also § 200.414.) If the nonprofit does not receive any funding from any Federal agency, the pass-through entity is responsible for the negotiation of the indirect cost rates in accordance with § 200.332(a)(4).

b. Except as otherwise provided in § 200.414(f), a nonprofit organization which has not previously established an indirect cost rate with a Federal agency must submit its initial indirect cost proposal immediately after the organization is advised that a Federal award will be made and, in no event, later than three months after the effective date of the Federal award.

c. Unless approved by the cognizant agency for indirect costs in accordance with § 200.414(g), organizations that have previously established indirect cost rates must submit a new indirect cost proposal to the cognizant agency for indirect costs within six months after the close of each fiscal year.

* * * * *

D. Certification of Indirect (F&A) Costs

(1) Required Certification. No proposal to establish indirect (F&A) cost rates must be acceptable unless such costs have been certified by the nonprofit organization using the Certificate of Indirect (F&A) Costs set forth in section j. of this appendix. The certificate must be signed on behalf of the organization by an individual at a level no lower than vice president or chief financial officer for the organization.

* * * * *

Certificate of Indirect (F&A) Costs

* * * * *

(2) All costs included in this proposal [identify date] to establish billing or final indirect (F&A) costs rate for [identify period covered by rate] are allowable in accordance with the requirements of the Federal awards to which they apply and with subpart E of this part.

(3) This proposal does not include any costs which are unallowable under subpart E of this part such as (without limitation): Public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, and defense of fraud proceedings; and

* * * * *

- 122. Amend appendix V to part 200 by revising:
- a. Section A, paragraph 2;
- b. Section B, paragraph 4;
- c. Section C
- d. Section E, paragraph 3.b.(1); and
- e. Section G, paragraph 5.

The revisions read as follows:

Appendix V to Part 200—State/Local Governmentwide Central Service Cost Allocation Plans

A. General

* * * * *

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled ''*A Guide for State, Local and Indian Tribal Governments: Cost Principles and Procedures for Developing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government.*'' A copy of this brochure may be obtained from the HHS Cost Allocation Services or at their website.

B. Definitions

* * * * *

4. *Cognizant agency for indirect costs* is defined in § 200.1. The determination of cognizant agency for indirect costs for states and local governments is described in section F.1.

* * * * *

C. Scope of the Central Service Cost Allocation Plans

The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. omitted from the plan will not be reimbursed.

E. Documentation Requirements for Submitted Plans

* * * * *

3. Billed Services

* * * * *

b. * * *

(1) For each internal service fund or similar activity with an operating budget of $5 million or more, the plan must include: A brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, *e.g.*, regular billings, interest earned, etc.; a listing of all non-operating transfers (as defined by GAAP) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this part, with an explanation of how variances will be handled.

* * * * *

G. Other Polices

* * * * *

5. Records Retention

All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in subpart D of this part.

* * * * *

- 123. Amend appendix VI to part 200 by revising paragraph 2 in section D to read as follows:

Appendix VI to Part 200—Public Assistance Cost Allocation Plans

* * * * *

D. Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans

* * * * *

2. Under the coordination process outlined in section E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the calendar quarter following the event that required the amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency for indirect costs acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the state public assistance agency and will inform the state agency of the action taken on the plan or plan amendment.

* * * * *

- 124. Amend appendix VII to part 200 by revising:
- a. Section A, paragraphs 2, 3, 4, and 5;
- b. Section B, paragraph 3;
- c. Section D, paragraph 1a.; and
- d. Section E, paragraph 4.

The revisions read as follows:

Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposals

A. General

* * * * *

2. Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Appendix V to this part) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in a brochure published by the Department of Health and Human Services entitled ''*A Guide for States and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government.*'' A copy of this brochure may be obtained from HHS Cost Allocation Services or at their website.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain state/local-wide central service costs, general administration of the non-Federal entity accounting and personnel services performed within the non-Federal entity, depreciation on buildings and equipment, the costs of operating and maintaining facilities.

5. This Appendix does not apply to state public assistance agencies. These agencies should refer instead to Appendix VI to this part.

B. Definitions

* * * * *

3. *Cognizant agency for indirect costs* means the Federal agency responsible for reviewing and approving the governmental unit's indirect cost rate(s) on the behalf of the Federal Government. The cognizant agency for indirect costs assignment is described in Appendix V, section F.

* * * * *

D. Submission and Documentation of Proposals

1. Submission of Indirect Cost Rate Proposals

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in § 200.334.

* * * * *

E. Negotiation and Approval of Rates

* * * * *

4. Refunds must be made if proposals are later found to have included costs that (a) are unallowable (i) as specified by law or regulation, (ii) as identified in § 200.420, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

* * * * *

■ 125. Amend appendix VIII to part 200 by revising the heading and paragraphs 32 and 33 to read as follows:

Appendix VIII to Part 200—Nonprofit Organizations Exempted From Subpart E of Part 200

* * * * *

32. Nonprofit insurance companies, such as Blue Cross and Blue Shield Organizations

33. Other nonprofit organizations as negotiated with Federal awarding agencies

■ 126. Appendix XI to part 200 is revised to read as follows:

Appendix XI to Part 200—Compliance Supplement

The compliance supplement is available on the OMB website.

■ 127. Amend appendix XII to part 200 by revising section A, paragraph 2.b to read as follows:

Appendix XII to Part 200—Award Term and Condition for Recipient Integrity and Performance Matters

A. Reporting of Matters Related to Recipient Integrity and Performance

* * * * *

2. Proceedings About Which You Must Report

* * * * *

b. Reached its final disposition during the most recent five-year period; and

* * * * *

[FR Doc. 2020–17468 Filed 8–11–20; 8:45 am]

BILLING CODE 3110–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 13, 39, and 52

[FAC 2020–08; FAR Case 2019–009; Docket No. FAR–2019–0009, Sequence No. 1]

RIN 9000–AN92

Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232).

DATES:

Effective: August 13, 2020.

Applicability: Contracting officers shall include the provision at FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment and clause at FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment as prescribed—

- In solicitations issued on or after August 13, 2020, and resultant contracts; and
- In solicitations issued before August 13, 2020, provided award of the resulting contract(s) occurs on or after August 13, 2020.

Contracting officers shall modify, in accordance with FAR 1.108(d), existing indefinite delivery contracts to include the FAR clause for future orders, prior to placing any future orders.

If exercising an option or modifying an existing contract or task or delivery order to extend the period of performance, contracting officers shall include the clause. When exercising an option, agencies should consider modifying the existing contract to add the clause in a sufficient amount of time to both provide notice for exercising the option and to provide contractors with adequate time to comply with the clause.

The contracting officer shall include the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations for an order, or notices of intent to place an order, including those issued before the effective date of this rule, under an existing indefinite delivery contract.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before September 14, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–009 via the Federal eRulemaking portal at *Regulations.gov* by searching for ''FAR Case 2019–009''. Select the link ''Comment Now'' that corresponds with FAR Case 2019–009. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2019–009'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FAR Case 2019–009, in all correspondence related to this case. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

All filers using the portal should use the name of the person or entity submitting comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referencing the specific legal authority claimed, and provide a non-confidential version of the submission.

Any business confidential information should be in an uploaded file that has a file name beginning with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal comments. All filers should name their files using the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a ''BC'' or ''P'' will be assumed to be public and will be made publicly available through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite ''FAR Case 2019–009.''

SUPPLEMENTARY INFORMATION:

I. Background

Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. 115–232) prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The provision goes into effect August 13, 2020.

The statute covers certain telecommunications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of those entities) and certain video surveillance products or telecommunications equipment and services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of those entities). The statute is not limited to contracting with entities that use end-products produced by those companies; it also covers the use of any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

Section 889 has two key sections, Section 889(a)(1)(A) and Section(a)(1)(B). Section (a)(1)(A) went into effect via FAR Case 2018–017 at 84 FR 40216 on August 13, 2019. The 889(a)(1)(A) rule does the following:

- It amends the FAR to include the 889(a)(1)(A) prohibition, which prohibits agencies from procuring or obtaining equipment or services that use covered telecommunications equipment or services as a substantial or essential component or critical technology. (FAR 52.204–25)
- It requires every offeror to represent prior to award whether or not it will

provide covered telecommunications equipment or services and, if so, to furnish additional information about the covered telecommunications equipment or services. (FAR 52.204–24)

- It mandates that contractors report (within one business day) any covered telecommunications equipment or services discovered during the course of contract performance. (FAR 52.204–25)

In order to decrease the burden on contractors, the FAR Council published a second interim rule for 889(a)(1)(A), at 84 FR 68314 on December 13, 2019. This rule allows an offeror that represents ''does not'' in the annual representation at FAR 52.204–26 to skip the offer-by-offer representation within the provision at FAR 52.204–24.

The FAR Council will address the public comments received on both previous interim rules in a subsequent rulemaking. In addition, each agency has the opportunity under 889(a)(1)(A) to issue agency-specific procedures (as they do for any acquisition-related requirement). For example, GSA issued a FAR deviation [1] where GSA categorized risk to eliminate the representations for low and medium risk GSA-funded orders placed under GSA indefinite-delivery contracts. For agency-specific procedures, please consult with the requiring agency.

This rule implements 889(a)(1)(B) and requires submission of a representation with each offer that will require all offerors to represent, after conducting a reasonable inquiry, whether covered telecommunications equipment or services are used by the offeror. DoD, GSA, and NASA recognize that some agencies may need to tailor the approach to the information collected based on the unique mission and supply chain risks for their agency.

In order to reduce the information collection burden imposed on offerors subject to the rule, DoD, GSA, and NASA are currently working on updates to the System for Award Management (SAM) to allow offerors to represent annually after conducting a reasonable inquiry. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite-delivery contracts. Similar to the initial rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019 and was followed by a second interim rule on December 13, 2019 to update the System for Award Management, the FAR Council intends to publish a subsequent rulemaking once the updates are ready in SAM.

Overview of the Rule

This rule implements section 889 (a)(1)(B) and applies to Federal contractors' use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The rule seeks to avoid the disruption of Federal contractor systems and operations that could in turn disrupt the operations of the Federal Government, which relies on contractors to provide a range of support and services. The exfiltration of sensitive data from contractor systems arising from contractors' use of covered telecommunications equipment or services could also harm important governmental, privacy, and business interests. Accordingly, due to the privacy and security risks associated with using covered telecommunications equipment or services as a substantial or essential component or critical technology of any system, the prohibition applies to any use that meets the threshold described above.

It amends the following sections of the FAR:

- FAR subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
- The provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.
- The contract clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

Definitions Discussed in This Rule

This rule does not change the definition adopted in the first interim rule of ''critical technology,'' which was included in the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (Section 1703 of Title XVII of the NDAA for FY 2019, Pub. L. 115–232, 50 U.S.C. 4565(a)(6)(A)). The rule does not change the definitions of ''Covered foreign country,'' ''Covered telecommunications equipment or services,'' and ''Substantial or essential component.'' The term offeror will continue to refer to only the entity that executes the contract.

This rule also adds new definitions for ''backhaul,'' ''interconnection arrangements,'' ''reasonable inquiry,'' and ''roaming,'' to provide clarity regarding when an exception to the prohibition applies. These terms are not currently defined in Section 889 or within the FAR. These definitions were developed based on consultation with subject matter experts as well as analyzing existing telecommunications regulations and case law.[2]

The FAR Council is considering as part of finalization of this rulemaking with an effective date no later than August 13, 2021, to expand the scope to require that the prohibition at 52.204–24(b)(2) and 52.204–25(b)(2) applies to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204–24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to whether they use covered telecommunications equipment or services. Section IV of this rule is requesting specific feedback regarding the impact of this potential change, as well as other pertinent policy questions of interest, in order to inform finalization of this and potential future subsequent rulemakings.

II. Discussion and Analysis

To implement section 889(a)(1)(B), the contract clause at 52.204–25 was amended to prohibit agencies ''from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system,'' unless an exception applies or a waiver is granted. This prohibition applies at the prime contract level to an entity that uses any equipment, system, or service that itself uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, regardless of whether that usage is in performance of work under a Federal contract.

The 52.204–25 prohibition under section 889(a)(1)(A) will continue to flow down to all subcontractors; however, as required by statute the prohibition for section 889(a)(1)(B) will not flow down because the prime contractor is the only ''entity'' that the agency ''enters into a contract'' with, and an agency does not directly ''enter into a contract'' with any subcontractors, at any tier.

The rule also adds text in subpart 13.2, Actions at or Below the Micro-

[1] *https://www.acquisition.gov/gsa-deviation/supply-chain-aug13.*

[2] *See FiberTower Spectrum Holdings, LLC* v. *F.C.C.*, 782 F.3d 692, 695 (D.C. Cir. 2015); *Worldcall Interconnect, Inc.* v. *Fed. Commc'ns Comm'n,* 907 F.3d 810, 814 (Nov. 15, 2018).

Purchase Threshold, to address section 889(a)(1)(B) with regard to micro-purchases. The prohibition will apply to all FAR contracts, including micro-purchase contracts.

Representation Requirements

Representations and Certifications are requirements that anyone wishing to apply for Federal contracts must complete. They require entities to represent or certify to a variety of statements ranging from environmental rules compliance to entity size representation.

Similar to the previous rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019, and was followed by a second interim rule on December 13, 2019, that updated the System for Award Management (SAM), the FAR Council is in the process of making updates to SAM requiring offerors to represent whether they use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule. This rule will add a new OMB Control Number to the list at FAR 1.106 of OMB approvals under the Paperwork Reduction Act. Offerors will consult SAM to validate whether they use equipment or services listed in the definition of ''covered telecommunications equipment or services'' (see FAR 4.2101).

An entity may represent that it does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule, if a reasonable inquiry by the entity does not reveal or identify any such use. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

Grants

Grants are not part of this FAR based regulation and are handled separately. Please note guidance on Section 889 for grants, which are not covered by this rule, was posted for comment at *https://www.federalregister.gov/documents/2020/01/22/2019-28524/guidance-for-grants-and-agreements.*

Agency Waiver Process

Under certain circumstances, section 889(d)(1) allows the head of an executive agency to grant a one-time waiver from 889(a)(1)(B) on a case-by-case basis that will expire no later than August 13, 2022. Executive agencies must comply with the prohibition once the waiver expires. The executive agency will decide whether or not to initiate the formal waiver process based on market research and feedback from Government contractors during the acquisition process, in concert with other internal factors. The submission of an offer will mean the offeror is seeking a waiver if the offeror makes a representation that it uses covered telecommunications equipment or services as a substantial or essential component of a system, or as critical technology as part of any system and no exception applies. Once an offeror submits its offer, the contracting officer will first have to decide if a waiver is necessary to make an award and then request the offeror to provide: (1) A compelling justification for the additional time to implement the requirements under 889(a)(1)(B), for consideration by the head of the executive agency in determining whether to grant a waiver; (2) a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain; and (3) a phase-out plan to eliminate such covered telecommunications equipment or services from the entity's systems. This does not preclude an offeror from submitting this information with their offer, in advance of a contracting officer decision to initiate the formal waiver request through the head of the executive agency.

Since the formal waiver is initiated by an executive agency and the executive agency may not know if covered telecommunications equipment or service will be used as part of the supply chain until offers are received, a determination of whether a waiver should be considered may not be possible until offers are received and the executive agency analyzes the representations from the offerors.

Given the extent of information necessary for requesting a waiver, the FAR Council anticipates that any waiver would likely take at least a few weeks to obtain. Where mission needs do not permit time to obtain a waiver, agencies may reasonably choose not to initiate one and to move forward and make award to an offeror that does not require a waiver.

Currently, FAR 4.2104 directs contracting officers to follow agency procedures for initiating a waiver request. Since a waiver is based on the agency's judgment concerning particular uses of covered telecommunications equipment or services, a waiver granted for one agency will not necessarily shed light on whether a waiver is warranted in a different procurement with a separate agency. This agency waiver process would be the same for both new and existing contracts. If a waiver is granted, with respect to particular use of covered telecommunications equipment or services, the contractor will still be required to report any additional use of covered telecommunications equipment or services discovered or identified during contract performance in accordance with 52.204–25(d).

Before granting a waiver, the agency must: (1) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy; additionally this senior agency official will serve as the primary liaison with the Federal Acquisition Security Council (FASC); (2) establish participation in an information-sharing environment when and as required by the FASC to facilitate interagency sharing of relevant supply chain risk information; and (3) notify and consult with the Office of the Director of National Intelligence (ODNI) on the issue of the waiver request: The agency may only grant the waiver request after consulting with ODNI and confirming that ODNI does not have existing information suggesting that the waiver would present a material increase in risk to U.S. national security. Agencies may satisfy the consultation requirement by making use of one or more of the following methods as made available to agencies by ODNI (as appropriate): Guidance, briefings, best practices, or direct inquiry. If the agency has met the three conditions enumerated above and intends to grant the waiver requested, the agency must notify the ODNI and the FASC 15 days prior to granting the waiver, and provide notice to the appropriate Congressional committees within 30 days of granting the waiver. The notice must include:

(1) An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security; and

(2) The required full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain; and

(3) The required phase-out plan to eliminate covered telecommunications or video surveillance equipment or services from the entity's systems.

The laydown described above must include a description of each category of covered telecommunications or video surveillance equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after such an inquiry.

In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements to enable effective mission critical functions or emergency response and recovery. In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must make a determination that the notice and consultation requirements are impracticable due to an emergency condition, and within 30 days of award, notify the ODNI, the FASC, and Congress of the waiver issued under emergency circumstances.

The provision of a waiver does not alter or amend any other requirements of U.S. law, including any U.S. export control laws and regulations or protections for sensitive sources and methods. In particular, any waiver issued pursuant to these regulations is not authorization by the U.S. Government to export, reexport, or transfer (in-country) items subject to the Export Administration or International Traffic in Arms Regulations (15 CFR 730–774 and 22 CFR 120–130, respectively).

Director of National Intelligence Waiver

The statute also permits the Director of National Intelligence (DNI) to provide a waiver if the Director determines one is in the national security interests of the United States.[3] The statute does not include an expiration date for the DNI waiver. This authority is separate and distinct from that granted to an agency head as outlined above.

ODNI Categorical Scenarios

Additionally, the ODNI, in consultation with the FASC, will issue on an ongoing basis, for use in informing agency waiver decisions, guidance describing categorical uses or commonly-occurring use scenarios where presence of covered telecommunications equipment or services is likely or unlikely to pose a national security risk.

Other Technical Changes

The solicitation provision at 52.204–24 has two representations, one for 889(a)(1)(A) and one for 889(a)(1)(B). This rule adds the representation for 889(a)(1)(B). The solicitation provision at 52.204–24 also has two disclosure sections, one for 889(a)(1)(A) and one for 889(a)(1)(B). This rule adds the disclosure section for 889(a)(1)(B) with separate reporting elements depending on whether the procurement is for equipment, services related to item maintenance, or services not associated with item maintenance. The reporting elements within the disclosure are different for each category because the information needed to identify whether the prohibition applies varies for these three types of procurements. This rule also administratively renumbers the paragraphs under the disclosure section. Finally, this rule will add cross-references in FAR parts 39, Acquisition of Information Technology, and to the coverage of the section 889 prohibition at FAR subpart 4.21.

Expected Impact of This Rule

The FAR Council recognizes that this rule could impact the operations of Federal contractors in a range of industries—including in the health-care, education, automotive, aviation, and aerospace industries; manufacturers that provide commercially available off-the-shelf (COTS) items; and contractors that provide building management, billing and accounting, and freight services. The rule seeks to minimize disruption to the mission of Federal agencies and contractors to the maximum extent possible, consistent with the Federal Government's ability to ensure effective implementation and enforcement of the national security measures imposed by Section 889. As set forth in Section III.C below, the FAR Council recognizes the substantial benefits that will result from this rule.

To date, there is limited information on the extent to which the various industries will be impacted by this rule implementing the statutory requirements of section 889. To better understand the potential impact of section 889 (a)(1)(B), DoD hosted a public meeting on March 2, 2020 (See 85 FR 7735) to facilitate the Department's planning for the implementation of Section 889(a)(1)(B).

NASA also hosted a Section 889 industry engagement event on January 30, 2020, to obtain additional information on the impact this prohibition will have on NASA contractors' operations and their ability to support NASA's mission.

In addition, the FAR Council hosted a public meeting on July 19, 2019, and GSA hosted an industry engagement event on November 6, 2019 (*https://interact.gsa.gov/FY19NDAASection889*) to gather additional information on how section 889 could affect GSA's business and supply chain. The presentations are located at *https://interact.gsa.gov/FY19NDAASection889*.

Please note presentations and comments from the public meetings are *not* considered public comments on this rule.

The FAR Council notes this rule is one of a series of actions with regard to section 889 and the impact and costs to all industry sectors, including COTS items manufacturers, resellers, consultants, etc. is not well understood and is still being assessed. For example, in a filing to the Federal Communications Commission, the Rural Wireless Association estimated that at least 25% of its carriers would be impacted.[4]

In addition, while the rule will be effective as of August 13, 2020, the FAR Council is seeking public comment, including, as indicated below, on the potential impact of the rule on the affected industries. After considering the comments received, a final rule will be issued, taking into account and addressing the public comments. *See* 41 U.S.C. 1707.

Industry Costs for New Representation and Scope of Section 889(a)(1)(B)

The statute includes two exceptions at 889 (a)(2)(A) and (B). The exception at 889(a)(2)(A) allows the head of executive agency to procure with an entity ''to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.'' The exception at 889(a)(2)(B) allows an entity to procure ''telecommunications equipment that cannot route or redirect user data traffic or [cannot] permit visibility into any user data or packets that such equipment transmits or otherwise handles.'' The exception allowing for procurement of services that connect to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements applies only to a Government agency that is contracting with an entity to provide a service. Therefore, the exception does

[3] Sec. 889(d)(2).

[4] *https://ecfsapi.fcc.gov/file/12080817518045/FY%202019%20NDAA%20Reply%20Comments%20-%20FINAL.pdf.*

not apply to a contractor's use of a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements. As a result, the Federal Government is prohibited from contracting with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider, unless a waiver is granted.

III. Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563

The costs and transfer impacts of section 889(a)(1)(B) are discussed in the analysis below. This analysis was developed by the FAR Council in consultation with agency procurement officials and OMB. We request public comment on the costs, benefits, and transfers generated by this rule.

A. Risks to Industry of Not Complying With 889

As a strictly contractual matter, an organization's failure to submit an accurate representation to the Government constitutes a breach of contract that can lead to cancellation, termination, and financial consequences.

Therefore, it is important for contractors to develop a compliance plan that will allow them to submit accurate representations to the Government in the course of their offers.

B. Contractor Actions Needed for Compliance

Adopting a robust, risk-based compliance approach will help reduce the likelihood of noncompliance. During the first year that 889(a)(1)(B) is in effect, contractors and subcontractors will need to learn about the provision and its requirements as well as develop a compliance plan. The FAR Council assumes the following steps would most likely be part of the compliance plan developed by any entity.

1. *Regulatory Familiarization.* Read and understand the rule and necessary actions for compliance.

2. *Corporate Enterprise Tracking.* The entity must determine through a reasonable inquiry whether the entity itself uses ''covered telecommunications'' equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor's ''covered telecommunications'' equipment or services as a substantial or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession—primarily documentation or other records—about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

3. *Education.* Educate the entity's purchasing/procurement, and materials management professionals to ensure they are familiar with the entity's compliance plan.

4. Cost of Removal (if the entity independently decides to). Once use of covered equipment and services is identified, implement procedures if the entity decides to replace existing covered telecommunications equipment or services and ensure new equipment and services acquired for use by the entity are compliant.

5. *Representation.* Provide representation to the Government regarding whether the entity uses covered telecommunications equipment and services and alert the Government if use is discovered during contract performance.

6. Cost to Develop a Phase-out Plan and Submit Waiver Information. For entities for which a waiver will be requested, (1) develop a phase-out plan to phase-out existing covered telecommunications equipment or services, and (2) provide waiver information to the Government to include the phase-out plan and the complete laydown of the presence of the covered telecommunications equipment or services.

C. Benefits

This rule provides significant national security benefits to the general public. According to the White House article ''A New National Security Strategy for a New Era'', the four pillars of the National Security Strategy (NSS) are to protect the homeland, promote American prosperity, preserve peace through strength, and advance American influence.[5] The purpose of this rule is to align with the NSS pillar to protect the homeland, by protecting the homeland from the impact of Federal contractors using covered telecommunications equipment or services that present a national security concern.

The United States faces an expanding array of foreign intelligence threats by adversaries who are using increasingly sophisticated methods to harm the Nation.[6] Threats to the United States posed by foreign intelligence entities are becoming more complex and harmful to U.S. interests.[7] Foreign intelligence actors are employing innovative combinations of traditional spying, economic espionage, and supply chain and cyber operations to gain access to critical infrastructure, and steal sensitive information and industrial secrets.[8] The exploitation of key supply chains by foreign adversaries represents a complex and growing threat to strategically important U.S. economic sectors and critical infrastructure.[9] The increasing reliance on foreign-owned or controlled telecommunications equipment, such as hardware or software, and services, as well as the proliferation of networking technologies may create vulnerabilities in our nation's supply chains.[10] The evolving technology landscape is likely to accelerate these trends, threatening the security and economic well-being of the American people.[11]

Since the People's Republic of China possesses advanced cyber capabilities that it actively uses against the United States, a proactive cyber approach is needed to degrade or deny these threats before they reach our nation's networks, including those of the Federal Government and its contractors. China is increasingly asserting itself by stealing U.S. technology and intellectual property in an effort to erode the United States' economic and military superiority.[12] Chinese companies, including the companies identified in this rule, are legally required to cooperate with their intelligence services.[13] China's reputation for persistent industrial espionage and close collaboration between its government and industry in order to amass technological secrets presents additional threats for U.S. Government contractors.[14] Therefore, there is a risk

[5] *https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/.*

[6] National Counterintelligence Strategy of the United States of America 2020–2022.

[7] National Counterintelligence Strategy of the United States of America 2020–2022.

[8] National Counterintelligence Strategy of the United States of America 2020–2022.

[9] National Counterintelligence Strategy of the United States of America 2020–2022.

[10] National Counterintelligence Strategy of the United States of America 2020–2022.

[11] National Counterintelligence Strategy of the United States of America 2020–2022.

[12] National Counterintelligence Strategy of the United States of America 2020–2022.

[13] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

[14] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

that Government contractors using 5th generation wireless communications (5G) and other telecommunications technology from the companies covered by this rule could introduce a reliance on equipment that may be controlled by the Chinese intelligence services and the military in both peacetime and crisis.[15]

The 2019 Worldwide Threat Assessment of the Intelligence Community [16] highlights additional threats regarding China's cyber espionage against the U.S. Government, corporations, and allies. The U.S.-China Economic and Security Review Commission Staff Annual Reports [17] provide additional details regarding the United States' national security interests in China's extensive engagement in the U.S. telecommunications sector. In addition, the U.S. Senate Select Committee on Intelligence Open Hearing on Worldwide Threats [18] further elaborates on China's approach to gain access to the United States' sensitive technologies and intellectual property. The U.S. House of Representatives Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE [19] further identifies how the risks associated with Huawei's and ZTE's provision of equipment to U.S. critical infrastructure could undermine core U.S. national-security interests.

Currently, Government contractors may not consider broad national security interests of the general public when they make decisions. This rule ensures that Government contractors keep public national security interests in mind when making decisions, by ensuring that, pursuant to statute, they do not use covered telecommunications equipment or services that present national security concerns. This rule will also assist contractors in mitigating supply chain risks (*e.g.* potential theft of trade secrets and intellectual property) due to the use of covered telecommunications equipment or services.

D. Public Costs

During the first year after publication of the rule, contractors will need to learn about the provisions and its requirements. The DOD, GSA, and NASA (collectively referred to here as the Signatory Agencies) estimate this cost by multiplying the time required to review the regulations and guidance implementing the rule by the estimated compensation of a general manager.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities. According to data from the Federal Procurement Data System (FPDS), as of February 2020, there was an average of 102,792 unique Federal awardees for FY16–FY19, of which 73%, 75,112, are unique small entities. Based on data in SAM for FY16–FY19, the Signatory Agencies anticipates there will be an average of 79,319 [20] new entities registering annually in SAM, of which 74%, 57,956, are anticipated to be small businesses.

We estimate that this rule will also affect businesses which become Federal contractors in the future. As stated above, we estimate that there are 79,319 [21] new entrants per year.

1. Time To Review the Rule

Below is a list of compliance activities related to regulatory familiarization that the Signatory Agencies anticipate will occur after issuance of the rule:

a. Familiarization with FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The Signatory Agencies assume that it will take all vendors who plan to submit an offer for a Federal award 20 [22] hours to familiarize themselves with the amendment to the offer-by-offer representation at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The Signatory Agencies assume that all entities registered in SAM, or 387,967 [23] entities, plan to submit an offer for a Federal award, since there is no data available on number of offerors for Federal awards. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$735 million* (= 20 hours · $94.76 [24] per hour · 387,967). Of the 387,967 entities impacted by this part of the rule, it is assumed that 74% [25] or 287,096 entities are unique small entities.

In subsequent years, these costs will be incurred by 79,319 [26] new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$150 million* (= 20 hours · $94.76 per hour · 79,319) per year in subsequent years.

b. Familiarization with FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. The Signatory Agencies estimate that it will take all vendors who plan to submit an offer for a Federal award 8 [27] hours to familiarize themselves with the amendment to the clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. The average number of unique awardees for FY16–FY19, or 102,792 [28] entities, will be impacted by this part of the rule, assuming all entities awarded Federal contracts would have to familiarize themselves with the clause. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$78 million* (= 8 hours · $94.76 per hour · 102,792). Of the 102,792 unique Federal awardees assumed to be impacted by this part of the rule, 73% or 75,038, are unique small entities.

In subsequent years, these costs are estimated will be incurred by 26% [29] of new entrants, or 20,623 entities because it is assumed that 26% of new entrants will be awarded a Federal contract and will be required to familiarize

[15] NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

[16] *https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf.*

[17] *https://www.uscc.gov/annual-reports/archives.*

[18] *https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg28947.pdf.*

[19] *https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=96.*

[20] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[21] This value is based on data on new registrants in *SAM.gov* for FY19 and FY20.

[22] The 20 hours are an assumption based on historical familiarization hours and subject matter expert judgment.

[23] According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

[24] The rate of $94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% burden to the base rate) based on subject matter judgment.

[25] As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small.

[26] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[27] The 8 hours is an assumption based on historical familiarization hours and subject matter expert judgment.

[28] As of February 2020, there was an average of 102,792 unique Federal awardees for FY16–FY19.

[29] The percentage of 26% is the percentage of active entities registered in *SAM.gov* in FY20 that were awarded contracts.

themselves with the clause. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$15.6 million* (= 8 hours · $94.76 per hour · 20,623) per year in subsequent years.

The total cost estimated to review the amendments to the provision and the clause is estimated to be *$813 million* in the first year after publication. In subsequent years, this cost is estimated to be *$166 million* annually. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

2. Time To Establish a Corporate Enterprise Tracking Tool and Verify Covered Telecom Is Not Used Within the Corporation or by the Corporation and Ensure There Are No Future Buys

In order to complete the representation, the entity must determine, by conducting a reasonable inquiry whether the entity itself uses ''covered telecommunications'' equipment or services. This includes a relationship with any subcontractor or supplier in which the prime contractor has a Federal contract and uses the supplier or subcontractor's ''covered telecommunications equipment or services'' regardless of whether that usage is in performance of work under a Federal contract. The Signatory Agencies do not have reliable data to form an estimate as to the processes vendors will adopt to conduct a reasonable inquiry or the costs, in time and other resources, for conducting such an inquiry. The Signatory Agencies intend to evaluate any information on this topic in the comments submitted by the public.

3. Time To Complete Corporate-Wide Training on Compliance Plan

The Signatory Agencies estimate that most entities have already begun to understand the impact of Section 889 (a)(1)(A) and have already educated the appropriate personnel to that part of the prohibition. Section 889 (a)(1)(B) requires a more robust training of the organization's compliance plan, which include business partners that are outside of the typical ''covered telecommunications equipment or services'' purchases; such as day-day office supplies. The Signatory Agencies estimate that it will take all vendors at least 4 [30] hours of training to ensure personnel understand the organization's compliance plan for tracking partners that procure ''covered telecommunications equipment and services'' that may be indirectly related to their respective business activities. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$147 million* (= 4 hours · $94.76 per hour · 387,967).

Of the 387,967 [31] entities impacted by this part of the rule, it is assumed that 74% or 287,096 entities are unique small entities.

In subsequent years, we assume that 50% [32] of the 79,319 [33] new entrants will incur these costs. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$15 million* (= 4 hours · $94.76 per hour· 50% · 79,319) per year in subsequent years. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

4. Time To Remove and Replace Existing Equipment or Services (if Contractor Decides to) in Order To Be Eligible for a Federal Contract

Data on the extent of the presence of the covered telecommunications equipment and services in the global supply chain is extremely limited, as is information as to the costs of removing and replacing covered equipment or services where it does exist. Furthermore, no data exists as to how many entities will receive a 2-year waiver from executive agency heads or a non-time-limited waiver from the ODNI. Accordingly, the Signatory Agencies are unable to form any estimate of the costs of this rule with regard to removing and replacing existing equipment and services. The Signatory Agencies intend to evaluate any information provided on this topic in comments submitted by the public.

5. Time To Complete the Representation

52.204–24

For the offer-by-offer representation at FAR 52.204–24 the Signatory Agencies assumed the cost for this portion of the rule to be *$11 billion* (= 3 [34] hours · $94.76 per hour · 102,792 unique entities · 378 [35] responses per entity).

In subsequent years, we assume that 26% [36] of new entrants will complete an offer and need to complete the offer-by-offer representation. Therefore, these costs will be incurred by 26% of the 79,319 [37] new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$2.2 billion* (= 3 hours · $94.76 per hour · 26% · 79,319 · 378 responses per entity) per year in subsequent years.

The FAR Council notes that these costs are based on offer-by-offer representations; upon completion of the updates to SAM, offerors will be able to make annual representations, which is anticipated to reduce the burden.

52.204–25

FAR 52.204–25 requires a written report in cases where a contractor (or subcontractor to whom the clause has been flowed down) identifies or receives notification from any source that an entity in the supply chain uses any covered telecommunications equipment or services. The signatory agencies estimate that 5% [38] of the unique entities awarded a contract (5,140) will submit approximately 5 [39] written reports annually pursuant to FAR 52.204–25. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$7.3 million* (= 3 hours · $94.76 per hour · 5,140 entities · 5 responses per entity) per year in subsequent years.

In subsequent years, we assume that half of the entities impacted in year 1 will incur these costs for 52.204–25. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *$3.6 million* (= 3 hours · $94.76 per hours 2,570 entities · 5 responses per entity) per year in subsequent years.

The total estimated burden for the representation and the clause for year one is *$11 billion*. The total annual cost for both representations in subsequent years is calculated as: *$2.2 billion*. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

[30] The hours are an assumption based on subject matter expert judgment.

[31] According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

[32] The 50% value is an assumption based on subject matter expert judgment. In the absence, to be conservative, it assumes that 50% of new entrants will decide to perform corporate-wide training.

[33] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[34] The hours are an assumption based on subject matter expert judgment.

[35] The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

[36] The percentage of 26% is the percentage of active entities registered in *SAM.gov* in FY20 that were awarded contracts.

[37] This value is based on data on new registrants in *SAM.gov* on average for FY16, FY17, FY18, and FY19.

[38] The 5% value was derived from subject matter expert judgment.

[39] The 5 reports value was derived from subject matter expert judgment.

6. Time To Develop a Full and Complete Laydown and Phase-Out Plan To Support Waiver Requests

The calculation at #2 above captures the time to develop a full and complete laydown. There is no way to accurately estimate the time required for offerors to develop a phase-out plan or the number of offerors for which a waiver will be requested.

The total cost of the above Public Cost Estimate in Year 1 is at least: *$12 billion.*

The total cost of the above Cost Estimate in Year 2 is at least: *$2.4 billion.*

The total cost estimate per year in subsequent years is at least: *$2.4 billion.*

The following is a summary of the estimated costs calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	$89
Annualized Costs (3%)	2.7
Present Value (7%)	43
Annualized Costs (7%)	3

The FAR Council acknowledges that there is substantial uncertainty underlying these estimates, including elements for which an estimate is unavailable given inadequate information. As more information becomes available, including through comment in response to this notice, the FAR Council will seek to update these estimates which could very likely increase the estimated costs.

E. Government Cost Analysis

The FAR Council anticipates significant impact to the Government as a result of this rule. These impacts will appear as higher costs, reduced competition, and inability to meet some mission needs. These costs are justified in light of the compelling national security objective that this rule will advance.

The primary cost to the Government will be to review the representations and to process the waiver request. The cost to review the representations uses the same variables as the cost to the public to fill out the representation resulting in a total cost to the Government of $11 billion as the hourly rate, hours to review, and number of representations are the same as the industry calculations. The other cost to the Government, is the cost to review the written reports required by the clause and the calculation uses the same variables as the cost to the public to complete the report, resulting in a total cost to the Government of $7.3 million.

Higher Costs and Reduced Competition: It is anticipated that at least three factors will each lead to the Government paying higher prices for services and products it buys: (1) Contractors will pass along some of the new costs of compliance; (2) due to anticipated compliance costs, some contractors will choose to exit the Federal market, particularly for commercial services and products and a reduced level of competition would increase prices; and (3) the risk of commercial firms choosing not to do business with the Government may be heightened in areas of high technological innovation such as digital services. In recent years, DoD and GSA, among other Departments and agencies, have placed particular emphasis on recruiting non-traditional contractors to provide emerging tech services and this rule could discourage innovative technology firms from competing on Federal Government contracts.

It is also anticipated that many Federal contractors may need to hire or contract for consultants to aid them in reviewing and updating their supply chains. Market principles suggest that this may increase the costs for such experts, making it more difficult for small businesses to afford them.

Inability to Meet Mission Needs: The Government uses Competition in Contracting Act exceptions (FAR subpart 6.3) to use sole source acquisitions to meet agency needs. These acquisitions would be impacted as offerors will also be subject to the section 889 requirements. There are industries where the Government makes up a small portion of the total market. There may be markets where the vendors will choose to no longer do business with the Government; leaving no sources to meet those specific requirements for the Government. This will reduce agencies' abilities to satisfy some mission needs.

The total cost of the above Government Cost Estimate in Year 1 is: *$11 billion.*

The total cost of the above Cost Estimate in Year 2 is: *$2.2 billion.*

The total cost estimate per year in subsequent years is: *$2.2 billion.*

The following is a summary of the estimated costs calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	$82.5
Annualized Costs (3%)	2.5
Present Value (7%)	40
Annualized Costs (7%)	2.8

F. Analysis of Alternatives

Alternative 1: The FAR Council could take no regulatory action to implement this statute. However, this alternative would not provide any implementation and enforcement of the important national security measures imposed by the law. Moreover, the general public would not experience the benefits of improved national security resulting from the rule as detailed above in Section C. As a result, we reject this alternative.

Alternative 2: The FAR Council could provide uniform procedures for how agency waivers must be initiated and processed. The statute provides this waiver authority to the head of each executive agency. Each executive agency operates a range of programs that have unique mission needs as well as unique security concerns and vulnerabilities. Since the waiver approval process will be based on each agency's judgment concerning particular use cases, standardizing the waiver process across agencies is not feasible. We believe that this alternative would not be able to best serve the public, as it would lead to inefficient waiver determinations at agencies whose ideal waiver process differs from the best possible uniform approach. As a result, we reject this alternative.

IV. Specific Questions for Comment

To understand the exact scope of this impact and how this impact could be affected in subsequent rulemaking, DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact on affected parties.

 To what extent do you currently use any equipment, system, or service that itself uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system?

Æ The FAR Council is considering as part of finalization of this rulemaking to expand the scope to require that the prohibition at 52.204–24(b)(2) and 52.204–25(b)(2) applies to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204–24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to represent whether they use covered telecommunications equipment or services. If the scope of rule was extended to cover affiliates, parents, and subsidiaries of the offeror that are domestic concerns, how would that

impact your ability to comply with the prohibition?

 To the extent you use any equipment, system or service that uses covered telecommunications equipment or services, how much do you estimate it would cost if you decide to cease such use to come into compliance with the rule?

 To what extent do you have insight into existing systems and their components?

 What equipment and services need to be checked to determine whether they include any covered telecommunications equipment or services?

Æ What are the best processes and technology to use to identify covered telecommunications equipment or services?

Æ Are there automated solutions?

 What are the challenges involved in identifying uses of covered telecommunications equipment or services (domestic, foreign and transnational) that would be prohibited by the rule?

 Do you anticipate use of any products or services that are unrelated to a service provided to the Federal Government and connects to the facilities of a third-party (*e.g.* backhaul, roaming, or interconnection arrangements) that uses covered telecommunications equipment or services?

 To what extent do you currently have direct control over existing equipment, systems, or services in use (*e.g.*, physical security systems) and their components, as contrasted with contracting for equipment, systems, or services that are used by you within meaning of the statute yet provided by a separate entity (*e.g.*, landlords)? How long will it take if you decide to remove and replace covered telecommunications equipment or services that your company uses?

 When a company identifies covered telecommunications equipment or services, what are the steps to take if you decide to replace the equipment or services?

Æ What do companies do if their factory or office is located in foreign country where covered telecommunications equipment or services are prevalent and alternative solutions may be unavailable?

Æ What are some best practices (*e.g.*, sourcing strategies) or technologies that can assist companies with replacing covered telecommunications equipment or services?

 Are there specific use cases in the supply chain where it would not be feasible to cease use of equipment, system(s), or services that use covered telecommunications equipment and services? Please be specific in explaining why cessation of use is not feasible.

Æ Will the requirement to comply with this rule impact your willingness to offer goods and services to the Federal Government? Please be specific in describing the impact (*e.g.*, what types of products or services may no longer be offered, or offered in a modified form, and why)

Æ The FAR Council recognizes there could be further costs associated with this rule (*e.g.* lost business opportunities, having to relocate a building in foreign country where there is no market alternative). What are they?

Æ What additional information or guidance do you view as necessary to effectively comply with this rule?

Æ What other challenges do you anticipate facing in effectively complying with this rule?

 Do you have data on the extent of the presence of covered telecommunications equipment or services? If so, please provide that data.

 Do you have data on the fully burdened cost to remove and replace covered telecommunications equipment or services, if that is a decision that you decide to make? If so, please provide that data and identify how you would revise the estimated costs in the cost analysis.

V. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not add any new provisions or clauses. The rule does not change the applicability of existing provisions or clauses to contracts at or below the SAT and contracts for the acquisition of commercial items, including COTS items. The rule is updating the provision at FAR 52.204–24 and the clause at FAR 52.204–25 to implement section 889(a)(1)(B).

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the simplified acquisition threshold (SAT). Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when, as in this case, the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items.

Finally, 41 U.S.C. 1907 states that acquisitions of commercially available off-the-shelf (COTS) items will be exempt from a provision of law unless certain circumstances apply, including if the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

C. Determinations

The FAR Council has determined that it is in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items. The Administrator for Federal Procurement Policy has determined that it is in the best interest of the Government to apply this rule to contracts for the acquisition of COTS items.

While the law does not specifically address acquisitions of commercial items, including COTS items, there is an unacceptable level of risk for the Government in contracting with entities that use equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This level of risk is not alleviated by the fact that the equipment or service being acquired has been sold or offered for sale to the general public, either in the same form or a modified form as sold to the Government (*i.e.*, that it is a commercial item or COTS item), nor by the small size of the purchase (*i.e.*, at or below the SAT).

VI. Interim Rule Determination and Executive Orders 12866, 13563, and 13771

A determination has been made under the authority of the Secretary of Defense (DoD), Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling circumstances necessitate that this interim rule go into effect earlier than 60 days after its publication date.

Since Section 889 of the NDAA was signed on August 13, 2018, the FAR Council has been working diligently to implement the statute, which has multiple effective dates embedded in Section 889. Like many countries, the United States has increasingly relied on a global industrial supply chain. As threats have increased, so has the Government's scrutiny of its contractors and their suppliers. Underlying these efforts is the concern a foreign government will be able to expropriate valuable technologies, engage in espionage with regard to sensitive U.S. Government information, and/or exploit vulnerabilities in products or services. It is worth noting this rule follows a succession of other FAR and DOD rules dealing with supply chain and cybersecurity.

Government agencies are already authorized to exclude certain contractors and products from specified countries. For example, Section 515 of the Consolidated Appropriations Act of 2014 required certain non-DoD agencies to conduct a supply chain risk assessment before acquiring high- or-moderate-impact information systems. The relevant agencies are required to conduct the supply chain risk assessments in conjunction with the FBI to determine whether any cyber-espionage or sabotage risk associated with the acquisition of these information systems exist, with a focus on cyber threats from companies ''owned, directed, or subsidized by the People's Republic of China.''

More recently, U.S. intelligence agencies raised concerns that Kaspersky Lab executives were closely tied to the Russian government, and that a Russian cybersecurity law would compel Kaspersky to help Russian intelligence agencies conduct espionage. As a result, DHS issued a Binding Operational Directive effectively barring civilian Government agencies from using the software. In the FY 2018 NDAA, Congress prohibited the entire U.S. Government from using products and services from Kaspersky or related entities. In June 2018, this prohibition was implemented as an interim rule across the U.S. Government by FAR 52.204–23.

Section 889 differs from the previous efforts in substantial ways. Unlike the blanket prohibition on agency use of goods and services from Kaspersky Labs, the prohibitions in Section 889 apply to multiple companies, and apply with slightly different characterizations to products and services from the various named companies. Additionally, section 889 contains carve-outs under which the prohibitions do not apply, further complicating interpretation and implementation of rulemaking. Finally, section 889 contains distinct prohibitions related to contracting, with the first applying to products and services purchased for use by the Government, and the second applying to use of the covered telecommunications equipment or services by contractors. Given the various provisions of Section 889, including the focus in the (a)(1)(A) prohibition on addressing risk to the Government's own use of covered telecommunications equipment and services and the shorter time period available to implement that prohibition, the FAR Council first developed and published at 84 FR 40216 on August 13, 2019, FAR Case 2018–017 to implement that prohibition. As discussed in the background section of this rule, that rule focused on products and services sold to the Government (directly or indirectly through a prime contract). Changes necessary to the System for Award Management to reduce the burden of the rule were not available by the effective date of the first rule, so in order to decrease the burden on contractors from this first rule, the FAR Council published a second interim rule on Section 889(a)(1)(A) at 84 FR 68314 on December 13, 2019. After the publication of this second rule, the FAR Council accelerated its ongoing work on the provisions of Section 889(a)(1)(B). Section 889(a)(1)(B) focuses on the Federal Government's ability to contract with companies that use the covered products or services at the requisite threshold.

Given the expansiveness and complexity of Section 889(a)(1)(B), this rule required substantial up-front analysis. As described elsewhere in the rule, all three signatory agencies held public meetings to hear directly from industry on concerns with this rule, with the first occurring in July of 2019 and the most recent occurring in March of 2020. The rule was prepared in part in the spring of 2020 as the nation began shutdown due to the COVID–19 pandemic and work across the Government was diverted to respond to the national emergency; the concentration of all available resources on the response to the pandemic very significantly delayed the Government's ability to finish the rule. These factors have left the FAR Council with insufficient time to publish the rule with 60 days before the legislatively established effective date of August 13, 2020, or to complete full public notice and comment before the rule becomes effective. As noted, however, the agencies are seeking public comment on this interim rule and will consider and address those comments.

Having an implementing regulation in place by the effective date is critically important to avoid confusion, uncertainty, and potentially substantial legal consequences for agencies and the vendor community. The statute requires contractors to identify the use of covered telecommunications equipment and services in their operations and the prohibitions will take effect on August 13, 2020. If they did so without an implementing regulation in place, contractors would have no guidance as to how to comply with the requirements of Section 889(a)(1)(B), leading to situations where contractors could refuse to contract with the Government over fears that lack of compliance could yield claims for breach of contract, or claims under the False Claims Act. Concerns of this sort were expressed during the outreach conducted by the FAR Council, with contractors expressing confusion as to the scope of the statutory prohibition, and asking for explicit guidance regarding what is required to comply with the requirement; this guidance is provided by the rule in the form of instructions regarding a reasonable inquiry and what must be represented to the Government. Absent coverage in the FAR to implement these requirements in a uniform manner as of the effective date, agencies would also be forced to implement the statute on their own, absent that unifying guidance, leading to rapidly divergent implementation paths, and creating substantial additional confusion and duplicative costs for the regulated contracting community. Publication of a proposed rule under these circumstances, while providing some indication of the direction the Government intended to take, would not provide sufficient clarity or certainty to avoid these consequences, given the complexity of the subject rule.

For the foregoing reasons, pursuant to 41 U.S.C. 1707(d), the FAR Council finds that urgent and compelling circumstances make compliance with

the notice and comment and delayed effective date requirements of 41 U.S.C. 1707(a) and (b) impracticable, and invokes the exception to those requirements under 1707(d). While a public comment process will not be completed prior to the rule's effective date, the FAR Council has incorporated feedback solicited through extensive outreach already undertaken, including through public meetings conducted over the course of nine months, and the feedback received through the two rulemakings associated with Section 889(a)(1)(A). The FAR Council will also consider comments submitted in response to this interim rule in issuing a subsequent rulemaking.

This interim rule is economically significant for the purposes of Executive Orders 12866 and 13563. This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because the benefit-cost analysis demonstrates that the regulation is anticipated to improve national security as its primary direct benefit. This rule is meant to mitigate risks across the supply chains that provide hardware, software, and services to the U.S. Government and further integrate national security considerations into the acquisition process.

The Office of Information and Regulatory Affairs (OIRA) has determined that this is a major rule under the Congressional Review Act (CRA) (5 U.S.C. 804(2)). Under the CRA (5 U.S.C. 801(a)(3)), a major rule generally may not take effect until 60 days after a report on the rule is received by Congress. As a result of the factors identified above, the FAR Council has insufficient time to prepare and complete a full public notice and comment rulemaking proceeding and to timely complete a final rule prior to the effective date of August 13, 2020. Because of the substantial additional impact to the regulated community if the rule is not in place on the effective date, the FAR Council has found good cause to forego notice and public procedure, the Council also determines, pursuant to 5 U.S.C. 808(2), that this interim rule will take effect on August 13, 2020.

Pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA expect that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

The reason for this interim rule is to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232).

The objective of the rule is to provide an information collection mechanism that relies on an offer-by-offer representation that is required to enable agencies to determine and ensure that they are complying with section 889(a)(1)(B).

The legal basis for the rule is section 889(a)(1)(B) of the NDAA for FY 2019, which prohibits the Government from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, on or after August 13, 2020, unless an exception applies or a waiver has been granted. This prohibition applies to an entity that uses at the prime contractor level any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, regardless of whether that usage is in performance of work under a Federal contract. This prohibition does not flow-down to subcontractors.

This collection includes a burden for requiring an offeror to represent if it ''does'' or ''does not'' use any equipment, system, or service that uses covered telecommunications equipment or services.

The representation requirement being added to the FAR provision at 52.204–24 will be included in all solicitations, including solicitations for contracts with small entities and is an offer-by-offer representation. A data set was generated from the Federal Procurement Data System (FPDS) for FY 2016, 2017, 2018 and 2019 for use in estimating the number of small entities affected by this rule.

The FPDS data indicates that the Government awarded contracts to an average of 102,792 unique entities, of which 75,112 (73 percent) were small entities. DoD, GSA, and NASA estimate that the representation at 52.204–24 will impact all unique entities awarded Government contracts, of which 75,112 are small entities.

This rule amends the solicitation provision at 52.204–24 to require all vendors to represent on an offer-by-offer basis, that it ''does'' or ''does not'' use any covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services and if it does to provide an additional disclosure.

If the offeror selects ''does'' in the representation at 52.204–24(d)(2), the offeror is required to further disclose, per paragraph (e), substantial detail regarding the basis for selecting ''does'' in the representation.

This rule will impact some small businesses and their ability to provide Government services at the prime contract level, since some small entities lack the resources to efficiently update their supply chain and information systems, which may be useful to comply with the prohibition.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The FAR Council intends to publish a subsequent rulemaking to allow offerors, including small entities, to represent annually in the System for Award Management (SAM) after conducting a reasonable inquiry. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation at 52.204–24(d)(2). The annual representation is anticipated to reduce the burden on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2019–009) in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained OMB approval and displays a currently valid OMB Control Number.

DoD, GSA, and NASA requested, and OMB authorized, emergency processing of the collection of information involved in this rule, consistent with 5 CFR 1320.13. DoD, GSA, and NASA have determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the PRA, because the prohibition in section 889(a)(1)(B) goes into effect on August 13, 2020.

b. The collection of information is essential to the mission of the agencies to ensure the Federal Government complies with section 889(a)(1)(B) on the statute's effective date in order to protect the Government supply chain

from risks posed by covered telecommunications equipment or services.

c. Moreover, DoD, GSA, and NASA cannot comply with the normal clearance procedures because public harm is reasonably likely to result if current clearance procedures are followed. Authorizing collection of this information on the effective date will ensure that agencies do not enter into, extend, or renew contracts with any entity that uses equipment, systems, or services that use telecommunications equipment or services from certain named companies as a substantial or essential component or critical technology as part of any system in violation of the prohibition in section 889(a)(1)(B).

DoD, GSA, and NASA intend to provide a separate 60-day notice in the **Federal Register** requesting public comment on the information collections contained within this rule under OMB Control Number 9000–0201.

The annual public reporting burden for this collection of information is estimated as follows:

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–24.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 102,792.
Average Responses per Respondents: 378.
Total Estimated Number of Responses: 38,854,291.
Average Time (for both positive and negative representations) per Response: 3 hours.
Total Annual Time Burden: 116,562,873.

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 5,140.
Average Responses per Respondents: 5.
Total Estimated Number of Responses: 25,700.
Average Time per Response: 3 hours.
Total Annual Time Burden: 77,100.

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Waiver from Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 20,000.
Average Responses per Respondents: 1.
Total Estimated Number of Responses: 20,000.
Average Time per Response: 160 hours.
Total Annual Time Burden: 3,200,000.

The public reporting burden for this collection of information consists of a representation to identify whether an offeror uses covered telecommunications equipment or services for each offer as required by 52.204–24 and reports of identified use of covered telecommunications equipment or services as required by 52.204–25. The representation at 52.204–24 is estimated to average 3 hours per response to review the prohibitions, research the source of the product or service, and complete the additional detailed disclosure, if applicable. Reports required by 52.204–25 are estimated to average 3 hours per response, including the time for reviewing definitions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the report.

If the Government seeks a waiver from the prohibition, the offeror will be required to provide a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain and a phase-out plan to eliminate such covered telecommunications equipment or services from the offeror's systems. There is no way to estimate the total number of waivers at this time. For the purposes of complying with the PRA analysis, the FAR Council estimates 20,000 waivers; however there is no data for the basis of this estimate. This estimate may be higher or lower once the rule is in effect.

The subsequent 60-day notice to be published by DoD, GSA, and NASA will invite public comments.

List of Subjects in 48 CFR Parts 1, 4, 13, 39, and 52

Government procurement.

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 4, 13, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 13, 39, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend the table by revising the entries for ''4.21'', ''52.204–24'' and ''52.204–25'' to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	
4.21	9000–0199 and 9000–0201.
* * * * *	
52.204–24	9000–0199 and 9000–0201.
52.204–25	9000–0199 and 9000–0201
* * * * *	

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.2100 [Amended]

■ 3. Amend section 4.2100 by removing ''paragraph (a)(1)(A)'' and adding ''paragraphs (a)(1)(A) and (a)(1)(B)'' in its place.

■ 4. Amend section 4.2101 by adding in alphabetical order the definitions ''Backhaul'', ''Interconnection arrangements'', ''Reasonable inquiry'' and ''Roaming'' to read as follows:

4.2101 Definitions.

* * * * *

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.,* connecting cell phones/towers to the core telephone network). Backhaul can be wireless (*e.g.*, microwave) or wired (*e.g.*, fiber optic, coaxial cable, Ethernet).

* * * * *

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (*e.g.,* connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Roaming means cellular communications services (*e.g.,* voice,

video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

* * * * *

· 5. Amend section 4.2102 by revising paragraphs (a) and (c) to read as follows:

4.2102 Prohibition.

(a) Prohibited equipment, systems, or services.

(1) On or after August 13, 2019, agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104.

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

* * * * *

(c) *Contracting Officers.* Unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or service is covered by a waiver described in 4.2104, Contracting Officers shall not—

(1) Procure or obtain, or extend or renew a contract (*e.g.*, exercise an option) to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or

(2) Enter into a contract, or extend or renew a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

* * * * *

· 6. Amend section 4.2103 by revising paragraph (a)(2) to read as follows:

4.2103 Procedures.

(a) * * *

(2)(i) If the offeror selects ''will not'' in paragraph (d)(1) of the provision at 52.204–24 or ''does not'' in paragraph (d)(2) of the provision at 52.204–24, the contracting officer may rely on the representations, unless the contracting officer has reason to question the representations. If the contracting officer has a reason to question the representations, the contracting officer shall follow agency procedures.

(ii) If an offeror selects ''will'' in paragraph (d)(1) of the provision at 52.204–24, the offeror must provide the information required by paragraph (e)(1) of the provision at 52.204–24, and the contracting officer shall follow agency procedures.

(iii) If an offeror selects ''does'' in paragraph (d)(2) of the provision at 52.204–24, the offeror must complete the disclosure at paragraph (e)(2) of the provision at 52.204–24, and the contracting officer shall follow agency procedures.

* * * * *

· 7. Amend section 4.2104 by revising paragraphs (a)(1) introductory text and (a)(2), and adding paragraphs (a)(3) and (4) to read as follows:

4.2104 Waivers.

(a) * * *

(1) *Waiver.* The waiver may be provided, for a period not to extend beyond August 13, 2021 for the prohibition at 4.2102(a)(1), or beyond August 13, 2022 for the prohibition at 4.2102(a)(2), if the Government official, on behalf of the entity, seeking the waiver submits to the head of the executive agency—

* * * * *

(2) *Executive agency waiver requirements for the prohibition at 4.2102(a)(2).* Before the head of an executive agency can grant a waiver to the prohibition at 4.2102(a)(2), the agency must—

(i) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy;

(ii) Establish participation in an information-sharing environment when and as required by the Federal Acquisition Security Council (FASC) to facilitate interagency sharing of relevant acquisition supply chain risk information;

(iii) Notify and consult with the Office of the Director of National Intelligence (ODNI) on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate; and

(iv) Notify the ODNI and the FASC 15 days prior to granting the waiver that it intends to grant the waiver.

(3) Waivers for emergency acquisitions.

(i) In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements under 4.2104(a)(2)(iii) and 4.2104(a)(2)(iv) to enable effective mission critical functions or emergency response and recovery.

(ii) In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must—

(A) Make a determination that the notice and consultation requirements are impracticable due to an emergency condition; and

(B) Within 30 days of award, notify the ODNI and the FASC of the waiver issued under emergency conditions in addition to the waiver notice to Congress under 4.2104(a)(4).

(4) Waiver notice.

(i) For waivers to the prohibition at 4.2102(a)(1), the head of the executive agency shall, not later than 30 days after approval—

(A) Submit in accordance with agency procedures to the appropriate congressional committees the full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and

(B) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(ii) For waivers to the prohibition at 4.2102(a)(2), the head of the executive agency shall, not later than 30 days after approval submit in accordance with agency procedures to the appropriate congressional committees—

(A) An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security;

(B) The full and complete laydown of the presences of covered

telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each category of covered technology equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after conducting a reasonable inquiry; and

(C) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 8. Amend section 13.201 by redesignating paragraph (j) as (j)(1) and adding paragraph (j)(2) to read as follows:

13.201 General.

* * * * *

(j)(1) * * *

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 9. Amend section 39.101 by redesignating paragraph (f) as (f)(1) and adding paragraph (f)(2) to read as follows:

39.101 Policy.

* * * * *

(f)(1) * * *

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Revise section 52.204–24 to read as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

As prescribed in 4.2105(a), insert the following provision:

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020)

The Offeror shall not complete the representation at paragraph (d)(1) of this provision if the Offeror has represented that it ''does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument'' in the provision at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v) of the provision at 52.212–3, Offeror Representations and Certifications–Commercial Items.

(a) *Definitions.* As used in this provision-

Backhaul, covered telecommunications equipment or services, critical technology, interconnection arrangements, reasonable inquiry, roaming, and *substantial or essential component* have the meanings provided in the clause 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. Nothing in the prohibition shall be construed to—

(i) Prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(ii) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract or extending or renewing a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract. Nothing in the prohibition shall be construed to—

(i) Prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(ii) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) *Procedures.* The Offeror shall review the list of excluded parties in the System for Award Management (SAM) (*https://www.sam.gov*) for entities excluded from receiving federal awards for ''covered telecommunications equipment or services.''

(d) *Representations.* The Offeror represents that—

(1) It [ ] will, [ ] will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation. The Offeror shall provide the additional disclosure information required at paragraph (e)(1) of this section if the Offeror responds ''will'' in paragraph (d)(1) of this section; and

(2) After conducting a reasonable inquiry, for purposes of this representation, the Offeror represents that—

It [ ] does, [ ] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) of this section if the Offeror responds ''does'' in paragraph (d)(2) of this section.

(e) *Disclosures.* (1) Disclosure for the representation in paragraph (d)(1) of this provision. If the Offeror has responded ''will'' in the representation in paragraph (d)(1) of this provision, the Offeror shall provide the following information as part of the offer:

(i) For covered equipment—

(A) The entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the original equipment manufacturer (OEM) or a distributor, if known);

(B) A description of all covered telecommunications equipment offered (include brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); and

(C) Explanation of the proposed use of covered telecommunications equipment and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

(ii) For covered services—

(A) If the service is related to item maintenance: A description of all covered

telecommunications services offered (include on the item being maintained: Brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); or

(B) If not associated with maintenance, the Product Service Code (PSC) of the service being provided; and explanation of the proposed use of covered telecommunications services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

(2) Disclosure for the representation in paragraph (d)(2) of this provision. If the Offeror has responded ''does'' in the representation in paragraph (d)(2) of this provision, the Offeror shall provide the following information as part of the offer:

(i) For covered equipment—

(A) The entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known);

(B) A description of all covered telecommunications equipment offered (include brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); and

(C) Explanation of the proposed use of covered telecommunications equipment and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(2) of this provision.

(ii) For covered services—

(A) If the service is related to item maintenance: A description of all covered telecommunications services offered (include on the item being maintained: Brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); or

(B) If not associated with maintenance, the PSC of the service being provided; and explanation of the proposed use of covered telecommunications services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(2) of this provision.

(End of provision)

- 11. Amend section 52.204–25 by—
- a. Revising the date of the clause;
- b. In paragraph (a), adding in alphabetical order the definitions ''Backhaul'', ''Interconnection arrangements'', ''Reasonable inquiry'' and ''Roaming'';
- c. Revising paragraph (b); and
- d. Removing from paragraph (e) ''this paragraph (e)'' and adding ''this paragraph (e) and excluding paragraph (b)(2)'' in its place.

The revisions read as follows:

52.204–25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020)

(a) * * *

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.*, connecting cell phones/towers to the core telephone network). Backhaul can be wireless (*e.g.*, microwave) or wired (*e.g.*, fiber optic, coaxial cable, Ethernet).

* * * * *

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (*e.g.*, connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Roaming means cellular communications services (*e.g.*, voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

* * * * *

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Contractor is prohibited from providing to the Government any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

* * * * *

- 12. Amend section 52.212–5 by—
- a. Revising the date of the clause;
- b. Removing from paragraphs (a)(3) and (e)(1)(iv) ''AUG 2019'' and adding ''AUG 2020'' in their places, respectively;
- c. Revising the date of Alternate II; and
- d. In Alternate II, amend paragraph (e)(1)(ii)(D) by removing ''AUG 2019'' and adding ''AUG 2020'' in its place.

The revisions read as follows:

52.212 –5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (AUG 2020)

* * * * *

Alternate II (AUG 2020). * * *

* * * * *

- 13. Amend section 52.213–4 by—
- a. Revising the date of the clause;
- b. Removing from paragraph (a)(1)(iii) ''AUG 2019'' and adding ''AUG 2020'' in its place; and
- c. Removing from paragraph (a)(2)(viii) ''JUN 2020'' and adding ''AUG 2020'' in its place.

The revision reads as follows:

52.213 –4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (AUG 2020)

* * * * *

- 14. Amend section 52.244–6 by—
- a. Revising the date of the clause; and
- b. Removing from paragraph (c)(1)(vi) ''AUG 2019'' and adding ''AUG 2020'' in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (AUG 2020)

* * * * *

[FR Doc. 2020–15293 Filed 7–13–20; 8:45 am]

BILLING CODE 6820–EP–P

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEPUTY DIRECTOR
FOR MANAGEMENT

June 18, 2020

M 20-26

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Michael Rigas
Acting Deputy Director of Management

SUBJECT: Extension of Administrative Relief for Recipients and Applicants of Federal Financial Assistance Directly Impacted by the Novel Coronavirus (COVID -19) due to Loss of Operations

As part of the Administration's aggressive response to the COVID-19 crisis, 0MB issued three memoranda[1] directing that all Federal departments and agencies marshal all legally available federal resources to combat the crisis. In accordance with the authority in 2 CFR § 200.102(a), *Exceptions,* the 0MB memoranda provided class exceptions allowing Federal awarding agencies to grant various administrative, financial and audit requirement flexibilities to their recipients.

The flexibilities provided in the three memoranda are meant to provide short-term administrative, financial and audit requirements under the 2 CFR 200, *Uniform Administrative Requirements , Cost Principles and Audit Requirements for Federal Awards ,* without compromising Federal financial assistance accountability requirements. The flexibilities and current expiration dates are June 16, 2020 (for M-20-17 and M-20-20) and July 26, 2020 (for M-20-11).

As the Country is now recovering from the Coronavirus pandemic and some areas are starting the re-opening process, the ramp-up effort is also starting for the performance of Federally-funded projects. In addition, during the Coronavirus pandemic, many recipients learned the capabilities and are now getting the experience to perform the objectives of the Federal programs remotely with limited access to their physical office. However , due to the uncertainty of the re-opening phase and the speed of the ramp-up effort, this memorandum provides an extension of item 1, *Allowability of salaries and other project activities* (item 6 in M-20-17) through September 30, 2020 and item 2, *Extension of Single Audit submission* (item 13

[1] (1) 0MB M-20-11, *Administrative Relief for Recipients and Applicants of Federal Financia l As;istance Directly Impacted by the Novel Coronavirus (COVID-19)* (March 09, 2020): (2) 0MB M-20-17, *Administrative Relief for Recipients and Applicants of Federal Financial Assistance Directly Impacted by the Novel Coronavirus (COVID-19) due to Loss of Operations* (March 19, 2020); and, (3) 0MB M-20-20, *Repurposing Existing Federal Financial Assistance Programs and Awards to Support the Emergency Response to the Novel Coronavirus (COVID-19)* (April 9, 2020).

in M-20-17) through December 31, 2020 to allow a responsible transition to normal operations. In light of the limited funding resources provided for each Federal award to achieve its own public performance goals, 0MB added restrictions to the flexibilities allowed in item 1, *Allowability of salaries and other project activities*.

Appendix A describes the two flexibilities extended under this memorandum to recipients affected by the loss of operational capacity due to the COVID-19 pandemic. All flexibilities provided in this memorandum are time limited and will expire on September 30, 2020. M-20-17 and M-20-20 are rescinded. M-20-11 expires on July 26, 2020.

As program managers are considering the extension of the administrative and financial relief, they should be prudent in their stewardship of Federal resources, which includes giving consideration to potential offsets- e.g., reduction in training and travel. In addition, agencies are reminded of their existing flexibility to issue exceptions on a case-by-case basis in accordance with 2 CFR § 200.102, *Exceptions* .

Questions regarding the above administrative relief provisions should be directed to the Office of Federal Financial Management at GrantsTeam@omb.eop.gov. 0MB will continue to provide updates and additional information as the situation unfolds. For the latest information, sign up for the Grants Community of Practice by clicking at: https://www.performance.gov/CAP/grants/

Appendix A-Administrative Relief Exceptions for COVID-19 Crisis

Federal awarding agencies are authorized to take the following actions, as they deem appropriate and to the extent permitted by law, with respect to the administrative provisions that apply to recipients grantees affected by COVID-19 (for both recipients with COVID-19 related grants and other types of Federal grants). Awarding agencies are required to maintain records on the level of particular exceptions provided to recipients. Awarding agencies must require recipients to maintain appropriate records and documentation to support the charges against the Federal awards.

1. **Allowability of Salaries and Other Project Activities.** (2 CFR § 200.403, 2 CFR § 200.404, 2 CFR § 200.405)

Awarding agencies may allow recipients to continue to charge salaries and benefits to active Federal awards consistent with the recipients' policy of paying salaries (under unexpected or extraordinary circumstances) from all funding sources, Federal and non-Federal. Awarding agencies may allow other costs to be charged to Federal awards necessary to resume activities supported by the award, consistent with applicable Federal cost principles and the benefit to the project. Awarding agencies may also evaluate the grantee's ability to resume the project activity in the future and the appropriateness of future funding, as done under normal circumstances-based on subsequent progress reports and other communications with the grantee. Under this flexibility, payroll costs paid with the Paycheck Protection Program (PPP) loans or any other Federal CARES Act programs must not be also charged to current Federal awards as it would result in the Federal government paying for the same expenditures twice. Awarding agencies must require recipients to maintain appropriate records and cost documentation as required by 2 CFR § 200.302 -*Financial management* and 2 CFR § 200.333 - *Retention requirement of records* to substantiate the charging of any salaries and other project activities costs related to interruption of operations or services. Due to the limited funding resources under each federal award to achieve its specific public program goals, awarding agencies must inform recipients to exhaust other available funding sources to sustain its workforce and implement necessary steps to save overall operational costs (such as rent renegotiations) during this pandemic period in order to preserve Federal funds for the ramp-up effort. Recipients should retain documentation of their efforts to exhaust other funding sources and reduce overall operational costs.

2. **Extension of Single Audit Submission and COVID-19 Emergency Acts Fund Reporting.** (2 CFR § 200.512)

Awarding agencies, in their capacity as cognizant or oversight agencies for audit, may allow recipients and subrecipients that have not yet filed their single audits with the Federal Audit Clearinghouse as of March 19, 2020 that have normal due dates from March 30, 2020 through June 30, 2020 to delay the completion and submission of the Single Audit reporting package, as required under Subpart F of2 CFR § 200.501 -*Audit Requirements,* up to six (6) months beyond the normal due date. Audits with normal due dates from July 31, 2020 through September 30, 2020 will have an extension up to three (3) months beyond the normal due date. No further

action by awarding agencies is required to enact this extension. This extension does not require individual recipients and subrecipients to seek approval for the extension by the cognizant or oversight agency for audit; however, recipients and subrecipients should maintain documentation of the reason for the delayed filing. Recipients and subrecipients taking advantage of this extension would still qualify as a "low-risk auditee" under the criteria of 2 CFR § 200.520 (a)-*Criteria for a low-risk auditee.*

Additionally, in order to provide adequate oversight of the COVID-19 Emergency Acts funding and programs, recipients and subrecipients must separately identify the COVID-19 Emergency Acts expenditures on the Schedules of Expenditures of Federal Awards and audit report findings.

To receive the latest information on grants, including COVID-19 update, sign up for the Grants Community of Practice by clicking at: https://www.performance.gov/CAP/grants/


USAID

BACKGROUND

Section 889 of the NDAA for 2019 prohibits USAID and our implementing partners from procuring or using certain “covered telecommunications equipment or services.” Section (a)(1)(B) of the law, which went into effect on August 13, 2020.

- Only applies to awards made **after August 13, 2020.**
- **Does not apply to modifications,** such as: changes in scopes of work or budgets, **as long as it does not involve an extension**.

IMPACT ON ASSISTANCE

Background: Effective August 13, 2020, 2 CFR 200.216 for U.S. organizations and the mandatory standard provision “Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment (AUGUST 2020) for non-U.S. organizations implemented the statutory prohibition 889(b)(1) that prohibits the use of award funds, including direct and indirect costs, cost-share and program income, to procure covered telecommunication and video surveillance services or equipment.

Guidance/Resources:

- ADS 303 Grants and Cooperative Agreements to Non-Governmental Organizations
- ADS 303mab, Standard Provisions for Non-U.S. Nongovernmental Organizations
- ADS 303maa, Standard Provisions for U.S. Nongovernmental Organization
- Assistance Implementing Partner Notice Portal:
  - Issued 8/21/2020: Notice # 10: Assistance Prohibition On Covered Telecommunications And Video Surveillance Services and Equipment

IMPACT ON ACQUISITION

Background: Effective August 13, 2020, FAR 4.2102(a)(2) implemented the statutory prohibition 889(a)(1)(B) for agencies to "enter into a contract to procure or obtain, or extend or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system," unless an exception or waiver as described in FAR applies.

Guidance/Resources:

- ADS 302: USAID Direct Contracting
- ADS 302mbp: Waivers for Covered Telecommunications and Video Surveillance Services or Equipment under FAR 4.2104
- Acquisition Implementing Partner Notices:
  - Issued 8/11/2020: Bilateral Modification #7: For IDIQ Awards Only.
  - Issued 8/14/2020: Bilateral Modification #8: For BPA Awards Only.
  - Issued 8/21/2020: Notice #16: FAR Part 4.2101 Prohibition On Covered Telecommunications And Video Surveillance Services and Equipment

Additional Information

Partner Resources and Frequently Asked Questions are available on USAID.gov:

https://www.usaid.gov/work-usaid/resources-for-partners/section-889-partner-information

Questions can be submitted to: IndustryLiaison@usaid.gov

Sign-up for the **Acquisition and Assistance Updates** email list serve to receive updates from the Agency.

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DELIVER UNCOMPROMISED

A Strategy for Supply Chain Security and Resilience in Response to the Changing Character of War

By Chris Nissen, John Gronager, Ph.D., Robert Metzger, J.D., Harvey Rishikof, J.D.

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Executive Summary

The character of war is changing. Our adversaries no longer have to engage the United States kinetically. They have shifted their strategy to engage our nation *asymmetrically,* exploiting the seams of our democracy, authorities, and even our morals. They can respond to a kinetic action non-kinetically and often in misattributed ways through *blended operations* that take place through the supply chain, cyber domain, and human elements.[1] They can render our national capability to project power—hard or soft—non-mission ready and collapse and even reverse the decision cycle.

Deliver Uncompromised

"For mission owners, the primary goal of DoD must be to deliver warfighting capabilities to Operating Forces without their critical information and/or technology being wittingly or unwittingly lost, stolen, denied, degraded or inappropriately given away or sold."

William Stephens,
Director of Counterintelligence, DSS

Today, various parts of the Department of Defense (DoD) and the Intelligence Community (IC) are generally aware of cyber and supply chain threats, but intra- and inter-government actions and knowledge are not fully coordinated or shared. Few if any holistically consider the entire blended operations space from a counter- intelligence perspective and act on it. Risk quan- tification and mitigation, as a mission, receive insufficient resources and prioritization. Too little attention is directed toward protection of operational security or software assurance. There is no consensus on roles, responsibilities, authorities, and accountability. Responsibilities concerning threat information are "siloed" in ways that frustrate and delay fully informed and decisive action, isolating decision makers and mission owners from timely warning and opportunity to act.

DoD must make better use of its existing resources to identify, protect, detect, respond to, and recover from network and supply chain threats. This will require organizational changes within DoD, increased coordination with the IC, and more cooperation with the Department of Homeland Security and other civilian agencies. It will also require improved relations with contractors, new standards and best practices, changes to acquisition strategy and practice, and initiatives that motivate contractors to see active risk mitigation as a "win." Risk-based security should be viewed as a profit center for the capture of new business rather than a "loss" or an expense

1 The four primary attack vectors in an asymmetric blended operation are supply chain (software, hardware, services), cyber-physical (cyber systems with real-time operating deadlines including weapons systems and industrial control systems), cyber-IT (informational technology), and human domain (witting or unwitting; foreign intelligence service or insider). Most operations use more than one of these vectors to realize an operational effect, moving between them as a function of time as access and opportunity allow. Viewing only cyber-IT as the primary vector affords the adversary a great degree of obfuscation and opportunity in the other three.

harmful to the bottom line. While DoD cannot control all the actions of its numerous information system and supply chain participants, it can lead by example and use its purchasing power and regulatory authority to move companies to work with DoD to enhance security through addressing threat, vulnerabilities, and consequences of its capabilities and adapt to dynamic, constantly changing threats.

Improved cyber and supply chain security requires a combination of actions on the part of the Department and the companies with which it does business. Through the acquisition process, DoD can influence and shape the conduct of its suppliers. It can define requirements to incorporate new security measures, reward superior security measures in the source selection process, include contract terms that impose security obligations, and use contractual oversight to monitor contractor accomplishments. Of course, there are limitations on what DoD can accomplish. DoD is not so large a customer that it can control all parts of its supplier base. DoD has strongest influence over companies with which it contracts directly. Nonetheless, DoD spending is a principal source of business for thousands of companies. The Department can reward the achievement, demonstration, and sustainment of cyber and supply chain security. It will take time to establish workable, fair processes, but these efforts should be given high priority. Where justified by urgent circumstances, the Department should consider use of interim rules to effectuate *Deliver Uncompromised* (DU) in near-term procurements.[2] By adding more security measures to the acquisition toolkit and making better use of those measures, DoD can exercise security leadership through use of its contractual leverage. This issue is elaborated more fully in *Annex I* of this report.

To succeed with *Deliver Uncompromised* requires commitment at the *enterprise* rather than the *element* level—for the Department and for its contractor base. Given the threat environment and its consequences for DoD, this report identifies a number of strategic elements—courses of action (COAs)—to address the cyber and supply chain security challenge. The COAs collectively can form an Implementation or

2 The genealogy of the term "Deliver Uncompromised" began at a 2010 National Counterintelligence Policy Board meeting when Bill Stephens of the Defense Security Service (DSS), along with National Security Agency CI representative Alan Brinsentine, coined the phrase during an informal conversation. Both were concerned that the U.S. government tolerated contract firms that repeatedly delivered compromised capabilities to DoD and the IC. A few months later, the National Counterintelligence Executive Senior Policy Advisor, Mr. Harvey Rishikof, joined in the conversation. The concept was developed at DSS CI and validated by their counterintelligence collection and analysis program largely built upon the rich reporting of suspicious contacts from cleared industry. Further conversations between the DSS CI leadership and affected government and contractor professionals eventually led to a DSS article in the American Intelligence Journal (Vol 29, no 2, 2011), entitled "The T-Factor and Cleared Industry." DSS CI continued to explore the concept until the organization rolled it out as a panel topic at the DSS 2016 Foreign, Ownership, Control and Influence annual meeting. The Undersecretary of Defense for Intelligence then joined with DSS in a contractor-facilitated DU conversation with likely U.S. government and industry stakeholders. The Office of the Secretary of Defense (OSD) and DSS brought this conversation to this MITRE study effort in order to help DoD find a solution to better maintain its technological advantage.

Campaign Plan that could operate along roughly eight lines of effort: Elevate, Educate, Coordinate, Reform, Monitor, Protect, Incentivize, and Assure.

This report examines options that span legislation and regulation, policy and administration, acquisition and oversight, programs and technology. Actions are presented for the near, medium, and long terms—recognizing the need for immediate action coupled with a long-term commitment and strategy. Cyber and supply chain vulnerability extends well beyond DoD, across government and into the private sector. Nonetheless, DoD has potentially decisive influence in this space. Beyond DoD, actions in the legislative domain are critical, as our adversaries are actively exploiting seams and shortcomings in areas such as information sharing, threat detection, and acquisition transparency. Building effective deterrence to asymmetric threats will require time and deliberate planning. The 15 COAs are:

1. Elevate Security as a Primary Metric in DoD Acquisition and Sustainment
2. Form a Whole-of-Government National Supply Chain Intelligence Center (NSIC)
3. Execute a Campaign for Education, Awareness, & Ownership of Risk
4. Identify and Empower a Chain of Command for Supply Chain with Accountability for Security and Integrity to DEPSECDEF
5. Centralize SCRM-TAC with the Industrial Security/CI mission owner under DSS and Extend DSS Authority
6. Increase DoD Leadership Recognition and Awareness of Asymmetric Warfare via Blended Operations
7. Establish Independently Implemented Automated Assessment and Continuous Monitoring of DIB Software
8. Advocate for Litigation Reform and Liability Protection
9. Ensure Supplier Security and Use Contract Terms
10. Extend the 2015 National Defense Authorization Act (NDAA) Section 841 Authorities for “Never Contract with the Enemy”
11. Institute Innovative Protection of DoD System Design and Operational Information
12. Institute Industry-Standard Information Technology (IT) Practices in all Software Developments
13. Require Vulnerability Monitoring, Coordinating, and Sharing across the Supply Chain of Command
14. Advocate for Tax Incentives and Private Insurance Initiatives
15. For Resilience, Employ Failsafe Mechanisms to Backstop Mission Assurance

Deliver Uncompromised

For the long term, DoD should articulate an end-state or strategic endpoint to serve as a “North Star” to guide and measure progress. We believe this initial collection of recommended actions within the *Deliver Uncompromised* framework is a solid foundation for this strategy.

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Understanding the Scope of the Threat

The character of war is changing. Our adversaries no longer have to engage us kinetically; they have shifted their strategy to engage us as a nation *asymmetrically*, exploit- ing the seams of our democracy, authorities, and morals. They can respond to a kinetic action non-kinetically and often in misattributed ways through *blended operations* that take place through the sup- ply chain, cyber domain, and human elements. They can render our national capability to project power— hard or soft—non-mission ready. They can collapse and even reverse the decision cycle.

> We are in an era of adversarial asymmetric warfare for which we have no comprehensive deterrence.

Nation-state adversaries have exploited cyber and supply chain vulnerabilities critical to U.S. security for hostile purposes. These include exfiltration of valuable technical data (a form of industrial espionage); attacks upon control systems used for critical infrastructure, manufacturing, and weapons systems; corruption of quality and assurance across a broad range of product types and cat- egories; and manipulation of software to achieve unauthorized access to connected systems and to degrade the integrity of system operation.

The missions for which the Department of Defense (DoD) are responsible are particularly vulnerable. Adversaries seek to counter areas of U.S. military dominance and to challenge U.S. interests in cyber domains via supply chains upon which our govern- ment, our industries, and our populace rely. In this space, traditional boundaries of threat, action, and response are blurred. *We are in an era of adversarial asymmetric warfare for which we have no comprehensive deterrence.* The contemporary threat landscape has not been effectively addressed or deterred in our national security missions, policies, and infrastructures. The response is inadequate within the private sector and across government. The mission readiness of the U.S. military and its ability to project force are at grave risk. Our adversaries have developed and demonstrated capabilities to collect valuable intelligence on defense capabilities, steal intellectual property, initiate offensive action, and respond to provocation in an asymmetric manner. They target military as well as private sector U.S. interests, using means that make attribution problematic. These conditions are without precedent and threaten mission resilience and national security.

Our supply chains are exposed to multiple threat vectors. Supply chains are one of the four primary elements of an adversarial attack via blended operations. Attacks may be mounted against the entire supply chain life cycle from conception to retirement. The supply chain is vulnerable to adversary insertion of counterfeit parts that pass ordinary inspection but fail operationally. Largely through cyber-physical threats, adversaries may introduce malware or exploit latent vulnerabilities in firmware or soft- ware to produce adverse, unintended, and unexpected physical effects on connected

or controlled systems. Supply chains as a service present another critical exploitation vector.

MITRE initially launched this study to help DoD strategically address software supply chain challenges in light of recent legislative branch interest in how "software provenance" was being addressed after the recent Department of Homeland Security Binding Operational Directive 17-1 dealing with Kaspersky Laboratory software. To that end, the report has a pronounced emphasis on addressing software supply chain security. However, the impact of supply chains as a service, hardware, and software on DoD mission readiness and ability to project power requires a strategy that encompasses all aspects beyond just software and within software, beyond just concerns surrounding Kaspersky. To that end, in this report we define supply chain as:

> The system of organizations, people, activities, information, and resources involved from development to delivery of a product or service from a supplier to a customer. Supply chain "activities" or "operations" involve the transformation of raw materials, components, and intellectual property into a product to be delivered to the end customer and necessary coordination and collaboration with suppliers, intermediaries, and third-party service providers.

The resulting COAs should be considered in that light so that the resulting strategy addresses services and hardware in addition to software supply chains.

The result of these attacks is damage to U.S. military readiness, as well as the infrastructure and commercial systems upon which our military relies. Inadequate defense can nullify the value of government and private sector investment and erase expected benefits of new technology. Adversaries will mount cyber and supply chain attacks to slow the progress and deployment of new defense technologies, to compromise the operation and reliability of defense mission and business systems, to replicate what the U.S. technology base has accomplished, and to defeat or deny expected military advantages from U.S. investment in emerging technologies. Stronger, holistic measures to make our networks and supply chains more robust and resilient can deter adversaries by increasing the costs or even reversing the likelihood of adverse effects—reducing the "return on investment" of potential attacks. While one aspect of deterrence is the threat of retorsion or retaliation, a complementary aspect is "gain denial" through measures that deny adversaries confidence in successful attack.

Software vulnerability is a new dimension of security risk, as defined by threat, vulnerability, and consequence, that has received too little recognition. For many if not most DoD systems, software now defines function. Software increasingly determines the boundaries, operation, and risks to systems relied upon by all facets of civil society— consumer-facing, industrial, transportation, energy, healthcare, communications—as well as defense missions and management. Increasingly, functionality is achieved through software. A modern aircraft may have more than 10 million lines of code. The initial Block 1A/1B F-35 had more than 8.3 million lines of code, and later versions

of the aircraft will have more than 20 million lines of code for both operations and support. Combat systems of all types increasingly employ sensors, actuators, and software-activated control devices.

The proliferation of command-driven electronic systems, increasingly connected to sensor-informed networks (even if not initially designed for such linkages), massively expands opportunity for mischief or physical injury achieved through cyber-physical attacks. Software assurance needs to be made a priority for all phases of system acquisition and sustainment. DoD needs to work closely with technical community industrial partners to demonstrate and deploy new methods and measures to identify and respond to software vulnerabilities. Such initiatives acquire new urgency as more and more systems become interdependent and reliant upon the growing instrumental- ities of the Internet of Things (IoT).

This report examines options that span legislation and regulation, policy and administration, acquisition and oversight, programs and technology. Actions are presented for the near, medium, and long terms—recognizing the need for immediate action coupled with a long-term commitment and strategy. Cyber and supply chain vulnerability extends well beyond DoD, across government and into the private sector. Nonetheless, DoD has potentially decisive influence in this space. DoD can implement policy and organizational changes, use its acquisition power, and manage the utilization of technology and research and development to address the problems. Beyond DoD, actions in the legislative domain are critical, as our adversaries are actively exploiting seams and shortcomings in areas such as information sharing, threat detection, and acquisition transparency. Building effective deterrence to asymmetric threats will require time and deliberate planning. For the long term, DoD should articulate an end-state or strategic endpoint to serve as a “North Star” to guide and measure progress. We believe this initial collection of recommended courses of action (COAs) within the *Deliver Uncompromised* framework is a solid foundation for this strategy.

Objective: Deliver Uncompromised and Resilient Systems

For the service components that ultimately own the responsibility to execute DoD mission and hence resilience, the primary goal of DoD must be to deliver warfighting capabilities to Operating Forces without their critical information and/or technology being wittingly or unwittingly lost, stolen, denied, degraded, or inappropriately given away or sold. The myriad of systems and capabilities that enable these missions must be resilient and able to respond to anticipated penetrations. The Department's acquisition mechanisms reward cost, schedule, and performance more than integrated risk-management upon which many capabilities rely, especially systems which depend upon complex software. For some years, the Department has pursued a succession of successful "Offset" strategies, focused on innovation in sensors and in network-centric warfare to produce advantages in the delivery and lethality of kinetic firepower. There has been no corresponding strategy, however, for securing that innovation from compromise with an emphasis on mission resiliency. Instead, all too often the Department and its contractors have used a lowest cost set of disparate, unsynchronized security activities and processes that do not match the importance of innovation, information, and technological superiority to our National Security Strategy, National Defense Strategy, and National Military Strategy. The objective of the *Deliver Uncompromised* strategy is to directly address this point, and institute a deliberate, inherent elevation of integrated risk management from concept through retirement, within the DoD and its contracting base, to ensure mission resilience. Choosing not to fight on our terms, our adversaries have embarked upon strategies that exploit the arbitrage of non-coherent defenses and rely on asymmetric capabilities to defeat our technological advances. As evidenced by all-too frequent media reports, our adversaries have had significant success in their strategy. Critical private-sector and military capabilities have been compromised through blended operation attacks, to one degree or another, at various points along the system development life cycle, sometimes prior to delivery, sometimes during sustainment.

State-of-the-Art Security

Independent analysis, respecting the skill and intention of adversaries in asymmetric warfare, should assume that the Department already has experienced systemic compromise, the impact of which may not now be knowable.

Independent analysis, respecting the skill and intention of adversaries in asymmetric warfare, should assume that DoD already has experienced systemic compromise, the impact of which may not now be knowable. The contemporary state of security, unique in the modern era, demands not an "improvement in the same" so much as

a “quantum change” from orthodoxy and established conventions. The response requires a number of strategic actions, some within DoD’s span of control, such as leveraging technology and policy, and others, such as legislation or Executive Branch action, requiring the participation and leadership of Congress, the President, and other Executive Branch participants.

For the near term and beyond, the key operational imperative must be to obtain and maintain positive operational control over critical information and technology/capabilities. This imperative extends the benefit of *Deliver Uncompromised* from the acquisition community to the operational community, because maintaining positive operational control is a key element of planning, command assurance, mission execution, and sustainment. Essentially, every element’s survival depends upon the ability to release, convey, or transfer information and/or technology under their own initiative and not the unapproved initiative of others. This key imperative may prove to be exceedingly difficult to achieve. DoD and its contractors will have to accept shared responsibility in which all participants take ownership of the challenge and assume a duty of continuing initiative. Absent such an approach, as a nation we risk dilution, or loss, of strategic and tactical advantages.

Too often the focus of government efforts to improve contractor cyber measures is upon perimeter defense, with security professionals assigned principal responsibility. The established presence of Advanced Persistent Threats (APTs) calls into question the operating premise of perimeter security. Counterintelligence personnel need to work with security professionals to inform enterprise actions with an understanding of adversary targets, methods, and priorities.[3]

Today our adversaries may have a better understanding of our strategic vulnerabilities than do we. This includes vulnerabilities introduced via networks or through the supply chain. This is because of poor/inadequate intelligence on such threats, excessive compartmentation that precludes effective sharing of such threat information, lack of prioritization, and widespread availability of information in the public domain. Combined with the inherent vulnerabilities of the natural seams of our democracy,

3 Experience has shown that external sensors for detecting network penetration do not reveal all attempts at penetrations or detect unauthorized outflow that results from APTs. In blended operations, adversaries may avoid the network perimeter and instead use tactics to attack supply chain hardware, software and services. George Patton’s observation applies here for how France’s Maginot Line, a static defense against German invasion, failed miserably. “Fixed fortifications are monuments to man’s stupidity. If mountain ranges and oceans can be overcome, anything made by man can be overcome.” The threat environment requires the United States to adopt a counterintelligence mindset to replace our legacy security mindset when securing the defense industrial base. Our adversaries’ great success against static defenses should be evidence enough that we need to make this change. To win in the Information Age where the advantage is to the attacker and not the defender, our new frame of reference should be: 1) no defensive perimeter wall is inviolate; 2) every wall has been penetrated or is susceptible to successful penetration by determined actors; and 3) the absence of evidence our security wall has been breached does not constitute evidence there has been no penetration.

this gives our adversaries a significant advantage to which we are just beginning to respond.

The 2018 National Defense Strategy recognizes the degradation of our force projec- tion capability across all domains and specifically calls for the investment of resilient capabilities:

> "Investments will prioritize ground, air, sea and space forces that can deploy, survive, operate, maneuver and regenerate in all domains while under attack. Transitioning from large, centralized, unhardened infrastructure to smaller, dispersed, resilient, adaptive basing that include active and passive defenses will also be prioritized." Likewise, "…New commercial technology will change society and, ultimately, the character of war. The fact that many technological developments will come from the commercial sector means that state competitors and non-state actors will also have access to them, a fact that risks eroding the conventional overmatch to which our Nation has grown accustomed. Maintaining the Department's technological advantage will require changes to industry culture, investment sources, and protection across the National Security Innovation Base…".

The recommended measures in this study are intended to serve as a foundation which directly supports this strategy.

Structural Challenges

There are fundamental structural challenges facing the Department. If not resolved, these barriers will undermine our ability to *Deliver Uncompromised*. Major challenges to consider are:

1. Overreliance on "trust," in dealing with contractors, vendors, and service providers, has encouraged a *compliance-oriented* approach to security—doing just enough to meet the "minimum" while doubting that sufficiency will ever be evaluated. This approach must change fundamentally so that enterprises are incentivized to find and solve any issue that might place a program at risk or expose systems to vulnerabilities. At the same time, industry needs the means to assess and validate their countermeasure accomplishments. We offer suggestions on how to establish an independent, expert intermediary that industry will trust to develop security metrics and necessary processes for review and assessment.
2. Solving the security issues facing DoD requires increased *counterintelligence* (CI) participation. A *security* community that largely operates to show compliance with established rules may be uninformed of evolving threats and therefore unable to adapt to the agile strategies and asymmetric techniques of adversaries. From Defense Security Service (DSS) reports and supporting documentation by the National Counterintelligence and Security Center (NCSC), as well as

Federal Bureau of Investigation (FBI) field office activities, there are lessons to be learned from the resources that are actively engaged in CI activities. Protection of DoD interests calls for Department leadership, as well as industry, to be kept alert and informed, by DSS, the FBI, and other entities, about the quiet attacks constantly being launched against DoD interests. This is why education and ownership of the problem are so important—and why expanding the resources and authority of DSS is vital.

3. There is no single DoD organization vested with lead responsibility for threats and risks to the defense industrial base (DIB), despite the fact that most major exploitations by adversaries are directed against and occur within the DIB. DoD should consider the DIB assets on a "whole of enterprise" basis, inclusive of assets beyond information and data, and shift from protecting *facilities* to protecting *assets*. Similarly, DoD's contract measures, and accompanying oversight, should evolve from safeguarding *information* and *information systems* to include safeguarding *operations* and enterprise *capabilities*. In this vein, the Department should address its interface with contractors for security practices, so that companies deal with trained resources and avoid inconsistent interpretations and instructions.

4. There has long been widespread recognition that "reform" of the existing acquisition process is needed to address typically over complex, behind schedule, and over budget acquisitions. However, given the changing character of war and our adversaries' asymmetric strategies, these processes, along with how we have maintained and sustained our capabilities, have also resulted in highly compromised systems despite the consumption of huge technical and financial resources, leaving the Department's mission readiness at risk. This fact must drive true reform of the acquisition process. The Vice Chiefs and the Vice Chair, who are ultimately responsible for the operational readiness for their Services, should create and maintain a strong and accountable chain of command for cyber defenses, supply chain security, and digital integrity, and themselves be held accountable. Accountability for integrity and mission readiness must be blended across the acquisition, operations, and sustainment communities, with a clear chain of command directly to the Secretary of Defense (SECDEF) through the Deputy Secretary of Defense (DEPSECDEF).

5. DoD (among other federal departments and agencies) has yet to communicate clearly with sufficient emphasis the importance of security and integrity. This failure is reflected in the recently released *Federal Cybersecurity Risk Determination Report and Action Plan* (May 2018). Across the entire range of enter- prise, business, and weapons systems, the Department will benefit from a clear leadership statement and direction that shifts priorities and reduces exposure to compromised delivery. At the national level, the Office of Management and Bud- get's (OMB) Memorandum M16-04, "Cybersecurity Strategy and Implementation Plan (CSIP) for the Federal Civilian Government," dated Oct. 30, 2015, included

directions to the heads of executive departments and agencies that still merit attention today. Agencies were directed to prioritize identification and protection of high-value information and assets, improve ability to timely detect and rapidly respond to cyber incidents, prepare for rapid recovery from incidents when they occur, recruit and retain the most highly qualified cybersecurity workforce, and make efficient and effective acquisition and deployment of both existing and emerging technology.

Contractual Leverage

Ultimately, improved cyber and supply chain security requires a combination of actions on the part of the Department and the companies with which it does business. Through the acquisition process, DoD can influence and shape the conduct of its suppliers. It can define requirements to incorporate new security measures, reward superior security measures in the source selection process, include contract terms that impose security obligations, and use contractual oversight to monitor contractor accomplishments. There are limitations upon what DoD can accomplish. DoD is not so large a customer that it can control all parts of the supplier base upon which it draws. And DoD has strongest influence over companies (large and small) with which it contracts directly. Nonetheless, DoD spending is a principal source of business for thousands of companies. The Department can reward the achievement, demonstration, and sustainment of cyber and supply chain security. It will take time to establish workable, fair processes, but these efforts should be given high priority. Where justified by urgent circumstances, the Department should consider use of interim rules to effectuate DU in near-term procurements. Adding more security measures to the "acquisition toolkit," and making better use of those measures, are ways DoD can exercise security leadership through use of its contractual leverage. This issue is elaborated more fully in *Annex I* of this report.

Courses of Action (COAs)

To succeed with *Deliver Uncompromised* requires commitment at the *enterprise* rather than the *element* level—for the Department and for its contractor base. Given the threat environment and its consequences for DoD, this report identifies a number of strategic elements—courses of action (COAs)—to address the cyber and supply chain security challenge. We classify actions into short term (ST), medium term (MT), and long term (LT), based on how quickly and urgently the Department should *initiate* action. The COAs are listed here and described in more detail further in the report:

Deliver Uncompromised

COAs		
1	Elevate Security as a Primary Metric in DoD Acquisition and Sustainment -ST	It is vital to Deliver Uncompromised that security have equal status to cost, schedule and performance. Revise DoD 5000.02 and Defense Acquisition Guidance to make security the "4th Pillar" of acquisition planning, equal in emphasis to cost, schedule and performance. Utilize acquisition tools and contract leverage and reinforce the objective of Deliver Uncompromised through the use of positive and negative incentives.
2	Form a Whole of Government National Supply Chain Intelligence Center (NSIC) -ST	Follow the example of the National Counterterrorism Center (NCTC) to integrate Title 10 and Title 50 "all source" supply chain threat intelligence and strategic warnings. Led by NCSC and heavily supported by an expanded DSS capability, extend out to include FBI, DHS, and other civilian agencies and share warnings and actions with contractors.
3	Execute a Campaign for Education, Awareness, & Ownership of Risk -ST	Educate all program and supply chain participants on the goals of Deliver Uncompromised and the breadth and nature of cyber and supply chain threats. Build and maintain training programs for DoD personnel, including measures to improve the expertise of persons assigned contractor oversight responsibilities.
4	Identify and Empower a Chain of Command for Supply Chain with Accountability for Security and Integrity to DEPSECDEF -ST	The Service Vice Chiefs are ultimately responsible for the operational readiness of acquired capabilities under their command and should require that acquisitions are conducted in a manner that values system integrity and mission resilience to Deliver Uncompromised. Cross-Service vulnerabilities and opportunities for effective threat response across the Department can be served by the Vice Chairman, Joint Staff, and possibly an accountable Supply Chain Security Executive. Organize resources to support this chain of command and hold them accountable to the DEPSECDEF for successful implementation.
5	Centralize SCRM-TAC with the Industrial Security/CI mission owner under DSS and Extend DSS Authority -ST	The Supply Chain Risk Management – Threat Analysis Cell (SCRM-TAC) is isolated from industry information sources and from operational elements supporting industry that are vital to structured SCRM analytic production. DSS has access to DIB information on classified contracts and has operational elements directly supporting industry. Consolidation could significantly improve DoD's cyber and supply chain strategic warning. This consolidation would result in a well-staffed and organized body of independent analysts, well trained in structured analytical techniques, which then could be positioned to help the program acquisition community directly address risk to programs as a function of not only threat, but system vulnerabilities and potential consequences.

COAs		
6	Increase DoD Leadership Recognition and Awareness of Asymmetric Warfare via Blended Operations -ST	Ensure that the entire DoD leadership is aware of the goal of DU and that adversaries seek not to engage the United States kinetically but instead are using cyber and supply chain attacks to exploit and degrade key national security capabilities. Educate leadership in DoD to "own" the problem and make detection and defense against these threats a natural part of everyday duties.
7	Establish Independently Implemented Automated Assessment and Continuous Monitoring of DIB Software -MT	Develop, validate, and exploit technical methods to assess and validate software security and integrity. Evaluate whether to require suppliers to use independent, continuous monitoring to detect software nonconformity and developmental abnormalities and to automate patching and recovery.
8	Advocate for Litigation Reform and Liability Protection -MT	Reduce liability exposure to encourage prompt contractor reporting of cyber and supply chain events. Encourage investment in integrity measures by providing new liability protection (e.g., extend SAFETY Act to cyber and supply chain).
9	Ensure Supplier Security and Use Contract Terms -MT	In new acquisitions, treat data security, product integrity, and supply chain assurance measures as competitive discriminators, and make end-product mission resilience a key contract award metric. Consider use of interim rules to expedite the availability of these tools for critical near-term procurements. Structure acquisitions so contractors have a profit motive to enhance security; establish standards and methods to enable contractors to earn and retain levels of independently verified established resilience. Use an independent Security Integrity Score (SIS), much like a "Moody's" rating in the financial world, which rates each potential contractor in a unified manner by an independent, unbiased third party.
10	Extend the 2015 National Defense Authorization Act (NDAA) Section 841 Authorities for "Never Contract with the Enemy" -MT	Extend existing authority to protect DoD against risks of contracting with entities under control of adversaries; provide for expedited action in high-threat situations. Empower the Supply Chain Executive to act on NSIC advice in conjunction with enforced responsibilities within the Combatant Commands against awards to sources of established assurance risk.

COAs		
11	Institute Innovative Protection of DoD System Design and Operational Information -MT	Minimize and obscure the dissemination of system design information, even within the design and build teams, but especially with vendors and contractors. Share what information needs to be shared only as long as needed and no more; utilize technical measures to protect data access and use rights at the file level.
12	Institute Industry Standard Information Technology (IT) Practices in all Software Developments -MT	Address the full span of software vulnerability through measures in acquisition and operations through full life cycle continuous security and risk reduction practices from concept through retirement. Determine where and for what programs or missions it is recommended or necessary to require submission of a Software Bill of Materials (SBOM) and require a documented Secure Software Design Life Cycle (SSDL).
13	Require Vulnerability Monitoring, Coordinating, and Sharing across the Supply Chain of Command -MT	The NSIC should serve as the focal point to aggregate vulnerability information across all sources of public and private source information, including Defense intelligence and other IC content. Each Service component in both acquisition and sustainment should look for and coordinate information sharing among themselves and with designated software vulnerability information sharing mechanisms such as Common Vulnerabilities and Exposures (CVE), Information Sharing and Analysis Organizations (ISAOs), United States Computer Emergency Readiness Team (US-CERT), National Telecommunications and Information Administration (NTIA), and Department of Justice (DOJ).
14	Advocate for Tax Incentives and Private Insurance Initiatives -LT	Work with Congress to provide tax incentives for contractors that invest in cyber and supply chain assurance, which is independently and routinely evaluated. Promote contractor use of cyber and supply chain insurance with government excess liability coverage.
15	For Resilience, Employ Failsafe Mechanisms to Backstop Mission Assurance -LT	For every critical function for which the consequence of an attack is denial of mission execution, develop means to execute the mission in a degraded state while under attack. Utilize "uncorrelated means" of accomplishing the missions in system and subsystem designs and diversity at the component, Service, or enterprise levels.

COA Details

1. Elevate Security as a Primary Metric in DoD Acquisition and Sustainment (ST).

Acquisition today is driven to meet cost, schedule, and performance objectives. Absence of incentives for security contributes to widespread compromised systems. Currently, the misalignment of risk and reward during acquisition results in systemic risks being transferred to the operational and sustainment communities without accountability. DoD must shift from measuring program progress primarily by financial considerations to a metric of durable operational readiness of acquired systems. Planning must account for the true cost of ownership of capabilities. Existing contract authorities should be leveraged to require demonstration of system integrity and mission assurance to be a deliverable, to the best extent reasonably possible; software security and system resilience should be Key Performance Parameters for contract execution. Methods of providing continuous monitoring of system integrity and having alternate means of executing mission function through system design and engineering (at the subsystem, system, and enterprise levels) and through prepared operational strategies are essential to increasing resilience and "fight through" capability.

As we introduce new and more secure processes to the private and public sectors, increased cost is to be expected. Absent adjustment, cost factors too often drive decision making away from the desired security outcome. When viewed from the asymmetric threat perspective, this is an undesirable outcome that can be avoided only through high-level priority, policy, and accountability changes. Part of the new strategy must be to transform security concerns from a cost center to a profit center. Additional funding will be needed to avoid the outcome that treating security as a "4th pillar" will produce undesirable compromises to cost, schedule, or performance. Products free of compromise represent more value than compromised products and have reduced total cost of ownership.

Means of accomplishing this objective are further discussed in this report. One important strategy is to use acquisition authority to adjust the expectations of private sector contracting partners. Few DIB participants disagree that a better job can be done with security and integrity. Many, however, are unsure how to "benchmark" what they have accomplished so as to manage their own progress and, if asked, demonstrate to DoD, or to primes or higher tier contractors, that they are worthy of trust.

To realize security as the "4th pillar" requires that the degree of risk a current or potential contractor presents to the government be continuously measured and mon- itored. We see this evaluation taking place in three dimensions: measured by the gov- ernment on currently performing contractors as a future performance indicator; mea- sured by an independent not-for-profit or federally funded research and development

center (FFRDC) much like a “Moody’s” score and made publicly available; measured privately by the contractor via the private sector to monitor their operational risk.

The commercial sector is currently developing various services to address the last measurement technique. In investigating the second “Moody’s”-like scoring, we have received a positive response, within the Department and DIB community, to creation of an independent, expert resource to create and operate a security scoring mechanism. Conceptually, SIS could be used in bidder qualification and in the selection and award of contracts. DoD and industry should partner to create an independently administered entity, perhaps a not-for-profit 501(c)(3) organization, to create standards and processes for risk-based evaluation and scoring of contractors, perhaps separating contractors into “tiers” of accomplishment, and accompanied by commitments to continuous monitoring, reporting, and self-improvement. Use of SIS would be phased in, figuring initially into acquisition decisions for Major Defense Acquisition Programs (MDAPs) and other, selected high-impact programs. Over time, as government and industry become confident in the value of SIS, they can become an important part of the acquisition process for more programs and for many levels of the supply chain. Receipt of SIS credentials could be valuable in qualification for commercial supply chain participation as well.

All too often today, DIB contractors are reluctant to price added integrity and integrated risk management into their bids because the U.S. government rarely requires it in the Request for Proposal (RFP), and they fear losing the contract where higher cost may be a decisive negative discriminator. Adding security credentials into the mix by crediting SIS as earned should motivate contractors to make the needed investments and to secure development environments, moving security from the loss column to the profit column.

The historical emphasis on “cost, schedule, and performance” is a fundamental driver for actions of DoD as well as the DIB. The DoD requirements process has not put security and integrity on an equal footing, with the result that the costs of assurance work against the usual program metrics. This approach works against the integrity of weapon platforms in today’s world of diverse and severe cyber and supply chain threats. For all aspects of the system development life cycle, and throughout oper- ation, sustainment, and system disposition, security must have higher priority. Dis- persed, agile, and evolving threats require continuous commitment from both govern- ment and industry participants. Special attention is required for software security—an area of great exposure but given relatively low priority at present.

Even after increasing the importance of security across the acquisition process, there are other areas DoD needs to address for continuous improvement over a longer term:

- The Department already invests in new technologies that can be applied to identify and mitigate cyber and supply chain threats in the near term, mid-term, and long term. Where breakthrough technologies are found, they should be rapidly

exploited. The Department already is expanding use of non-procurement "Other Transaction Agreements" (OTAs) under 10 USC §2371b. To encourage innovation by its established and dedicated contractors, the Department should be able to make OTA awards to both "nontraditional" and "traditional" defense contractors. Beyond application to prototype projects, DoD may need clarified and enhanced legislative authority for transition from prototype to production and deployment, where justified by national security considerations.

- Constraints remain in the ordinary application of today's "full and fair competition" rules to DoD acquisition at all phases of the system life cycle. Further study is needed to remove barriers to rapid, secure accomplishment of national security goals, while recognizing that competitive opportunity encourages industry partici- pation and innovation. In the same vein, the Department should consider whether pending "acquisition reform" initiatives (such as the Section 809 Commission) give sufficient weight to security. As it considers the 809 Commission recommen- dations, the Department must assess the tension between current and planned reform actions and the full scope of the asymmetric threat and response.
- DoD needs to retain the trust of its contractors, who will not invest as needed in security (or in new technologies) without assurance of opportunity for return through a fair competitive process. Program budgets must incorporate funds sufficient for higher levels of security. Product integrity, data security, and supply chain assurance should become key contract award criteria. This will remove today's security disincentive, as contractors now risk the award should they include costs that ensure delivery of uncompromised capabilities. In the competitive source selection process, DoD should incentivize bidders to make demonstrable and independently verifiable improvements to the protection of their system development and delivery processes and to sustained security over system life.
- "Transparency" and "open government" have policy benefits but expose massive amounts of exploitable information to adversaries, contributing to their knowl- edge base without counterpart exposure to the United States. This must stop. For high-impact programs and critical technologies, and in areas where known cyber and supply chain risk is present, the Department may need authority to obfuscate program and procurement information—and it will need corresponding capabilities from its private sector partners and their suppliers.
- DoD has reasons to seek more knowledge of contractor technologies, more data about as-built configurations, and more insight into supplier selection, pedigree, and provenance. These interests must be balanced with recognition that intellec- tual property (IP) is a critically important asset to many contractors, and DoD must assure its suppliers it can protect their IP, where demanded and delivered, and that contractors will retain the ability to exploit the IP of their innovations. DoD should always be mindful that its contractors must have a positive business case before they incur new costs and responsibility for software assurance or other security improvements.

For budgeting and planning, the Department needs to address the financial consequence of losing or utilizing a compromised critical system—including the ultimate cost of a failed mission for which the capability was developed in the first place.

Likewise, much of the technological advantage the United States has enjoyed is constantly eroded due to adversary theft of key designs and technologies. (There are numerous examples of nearly identical adversary capabilities that our enemies have fielded as a result of compromised acquisitions.) To provide the requisite system security or confidence—from the outset rather than as a midlife correction or enhancement—realistic resource assessments should be factored into the expected acquisition and sustainment budgets. As shown in Figure 1, the up-front costs of a representative acquisition appear significantly different for a supply chain adequately protected from inception. The apparent cost differential, however, is significantly smaller for the protected acquisition when compared to the higher total cost of ownership experienced where failure to secure the supply chain initially delivers compromised products requiring expensive attempts at correction later in program life.

Once an exploited vulnerability is discovered, a new acquisition effort will be required to replace or re-engineer a deployed system. If the process is not protected, it may be

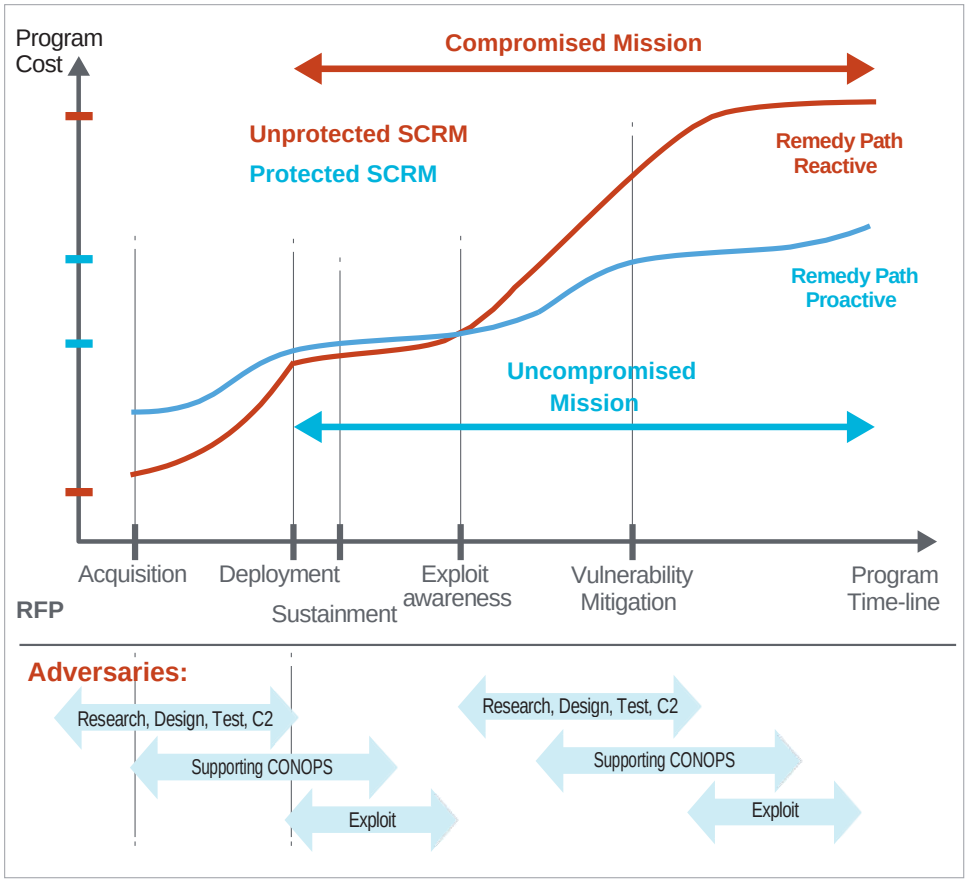

Figure 1: Cost framework for SCRM: Total cost of ownership implications

attacked again. Most serious in this entire paradigm is the loss of the ability to ensure that the mission for which the system is designed can be successfully conducted, and/or the loss of overmatch of the U.S. capability over the adversary.

2. Form a Whole-of-Government National Supply Chain Intelligence Center (NSIC) (ST).

Supply chain threats include but extend beyond the DIB. A whole-of-government (WOG) response first includes DoD and the IC with likely leadership from the National Counterintelligence Security Center (NCSC). This strategy then should then be extended to FBI, DHS, and other civilian agencies. DoD should endorse and support a national joint, inter-agency entity—the NSIC—that can aggregate all-source data, both classified and unclassified, cyber and non-cyber, and share it with at-risk operators and industrial partners. The NSIC should follow the NCTC model functionally. The NSIC would be jointly governed, likely reporting to the Director of National Intelligence (DNI), the Under Secretary of Defense for Intelligence (USD[I]), and the NCSC. The goal of the NSIC would be to support the delivery to Operating Forces of warfighting capabilities that are uncompromised and resilient (i.e., without their being wittingly or unwittingly lost, stolen, sold, inappropriately given away, degraded, or denied) through the use of all-source intelligence and warning. In the wake of the 9/11 events, President Bush worked with Congress to create the NCTC to enable the responsible exercise of new investigative and analytical authorities and information collection, consolidate data, facilitate information sharing, and provide national, state, and local warning within and across various public-sector entities. Its stated purpose is to "lead and integrate the national counterterrorism (CT) effort by fusing foreign and domestic CT information, providing terrorism analysis, sharing information with partners across the CT enterprise, and driving whole-of-government action to secure our national CT objectives." Creation of the NSIC would be a similar initiative, drawing from experience and lessons learned over more than a decade of NCTC operations. From the DoD perspective, this could be partially realized by centralizing SCRM-TAC with the Industrial Security/CI mission owner under DSS lead.

With new authorities supported by policy and legislative changes, the NSIC would be able to share intelligence-based strategic warning among all DoD components and mission owners and, eventually, with all U.S. government (USG) department and agencies. This would contribute to a national resource for threat collection and analysis that produces actionable intelligence and measures that can be utilized across the WOG at the unclassified level. This integrated resource would develop and operate technologies for threat detection, artificial intelligence, and data analytics, enabling analysts to "connect the dots" among subtle and disparate data from a wide variety of sources. Risk assessments require an understanding of system vulnerabilities and their consequences across the supply chain cycle, as shown in Figure 2.

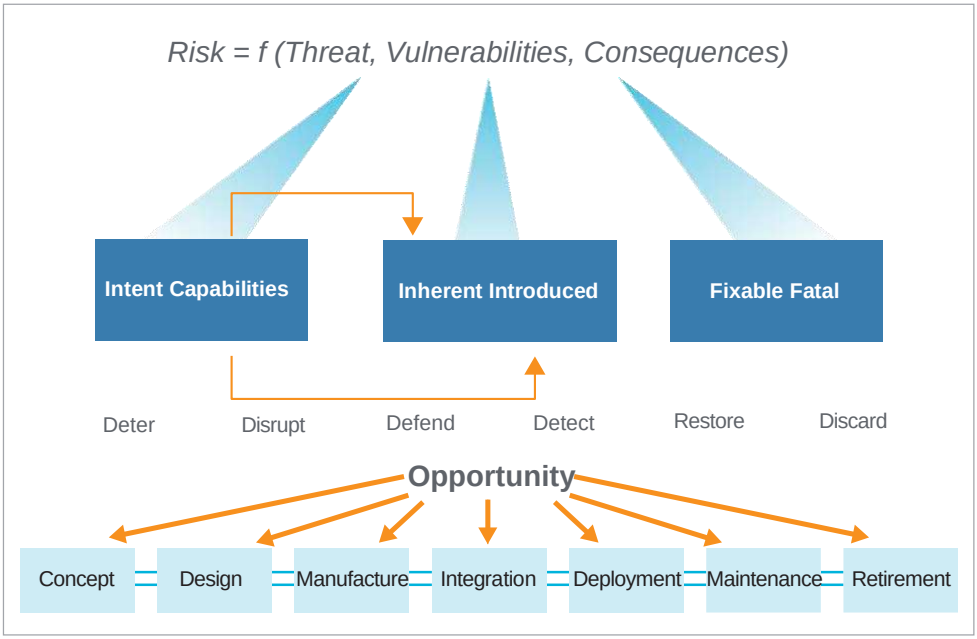

Figure 2: Supply chain risk assessment and integrated response

Risk assessment is crucial to supply chain defense and assurance of system integrity. Knowing the threat is the essential first function of successful risk assessment and supply chain defense. Existing stovepipes of legacy sectoral assignments hinder fully informed actions. Imperfect or incomplete intelligence dilutes the value of assessments and recommended actions while increasing the probability of a missed detection or false alarm. The NSIC will generate high-value threat assessments and be positioned, through joint interagency interactions, to help its component members develop measures of risk based on their specific vulnerabilities and mission failure consequences. It can combine all-source government intelligence, data from civilian agencies, and private sector reports.

As the center of excellence for supply chain strategic warning and risk assessment, the NSIC will be expert in knowing potential system vulnerabilities (inherent or introduced) if populated with representatives from the program and system engineering communities. The NSIC should be staffed with and led by trained analysts and subject matter experts who understand both the engineering technical characteristics of a potential exploitation as well as potential tactics, techniques, and procedures (TTPs) an adversary may use. Multiple, diverse stakeholders from across the development and acquisition community can use warnings produced by the NSIC. Consequences can be averted or mitigated by timely warning coupled with expert advice on response and recovery, as shown in Figure 3.

Attention must be directed to communicating strategic warnings (and action recommendations) to industry, as it is frequently the target and is best able to protect,

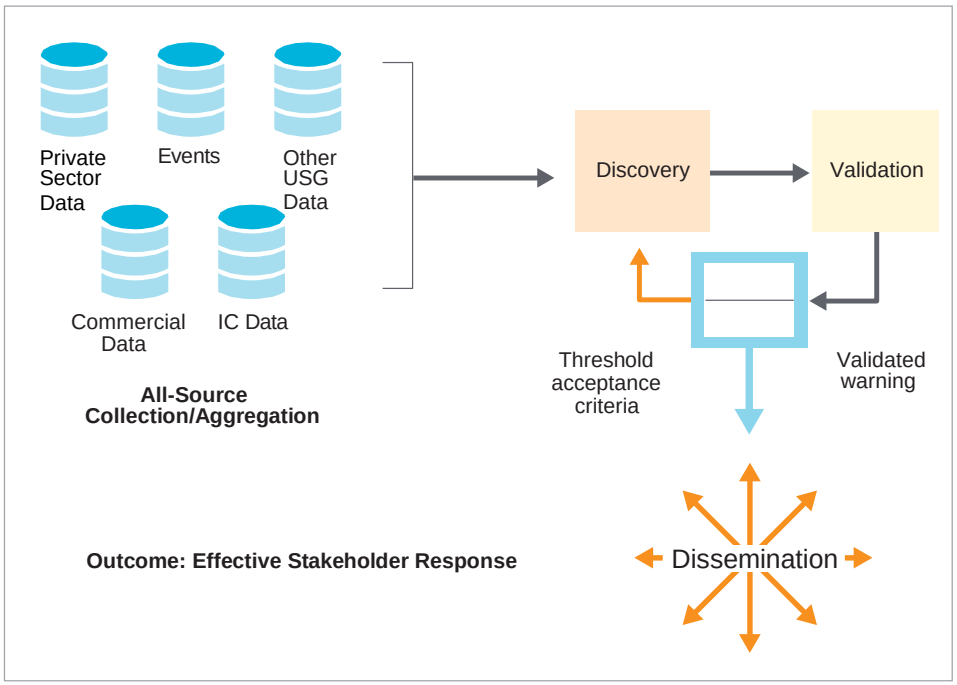

Figure 3: Distribution of source data, validation and warning, and action

detect, respond, and recover. Today, the distribution of threat information to industry—if it occurs at all—is too slow and too cumbersome. In an information age, means are needed to communicate electronically to industry. Methods must be established to share threat information and recommendations with companies who are not cleared contractors. It is difficult to translate from classified threat data into unclassified warning, but this is a responsibility that should be assigned to the NSIC. Informing only cleared industry is not satisfactory—it leaves the great majority of companies in the DIB uninformed and exposed.

This concept can also significantly reduce duplicative government purchasing of commercial data sources.

3 Execute a Campaign for Education, Awareness, and Ownership of Supply Chain and Digital Risk (ST).

Program executives and the acquisition workforce must be better informed, educated, and trained. The entire acquisition and sustainment community must become aware of the expanse of the asymmetric threat we face. As a matter of duty, supporting personnel must understand and "own" the problem—namely a lack of appreciation of how the new threat environment has made the supply chain a vector of attack and that this vulnerability continues for the entire supply chain cycle. As stated at

the outset, the supply chain is exposed to multiple threat vectors and categories. As shown by the recent experience with Kaspersky Labs anti-virus software, our soft- ware supply chains are being exploited, potentially on a massive scale, that could produce a host of nefarious outcomes. Supply chain risks extend beyond the subject of cybersecurity that often dominates the attention of Department leadership. Risks exist through the entire supply chain cycle and are not limited to networks and information systems. Deliberate insertion of non-conforming parts can sabotage mission capability. The firmware or software in electronic parts can be the subject of corruption or subversion. Adversaries, unfortunately, have many choices among attack surfaces to produce effects adverse to defense planning and mission execution.

New comprehensive curriculums on supply chain risk and asymmetric adversary intent should be readily available at the Department (e.g., Defense Acquisition University, National Defense University, National Intelligence University, etc.) and Component levels to members of the acquisition, operations, and sustainment communities.

The human factor contributes to supply chain risk. Individuals can enable, even engineer, hardware and software attacks. Insider threats remain among the most important causes of successful compromise. They can arise by design and intention, where an insider is untrustworthy, subject to foreign control or influence, or otherwise suborned, through means such as a social engineering attack. The same outcome can result from imprudent or uninformed actions without any hostile intent, by persons who lack sufficient training or who are given unmonitored or overbroad access to or authority over connected systems. Best practices for supply chain protection, in government and industry, call for improved training and better monitoring to detect, limit, or prevent insider-caused events.

Too often, within DoD and industry, senior executives pay insufficient attention to supply chain assurance—and too little investment of money or other resources—because they lack sufficient understanding of the problem and the hidden operational risks they incur. The awareness campaign recommended here is not a one-time or static exercise. Training has to evolve to keep pace with the intense rate of change in this threat/response landscape.

4. Identify and Empower a Chain of Command for Supply Chain with Accountability for Integrity to DEPSECDEF (ST).

How systems are engineered and designed in the future should be a fundamental focus for the Defense Research and Engineering (R&E) and Acquisition and Sustainment (A&S) communities. How capabilities are acquired and operated in a secure manner ultimately lies with those charged to organize, train, equip, and command—the Components. This needs to be reinforced. Consequently, the Service Vice Chief would be the official best positioned to reconcile inputs from Acquisition (cost, schedule and performance) and from the IC and CI (Security) through their development and approval of requirements and acceptance of delivered capabilities. Since supply chain security is an overarching domain—affecting requirements, acquisition, operations, and sustainment—the Service Component Vice Chiefs should own the responsibility to ensure that the acquisitions under their command and for their operations are conducted in a manner that values system integrity and mission assurance to *Deliver Uncompromised*. Cross-Service vulnerabilities and opportunities for effective threat response across the Department can be served by the Vice Chairman, Joint Staff, and possibly an accountable Supply Chain Integrity Executive within the Office of the Secretary of Defense (OSD). These resources should be organized to support this chain of command and be held accountable at the Vice Chairman and the Executive levels to the DEPSECDEF for successful implementation with authorities that span the Department.

Breadth of the Supply Chain Threat

Counterintelligence and security should not be subordinate to business and engineering professionals. The supply chain threat is larger than information and communications technology and extends beyond network-delivered cyber attacks upon information and information systems.

This authority should be coupled with personal accountability. The function affects all Military Departments as well as the fourth estate supporting agencies. Just as the corporate world is now standing up Vice Presidents for Supply Chain, and DNI/NCSC has a Supply Chain Directorate, DoD's supply chain responsibilities should be vested in these single individuals and offices with expanded authority and strong lines of interaction across the Department. Counterintelligence and security should not be subordinate to business and engineering professionals. The supply chain threat is larger than information and communications technology and extends beyond network-delivered cyber-attacks upon information and information systems. Accordingly, if system and supply chain integrity is viewed as its own mission, there are many contributing functions, among them Chief Intelligence Officer and cyber, CI and Defense Procurement and Acquisition Policy (DPAP), systems engineering and industrial base, etc. Considered as a whole, the potential function of a DoD supply chain executive reaches to

issues of technology base and national assets, such as foundries and field-programmable gate array (FPGA) assurance and supply, and the advancement of specialized assurance technologies such as automated software verification and emerging methods of authentication and measurement to protect against threat vectors from the IoT. Consolidated authority is needed for effective coordination among many contributing functions and to enable DoD *leadership* to make *strategic* decisions on approach, investment, and execution of assurance measures and to interact, coordinate, and collaborate across the WOG in a more consistent manner. It would ensure proper, accountable representations across the WOG as the nation begins to seriously deal with the supply chain security issue.

5. Centralize SCRM-TAC under DSS and Extend DSS Authority (ST).

SCRM-TAC, at present, is not well linked to USG and DoD assets performing operational intelligence, counterintelligence, security, and law enforcement prosecution. Although DoD, pursuant to instructions 5200.44, Protection of Mission Critical Functions to Achieve Trusted Systems and Networks (TSN), and Committee on National Security Systems Directive 505, Supply Chain Risk Management, has worked with SCRM-TAC, Joint Acquisition and Protection Cell, and Joint Federated Assurance Center to produce a TSN Mitigation Playbook, vulnerabilities have continued to plague the process. SCRM-TAC focuses on portions of the *intent* and *capability* of adversaries, but not Component capability *vulnerabilities* and *consequences*, which are the domain of the acquisition and sustainment communities and elements of "DSS In Transition" currently being stood up. SCRM-TAC also is isolated from industry information sources.

DSS, in contrast, has CI operators in the field, and access to DIB information on classified contracts. The capability of DSS would be more robust and scalable if SCRM-TAC were to report to DSS. In this context, "report" should be understood to mean both administrative control and operational control. Production of supply chain intelligence would be enriched and accelerated by this change and further enhanced by combining these sources with content from the FBI and other authorities as needed. These would be initial steps for the Department's participation in a wider communi- ty-wide strategic warning capability, as is the intent of NSIC as described above. A consolidated, well-staffed and organized body of analysts well trained in structured analytical techniques could then be positioned to help program acquisition and sustainment to actually address *risk* to the program as a function of not only threat, but system vulnerabilities and potential consequences.

Elements of the acquisition community within DoD, however, are attempting to use SCRM-TAC as a clearinghouse on risk—a function that cannot be provided in the construct as described above. There are many elements and definitions of risk, and DoD should standardize on its own Defense Science Board and NCSC definition, as

illustrated in Figure 2 above. In some instances, SCRM-TAC is asked to provide the "risk" of a program utilizing specific components; in others, the risk of an entire system design. In nearly all instances, SCRM-TAC is utilized relatively late in the process, well after major procurement and design decisions have been made, and lacks sufficient information to conduct such assessments. At the program acquisition planning level, there seems to be less than recommended receptivity for strategic warning, especially when related to enterprise-wide threats. We have made several recommendations to specifically address these problems and approach supply chain security with threat analysis, information sharing, and intelligence management functions that would holistically address the challenge and mitigate risk. Although a daunting challenge, this report concludes that it is vital to recognize and address supply chain threats early in the acquisition planning rather than react later in the program cycle and attempt remediation after systems are built and deployed.

6. Increase DoD Leadership Recognition and Awareness of Asymmetric Warfare via Blended Operations (ST).

Our adversaries have demonstrated they wish to engage us *not* kinetically but rather asymmetrically. The landscape of potential non-kinetic adversary attacks is broad indeed. The United States lacks a comprehensive deterrence against these actions.
We worry and debate over the possibility of a lawsuit by a contractor or supplier who is intentionally jeopardizing mission assurance while China openly discusses "lawfare" as a *strategy*. All levels of DoD leadership must fully understand the adversary's strategic intent to act through *all of* the supply chain (hardware, software, and service), cyber IT, cyber-physical, and the human element (witting or unwitting), and adjust the Department's response and posture accordingly.

As with other military domains (air, sea, land, and cyber), asymmetric warfare is, among other characteristics, complex and destructive, with offensive and defensive capabilities and a commitment to action (strategies and tactics). National leadership must recognize that we are currently in a state of war within all of these domains via asymmetric actions. The ability to take a whole-of-government or whole-of-society approach to combat an adversary's attack must take on the same level of investment, planning, and implementation we would exercise for a more conventional attack on our homeland and allies. A key part of the strategy is to reform our acquisition policies and authorities to combat an adversarial manipulation of the supply chain and work with the private sector.

The impact of this insidious asymmetric warfare against the United States has gone largely unrecognized. Some refer to this domain as conflict in the "gray zone" because of its comparative absence of visibility and the continuing challenge to attribution to responsible actors. Awareness of the true complexity of the asymmetric threat is distorted by the very nature of the technical and operational approaches our adversaries are employing in their attacks. Our response has been stunted because

of the lack of public awareness and understanding of adversaries' intentions, capabil- ities, or hostile acts.

Most nation-states have a full complement of technologies available to achieve their asymmetric strategies and goals. The development of effective approaches to take advantage of inherent vulnerabilities in complex systems is well within their capabil- ities and the access to our systems they enjoy through our supply chains. Likewise, through reverse engineering of complex systems, nation-states are capable of intro- ducing or inserting vulnerabilities for exploitation.

This full-spectrum threat is not only capable of developing technical products, but is coupled with the requisite operational tradecraft, training, access development, and resources to mount an effective attack. All levels of DoD leadership must fully under- stand the adversary's strategic intent to act through blended operations.

Even the relatively unsophisticated actors, with limited or incomplete knowledge of our systems, can develop capabilities that have a profound impact on our offensive and defensive capabilities and infrastructures; to deny us the ability to effectively uti- lize them to achieve our tactical and strategic objectives. These capabilities are often available through third-party venues that leverage nation-state investments, often at low cost.

A significant shortfall in our defense is the lack of visibility to identify our adversaries' signatures or implementation across multiple domains and critical infrastructures. Indeed, misattribution of their actions is an important part of their strategy. In part this is due to the segmentation of responsibility we have imposed on ourselves for decades. Today, responsibility for risk to DoD capabilities is dispersed across depart- ments and agencies and among many DoD Components and entities. The result is that leadership views their roles and responsibilities, with respect to security and acquisition integrity, through many different lenses. Each lens provides a limited view of the complete landscape in which we procure and maintain our weapon systems, exercise command and control, and utilize various infrastructures. A comprehensive, seamless approach is required to provide the requisite awareness, support, and *response of all participants* throughout the WOG enterprise.

As it is for other warfare domains, it is essential that an integrated approach to an education program, tailored for the various levels of participants from senior leader- ship through subject matter experts, provide a complete awareness of current pro- curement requirements and processes, the availability and utilization of intelligence, adversary TTPs, and the fundamental construct of adequate risk assessments and mitigation.

In the near term, we need to better utilize or leverage current authorities of depart- ments, institutions, organizations, and agencies, and re-establish or confirm their roles and responsibilities, with the goal of reducing overall administrative burden,

redundancies, and costs, while vastly improving their effectiveness to combat asymmetric threats.

7. Establish Independently Implemented Automated Assessment and Continuous Monitoring of DIB Software (MT).

Mission-critical systems depend upon complex software assemblies with imperfect assurance. Where DoD programs require the DIB to develop custom software or exploit commercial and open-source software, DoD should require the application of automated validation tools and subject software to independent continuous monitoring for nefarious behavior. Independent validation is especially important where DIB primary and subcontractors use agile or DevOps environments. This may require the creation of a new, independent organization to evaluate the inherent risk within applications and processes, but this is already beginning to happen in the private sector. Ideally, this service should be provided by an independent, unbiased organization such as a not-for-profit or FFRDC. Preliminary conversations indicate that industry is more likely to embrace an assessment or credentialing organization if it is independent of government, though it also must have strong ties to government and the ability to receive and act upon information unique to government sources, including classified information.

Software security is a special risk. Some say, "software is the new hardware" or "software is everything." Software developers rely increasingly upon third-party components for today's complex applications. Much of the software used in devices and systems across all technology types is from multiple sources about which, in all but exceptional cases, little is known. Should adversaries insert malicious functionality into open-source components of software code or exploit latent vulnerabilities, the resulting corruption of the software tool chain can have pervasive and durable effects; these may not result in immediate harm but can be activated at the time chosen by an adversary. Hence, static assessment or static certification by itself is insufficient to ensure protection.

8. Advocate for Litigation Reform and Liability Protection (MT).

For DoD (and the WOG) to achieve and sustain cyber defense and supply chain resilience, government and industry must work together. Government laws and regulations can shape desired industrial behavior. Litigation and potential legal liability also figure prominently as both incentives and constraints on the way industry accomplishes security objectives. This is especially true in the production of software. DoD can lead efforts at litigation reform to manage liability risks and therefore to encourage positive industry behavior and facilitate timely government actions. This subject is addressed in *Annex II.*

9. Ensure Supplier Security and Use Contract Terms (MT).

Industry plays a crucial role. While DoD funds programs, conducts acquisition, and exercises oversight, it relies on the innovation and resources of its industrial base to execute programs and for the technological advantages our warfighters need. Therefore, in dealing with its contractors, DoD should be creating the best environment to ensure supplier security and resilience. Industry is the source of the new technologies to protect those technologies and can provide innovative means, operational and technical, to defend them. Industry often can respond more quickly and with more advanced, difficult-to-defeat technical measures than can government counterparts. Getting the best and most out of industry should be DoD's objective and is a primary element of *Deliver Uncompromised*. Adversaries know to attack those elements of the supply chain that have done the least. For this reason, DoD has to strike a balance—*incentivizing* best practices and company initiative on the one hand but *requiring* sufficient security measures on the other. The ultimate goal of the Department, to reduce *operational risk*, is promoted by measures that supplant *compliance* considerations as drivers and add *positive incentives* for companies to continuously examine and improve their systems and practices. This subject is addressed in *Annex III*.

Elsewhere in this report, we recommend a WOG approach to addressing supply chain resilience and integrated risk management. In some respects, this is only half the equation. As the character of warfare has changed, future battles may be fought, lost, or won within the industrial base. That base includes not only suppliers and integrators that specialize in defense acquisitions, but many other sources—some "commercial" and even "commercial off the shelf (COTS)"—whose products and services are incorporated in defense systems and infrastructure operation. For this reason, next-generation security merits a "whole of industry" approach. Beyond what can be accomplished with companies that are government contractors, leaders should consider how to establish and implement security and resilience standards to cover commercial sources and COTS suppliers. Otherwise, vulnerabilities at the weakest link remain. Because DoD is a major purchaser of supplies and services from the acquisition vehicles of other agencies, such as the General Services Administration Schedule 70 Governmentwide Acquisition Contract or the National Aeronautics and Space Administration Solutions for Enterprise-Wide Procurement, it will be necessary to extend the coverage of contract measures and validation methods to the contracting vehicles of civilian agencies for the acquisition of commercial IT products and product-based services. As demonstrated vividly by the experience with Kaspersky Labs software, attention must extend to commercial software as well as open-source software content that drives systems on which the government and the private sector rely.

10. Extend the 2015 National Defense Authorization Act (NDAA) Section 841 Authorities for "Never Contract with the Enemy" (MT).

The Combatant Commands, being forward-deployed outside the Continental United States, often in hostile and always in high CI threat environments, have unique supply chain and system integrity acquisition (contracting) and operational needs. They lack dedicated DIA/DSS interface, receive little in the way of warning, and when they do, there is no formal requirement for the Commander to act on such potential threats. Formation of the NSIC, as recommended above, would be extremely helpful to the Combatant Commands, as they would ultimately have a handful of liaisons with ready access to threat intelligence. In the meantime, adequate Joint Staff representation with DSS's expanded authorities as elsewhere recommended would support NSIC or interim entities.

To directly address these shortcomings, DPAP has drafted legislation that includes modifications of sections 841-843 of the NDAA, which goes back to 2012 and was modified in 2015. The draft legislation, which was approved by OSD, the Combatant Commands, Office of the General Counsel, and OMB, to shore up operational environment contracting overseas, includes proposed modifications for the 2019 NDAA. DoD should actively engage with Congress and the Executive Branch to build a strong support base to extend these authorities to the Combatant Commands. The recommendations that concern extension of these statutory authorities are summarized in *Annex IV.*

Contractors also have a role to play to avoid purchases from compromised and high-risk sources. Already, leading commercial companies go to great lengths to verify and monitor the trustworthiness of their supply chain. These should become prevailing if not expected practices within the defense supply chain. For certain types of key systems or technologies, it may be necessary to limit suppliers to U.S. sources or to validated international sources. Companies in the DIB should be encouraged to take measures to identify, mitigate, and then eliminate dependencies upon at-risk foreign sources.

11. Institute Innovative Protection of DoD System Design and Operational Information (MT).

Much of U.S. defense and intelligence has confused the concept of "need to know" with "classified." As a result, vast amounts of information regarding system design, trades, vendors, parts lists, operational details, etc., are usually available to *anyone* on the program, and much of it is available to the general public if they desire to go looking for it. Yet the commercial world treats its IP much more carefully and is much stricter concerning not only *who* they share their information with but *how*. Minimally persistent information sharing—much like that used in applications such as

Snapchat—in which minimum information is shared with a subcontractor or vendor via a thin-client network and only available for as long as needed—is becoming industry best practice in some circles. Some elements of the DIB are voluntarily using such techniques on defense contracts without being asked to by the USG. DoD could require such state-of-the-art techniques and compartmentalization based on need-to-know as a part of its basic information protection plan within the Department as well as contractually with suppliers.

Furthermore, where a program is in its life cycle is a determining function of what kind of protective measures are available (see Figure 2). Key capabilities that have been in operational use for decades are likely well known by our adversaries. As a result, their operational assurance risk should be considered high, and for the most vital ones, DoD should seriously consider increasing the ambiguity and uncertainty of the adversary with respect to these programs. Programs early in their life cycle are the easiest to protect, but that commitment needs to be made *at conception* and maintained through the life cycle.

There is a wide range of special options available for the most important programs, but each is different, depending on where the program is in its development cycle (from conception through retirement). The options exercised will become classified, but there will be tens of these, not hundreds.

12. Institute Industry-Standard IT Practices in all Software Developments (MT).

Software Bill of Materials (SBOM)

The software industry has progressed tremendously in the past several decades. Software is the “glue” that binds together components, systems, subsystems, sensors, etc. It is through software instructions that information moves to produce data-based decision making in complex instantiations of hardware. As software has acquired central significance in many systems of ever-expanding complexity, great change has occurred in how software code is created, compiled, and used. The software of complex systems is often built from many discrete software modules that perform distinct functions. Modern software can be rapidly or even automatically assembled. In this respect, software development increasingly resembles manufacturing processes. Thus, it is likely that any given custom or commercially available software system is, in fact, a product of a varied and often complex supply chain. Yet, all too often, and especially with open-source software, little is known concerning the pedigree of the software developer (who owns or controls the developer, for example) or the provenance of the software components (what measures were taken to ensure its integrity and trustworthiness).

In recognition of this fact, good industry practices increasingly mandate the use of an SBOM that identifies the provenance of the various components. If done properly, an SBOM can estimate the overall risk of the ensemble of software elements based on the risk of the individual elements. A dramatic increase in the security of operational software instantiations could be achieved by combining independent continuous monitoring of the development system and operations, independent integrity scoring of the contractor/vendor, and some type of real-time anomaly/event detection for the operational system.

Tracking software composition across the supply chain beyond the primary contractor/vendor is highly recommended and can be leveraged as a contractual term. Acquisition contract language should require the disclosure of commercial, open-source, and third-party software components as part of an SBOM. These disclosures should be independently verified. Knowingly providing false information should be subject to liability for damage and other sanctions against responsible contractors.
DoD should not continue to do business with or use software sources that fail to deliver software uncompromised and those that submit false, misleading, or incomplete information. Taking such an approach as this is believed to be consistent with trends in the private sector and is recommended as a tenet of best industry practice.

Secure Software Design Life Cycle (SSDL)

The SSDL is a process DoD could apply to integrate security and integrity into the software development process from concept through decommissioning. This life-cycle approach to the software integrity challenge, blending security and risk identification and management across the acquisition and sustainment boundaries, will require true institutionalization of integrity and accountability in the chain of command. This process should begin with planning and requirements and continue through architecture and design, testing, coding, release, and maintenance. Simply “testing” or “certifying” once during Initial Operating Test and Evaluation is not only inadequate but signals to the adversary exactly when and how to “get past the gate” of security. By utilizing SBOM with continuous monitoring of the development environment coupled with SSDL techniques, this exposure can be reduced, resulting in a tangible realization of software integrity and a greater understanding of risk. The objective is for software security and integrity to become a *continuous* rather than a time-specific concern—from concept to retirement.

DoD can take a wide variety of SSDL approaches to software development that go well beyond the scope of this report. Industry best practices include use of code scanning tools both statically and dynamically and the establishment of realistic secu- rity goals and the means to measure progress toward them.

13. Require Vulnerability Monitoring, Coordinating, and Sharing across the Chain of Command for Supply Chain (MT).

While execution of a specific exploit against a particular program or capability may seem local, in reality, it is likely part of a more organized asymmetric offensive strategy against the United States' ability to project force or for the adversary to collect intelligence, steal IP, or otherwise gain a competitive advantage. Therefore, information sharing and the results of vulnerability monitoring are critical elements of an integrated defense. While the NSIC will provide strategic warning and insight into the risks of dealing with individual vendors/contractors or components, valuable information for the counterintelligence picture across the Department comes from the programs and operational Components in the form of self-reporting and observations of anomalous or suspicious activity or behavior. Currently, even within a Service Component, clear examples of incident reporting and potential exploitation are rare. While DSS enjoys a reliable stream of sharing from the DIB, its current purview is constrained to cleared facilities and the contractors using those facilities. Each Service Component in both acquisition and sustainment should look for and coordinate information sharing among themselves and with designated software vulnerability information sharing mechanisms such as the CVE® database, ISAOs, the NTIA, the National Cyber Awareness System of US-CERT, and reports of the Computer Crime and Intellectual Property Section of the DOJ. Many of the COAs recommended by this report reinforce this discovery and sharing.

A vendor vetting database should be created and available to all. This could be championed out of DSS, DPAP, and NSIC. This database would house relevant acquisition, intelligence, and security information related to supply chain risk.

14. Advocate for Tax Incentives and Private Insurance Initiatives (LT).

There is a range of viable options for incentivizing members of the DIB to embrace cyber and supply chain security—especially the smaller subcontractors that are likely to be the most attractive targets of hostile actors. A central theme of this report is that DoD should examine ways to transform risk-management security functions from a cost center to a potential profit center—and a critical differentiator in the source selection process. We have identified and briefly described two categories that would produce positive financial incentives for the DIB—tax and insurance—and suggest other business initiatives to influence private sector actions. These measures would serve the congruent purposes of protecting contractor IP and protecting DoD tech- nical data and other sensitive but unclassified information. DoD can make legislative proposals or otherwise advocate to Congress. This subject is addressed in *Annex V*.

15. For Resilience, Employ Failsafe Mechanisms to Backstop Mission Assurance (LT).

Beyond exploitation aimed at intelligence collection or harvesting of U.S. intellectual property, the objective of asymmetric adversary warfare is to degrade DoD's ability to execute its missions. The adversary has choices among targets. It may be able to achieve its ends largely, even entirely, through asymmetric operations launched against the private sector. An example is where an attack upon commercial logistics systems or transportation infrastructure denies the United States the ability to move forces when and where needed. Adversaries likewise target DoD capabilities directly. As shown in Figure 2, the ultimate exposure of such actions is where the consequence of attack, in the risk equation, produces a "fatal" result—denying readiness for mission. Means must therefore be identified to understand what critical systems are at risk of attack that could reduce them to a non-mission-ready state, and institute techniques that restore systems to a "fixable" state where mission execution continues even in a degraded state until full restoration is achieved.

The high-level, fundamental means of accomplishing resilience, from a system design perspective, is the use of "uncorrelated means of accomplishing the mission." In other words, there should be no single points of failure for critical mission elements—resiliency should be realized through smart system design, implementation, diversity, and redundancy. This can be done at the component, subsystem, system, and even enterprise level. For example, if command and control is singularly dependent upon satellite communications, then alternate means of enabling even degraded communications must be designed into the system to provide a failsafe mechanism. Ideally, different design teams, vendors, and contractors would design these failsafe backups, and collective knowledge of the entire system operation would be closely held. Realistic exercises should be conducted to inform mission owners of where they are at risk and how to recover.

A similar practice is utilized in the commercial world today, although often driven by the extremely high financial cost of loss of operational capability due to non-malicious events. For example, Amazon Web Services has multiple levels of failsafe mechanisms built into its architecture at the board, rack, building, micro geo-location, and macro geo-location—originally to ensure that when someone drops an item in their shopping cart, that information is not lost should a portion of the system fail.

This same type of integrated, integrity-based thinking needs to become pervasive within system engineering and design of DoD capabilities and could be a focus of OSD(R&E).

Conclusion

As a nation, we are at a watershed moment as the character and arguably even the nature of war is changing. There is now overwhelming evidence that adversaries employ blended operations in asymmetric warfare to steal our intellectual property, compromise our technical information, and to degrade, deny, or otherwise damage our factories and critical infrastructure. It is necessary to cast aside historical assumptions that have proven more to trap us than to protect. It is time to put legacy methods behind us. While we should be informed by the past, we should not become its prisoner. Therefore, the Department of Defense must lead initiatives to reduce exposure to hostile acts and enhance security of assets and capabilities. There are many initiatives to be combined and managed. Some affect the internal operations of the Department. Some are directed at the industrial base upon which DoD relies. And some require the coordination of resources among intelligence sources so that threat information can be rapidly processed to produce and appropriately distribute actionable strategic warning. The effort will take time and will present many challenges—but perpetuation of the status quo is unacceptable. We are past the time we can be satisfied with responses that are incidental or merely incremental.

The *Deliver Uncompromised* strategy merits leadership attention and immediate action. In the near term, *Deliver Uncompromised* means that mission owners can trust that the industrial base will not confer technical information or information advantage to adversaries. Means to achieve *Deliver Uncompromised* include elevating *security* as a primary metric for DoD acquisition, forming a Whole of Government National Supply Chain Intelligence Center, using existing acquisition authority and contracting leverage, and taking measures internal to the Department to empower leadership, better inform decision makers, and use accountability to spur results. This all needs to be done in concert with an incentivized and rewarded DIB.

DoD requires a Global Campaign Plan that goes well beyond countering terrorism— one that will defeat asymmetric threats being perpetrated against the United States. This report can serve as the foundation for a comprehensive strategy to defend the procurement and sustainment of the capabilities upon which DoD depends.

Annex I: Contractual Measures

Efforts are needed to create standards for secu- rity sufficiency that comprise a "standard of care" expected contractually of every company in the DoD supply chain. Medium and small-sized suppliers frequently complain that they need consistency and coordination in establishing security credentials to the satisfaction of DoD or higher tier contractors. We recommend that DoD and industry establish a system and process to produce SIS, as introduced earlier in this report.

Industry is likely to have more trust in such a system if it is administered by an independent, expert, pub- lic-private body that would work with government, standards-setting bodies, industry, academia, techni- cal specialists, and other interested parties. This entity would be able to receive classified materials so that the rating system would reflect the changing threat landscape. We envision the organization acting as an accrediting intermediary. DoD could establish levels or tiers of security sufficiency (Low, Moderate, and High, for example). The public-private entity could work with and for industry to guide, assess, accredit, and even authorize. Credentials received by a supplier through this process could be leveraged to demonstrate assurance to many potential defense customers and other public (or private) sector clients.

This report contains various contracting recom- mendations. Some will require new regulations and contract clauses. A few might require new statutory authority and rulemaking. To accomplish these will be time-consuming, and there may be uncertainty and questioning from some in the DIB. Those are not rea- sons to refrain from new action. The plain truth, how- ever unfortunate, is that too many of the Department's present programs and operations already are compro- mised. Expecting better from our adversaries in the future, or believing that these problems will resolve themselves, would cause optimism to triumph over reality. However difficult, bold new action is required, and the acquisition process—broadly understood—is essential to positive change. Below, we summarize key concepts for using contractual leverage:

The "Plain Truth" Calls for Bold Action

The plain truth, however unfortunate, is that too many of the Department's present programs and operations already are compromised. Expect- ing better from our adversaries in the future, or believing that these problems will resolve themselves, would cause optimism to triumph over reality.

1. Achievement of minimum security measures can be required for companies (at any level) to par- ticipate in the defense supply chain for certain acquisitions.
2. Beyond trusting contractors to provide "ade- quate security" as required by DFARS 252.204- 7012, the Department can establish measures and methods to review and assess actual accomplishment of promised security measures.
3. The Department can work with industry to estab- lish metrics for enterprise-level accreditation of accomplished security using expert third par- ties for assessment. Use of SIS could motivate improved industry measures.
4. In determining eligibility for new awards, the Department can review the adequacy of required security measures, consider SIS, insist upon specified levels of accreditation, or otherwise

direct requiring activities to make authorization decisions based on their assessment of perceived risk for their specific missions.

5. Where competitive source selection methods are used, DoD can treat security as an evaluation factor and make superior security a positive competitive discriminator. RFPs would inform companies of what is expected and how it will be reviewed.
6. For software assurance, in appropriate contracts DoD can require source code disclosures, minimum maintenance and patching, continuous monitoring, and mandatory event reporting.
7. Using established safeguards, methods, and practices, DoD could establish minimum "standards of due care" such that gross negligence could expose contractors to civil liability or limit their eligibility for future contracts or subcontracts absent satisfactory corrective measures.
8. Contractual "safe harbor" provisions could be used to encourage positive security actions by contractors and to remove present barriers to prompt incident reporting and full cooperation with DoD's assessment and remediation measures.
9. Once appropriate standards are in place, DoD could require contractors to have specified levels of cyber and supply chain insurance.
10. DoD can improve its oversight of contractors to include review of cyber and supply chain assurance measures. DSS can extend its present responsibilities beyond cleared contractors.

Annex II: Litigation Reform Measures

Areas Where Litigation Exposure Should Be Reduced

It is advantageous for DoD that industry reports promptly and fully on known or suspected cyber and supply chain attacks and discovered software vulner- abilities. The DIB and its suppliers need to improve their record of reporting cyber incidents, supply chain vulnerabilities, and assurance failures. Potential litiga- tion risk is part of the problem—both for industry and government.

- Contractors need "safe harbors" to promptly share suspicious or potentially derogatory information with NSIC for its assessment of and appropriate action on potential cyber and supply chain exploitations. Legislation or new regulation may be needed to establish that contractors making good-faith, informed reports on cyber and supply chain attacks will not be exposed to third-party lawsuits challenging the validity of such reports or seeking damages against the reporting entity. For this to occur, contractors need assurance that NSIC can protect the identity of reporting entities and keep reports confidential. NSIC will need to develop protocols on how to disseminate threat and response information based upon the reports.
- DSS has demonstrated the ability to leverage its existing contractual authorities for facility clearances; more robust information sharing on behalf of contractors would go much further with appropriate liability protections. Companies seeking to be treated as "trusted suppliers" can be asked to agree to higher obligations of event reporting and terms of participation in information sharing. New initiatives should be informed by present experience, such as that acquired by the Defense Microelectronics Activity in its trusted accreditation program. In this initiative, DoD must remain cognizant that suppliers will accept costs and burdens of specialized security regimes only if there is a corresponding business case that covers the costs and offers opportunity for profit.

- The government may need litigation reform to act upon industry reports or inputs from other public or non-public sources. Reporting is likely to have the highest value where it can be accomplished quickly. Speed is of the essence. Delays caused by legal review and process can work against the national interest. If the government acts to publish and disseminate contractor-sourced information, it may be exposed to third-party liability under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, unless it can claim an exemption such as that for "discretionary function." The exigencies and gravity of cyber and supply chain threats may call for national security exceptions to standing laws and regulations. For example, a new FTCA exception could provide a basis for the federal government to claim immunity from third-party claims arising from cyber alerts and actions.

  DoD and WOG should have a set of tools to benefit its contractors and their suppliers who invest to develop new technologies for cyber and supply chain defense. These can run the gamut of functions—Identify, Protect, Detect, Respond, Recover—that the National Institute of Standards and Technology (NIST) has identified as the Core elements in the *NIST Framework for Improving Critical Infrastructure*.

- The *SAFETY Act*, administered by DHS, encourages investment in anti-terrorism technologies through liability limitations for qualifying, approved products, equipment, service, devices, and technologies. DoD should encourage Congress to extend this aspect of the SAFETY Act to cyber and supply chain security investments. Companies that make such investments and utilize new security systems should face reduced exposure to third-party and government claims following a cyber or supply chain attack. The immunity should extend also to subcontractors and suppliers who employ validated technologies.

- Industry needs to have confidence in the efficacy and expertise of the persons or entities assigned the responsibility to assess and qualify the cyber and supply chain technologies eligible for SAFETY Act liability protection. Consideration is warranted of assigning this function to a trusted third-party intermediary (public or private) that can concentrate expertise, promote new standards and best practices, secure valuable contractor IP, and coordinate with DoD and other government resources for their input and, if appropriate, approval. Potentially, the same independent intermediary that conducts assessments and assigns SIS could perform the SAFETY Act reviews.

Areas Where Liability Risk Might Be Increased

With limited exceptions, it is at best uncertain where or under what circumstances any DoD contractor would face liability to DoD for damages should it fail to fulfill minimum contractual requirements for supply chain and cyber security. Under present law, action could be brought under the False Claims Act for knowing or reckless disregard of cyber obligations, or for intentionally false promises to operate with security that were not fulfilled. To be sure, no contractor or commercial enterprise can guarantee that it will not suffer cyber or supply chain attack, and the fact of attack should never be treated as evidence, itself, of fault on the part of the entity attacked.

Nonetheless, if there is little or no prospect of monetary liability to the DoD customer, and where there may be no financial consequences for bad cyber and supply chain hygiene, some companies may ignore their promises, and others will fail to commit sufficient resources and attention to security improvement. DoD should examine where and on what basis, and with what process, it could expose contractors to contractual damage liability for failure to take reasonable and timely cyber and supply chain assurance measures. Even if the bar is set very high for a contractor to be held liable for breach of expected minimums for assurance, the prospect of such litigation and potential liability may have salutary effects upon

management commitment and company actions. Moreover, the Department may consider whether to seek legislative authority and a regulatory basis to hold its contractors, on selective programs, liable for gross negligence in failure to fulfill cyber and supply chain commitments.

Software liability is an area that merits close atten- tion. Vulnerabilities arise from poor software security, yet it remains the prevailing commercial practice not to make users and operators responsible for software-caused failures and to immunize those who developed the software. For its mission-critical and specially developed software, DoD can demand higher security across the software development life cycle, especially in projects that involve agile or DevOps environments or software refresh during sustainment. Much of the software used in contemporary systems has open-source components with uncertain pedigree or provenance. DoD should consider when to require an SBOM and can encourage Congress to hold hearings on whether to change the law on software immunity—perhaps for certain areas of commerce related to national security and industry and key infrastructure.

It remains true that a hostile actor instigates software, cyber, and supply chain attacks, and therefore, the initiating responsibility resides with the attacker. Today's security environment, however, is one in which such attacks are a fact of life. The attacks are recurring, persistent, diverse, evolving, and highly destructive. In this environment, those who own and operate systems at risk of these threats have a duty of due care to take actions *reasonable*, in light of what they know of threat, vulnerability, and consequence, and *responsible*, considering their resources and technical capabilities. Some analysts have argued that the prospect of civil litigation in the courts and liability for damages will prove important to move the whole of industry to act. The standard of care will figure prominently in what companies do to mitigate litigation risk. DoD has a responsibility to establish and incentivize cyber and supply chain standards that will set a standard of care that is achievable and affordable for the DIB and its suppliers.

Annex III: Ensure Supplier Readiness and Use Contract Terms

The Department should communicate to all levels of the supply chain that integrity is both expected and rewarded, for continuing DoD business, and that *delivering* uncompromised and resilient products is an integral part of contract performance—equal (at least) to cost, schedule, and performance.

Supplier Readiness

DoD can exercise creative options to ensure supplier readiness.

- DoD can work with industry stakeholders to establish cyber and supply chain security standards and practices, and software assurance measures, building off the increasing volume of NIST work that integrates cyber and supply chain measures.

NIST has issued a proposed Revision 5 to SP 800-53 and the Cybersecurity Framework v. 1.1, which encourage important progress in elaboration of combined cyber and supply chain measures. Indeed, the just released SP 800-37 Revision 2 includes the following concise statement of purpose:

"To integrate supply chain risk management (SCRM) concepts into the RMF [Risk Management Framework] to protect against untrustworthy suppliers, insertion of counterfeits, tampering, unauthorized production, theft, insertion of malicious code, and poor manufacturing and development practices throughout the SDLC [System

Development Life Cycle].”
Draft SP 800-37 Rev. 2, at vi.

- As companies act to implement these safeguards, they can be evaluated and assigned into tiers of relative security. Previously in this report, we introduced the idea of SIS. A similar approach is used elsewhere in the federal government. For example, the NIST Cybersecurity Framework articulates four Implementation Tiers in a range from Partial (Tier 1) to Adaptive (Tier 4). Federal Information Processing Standard (FIPS) 199 distinguishes among security impact at levels of Low, Moderate, and High. As elaborated in FIPS 200 and NIST SP 800-53, obligations for controls and enhancements are linked to the impact level of information at risk. The implementation of the Federal Risk and Authorization Management Program (FedRAMP) is particularly instructive. FedRAMP provides a standardized approach to security for cloud computing and for the authorization of cloud services for civilian agencies. In simplified form, FedRAMP produces Authorization to Operate for federal customers for Low-, Moderate-, and High-impact systems. DoD has special requirements for cloud, but again it is a hierarchy of information sensitivity, with more security required for higher Impact Levels. The Defense Information Systems Agency has produced the *Security Requirements Guide,* which adds overlay of both process and substantive security requirements building on FedRAMP, again relying on NIST SP 800-53 as the catalog of available controls.

- For cyber and supply chain assurance, we envision that DoD can work with industry to specify which assurance methods and measures must be met for a contractor to earn a Low, Moderate, or High SIS. Each requiring activity (or each prime contractor) can decide whether its program requires the additional measures (and expense) of a supplier with a higher score, and what evaluation credit to extend for competitors with different score levels. For FedRAMP, the security assessment process is the responsibility of independent third-party assess- ment organizations working to government-ap- proved process and standards. For the SIS pro- cess, we see merit in following a similar approach that allocates the assessment and scoring respon- sibility to accredited third parties.

- Both suppliers and DoD will benefit if security credentials, established once, can be leveraged across all DoD Requiring Activities. The same approach—“do once, use many times”—can be applied to assessment of suppliers and SIS. Documentation that supports the assigned rating can be available for review by requiring activities within the Department. This prevents duplication of assessment. DoD can require that companies awarded an SIS credential conduct continuous monitoring, and the status as a holder of a credential can be subject to review and renewal at specified intervals. This too is like FedRAMP. It also is similar to the process DSS uses in the grant of Facility Clearance Levels.

It may take some time to establish this credentialing regime, to establish expected methods and assessment process, and to resolve questions of roles and missions among many potentially interested stakeholders. There can be high payoff, however.

Acquisition and Contract Terms

DoD has great influence, through the acquisition process, on the companies that constitute the DIB supply chain. The Department can make better use of these tools to achieve and sustain cyber and supply chain security.

- DoD, through DFARS 252.204-7012, requires all its contractors to have “adequate security” to protect Controlled Unclassified Information (CUI), relying on the 110 safeguards in NIST SP 800-171. Today, there is no method or requirement for assessment, as the implementation is largely trust-based. More- over, DoD has not assigned a qualified resource to review the actual security accomplishments of

its suppliers. Further, the SP 800-171 safeguards treat all information as having essentially the same, Moderate impact should a breach occur. In addition, DFARS and SP 800-171 focus on the protection of information on or in information systems—with little coverage of supply chain security or operations technology as distinct from IT.

- In the dynamic threat environment, the Department needs to pursue a strategy and campaign to elevate the level and expand the breadth of security achieved, and to implement means of review, assessment, approval or authorization, and oversight. These must be pursued gradually because the present requirements, notwithstanding their limitations, have proven to be very difficult for a sizable percentage of the DIB. DoD must retain the innovation and versatility of the smaller members of the industrial base, and it must work with its prime contractors to assist companies struggling with security requirements. Specifically, DoD should encourage primes and their small business suppliers to shift information systems and applications to qualified, secure cloud service providers. The security outcome for many companies using the cloud will be superior compared to measures taken for on-premises systems. Updates, information management, and cybersecurity are all improved with a cloud provider, since responses can be done on scale and quickly, by not relying on individual patching. DoD is moving aggres- sively to the cloud, and requiring the DIB and its sub-tired suppliers to follow suit is a logical and practical solution.

- The Department has its greatest leverage, of course, over prime contractors. As evident from Enclosure 14 of Department of Defense Instruction (DoDI) 5000.02, DoD already includes cyber as an objective in the acquisition planning for MDAPs. Similar improvements could be made to DoDI 5000.02, and to the accompanying Defense Acquisition Guidance, to give greater importance to supply chain and software assurance.

- Incorporation of further objectives in acquisition planning should translate to additional definition of cyber, supply chain, and software assurance in program requirements as expressed in Statements of Work and specifications. Funding should accompany these changes, as security has a cost.

- DoD is already acting to inform contractors that they may be required to submit System Security Plans (SSPs) for evaluation and adequacy determination in the source selection process. DoD recently proposed guidance for Contracting Officers on when to request SSPs and how to evaluate their adequacy. Further measures along these lines should be established as security standards and assessment processes develop. DSS, in line with its new emphasis on asset protection, should be considered for increased responsibilities to assess and validate contractor measures to secure CUI.

- Prime contractors undoubtedly will strive to improve and demonstrate their security accomplishments where a source selection includes comparative evaluation and scoring of each offeror's security. At the same time, contractors will insist upon a fair process in which they understand in advance what is expected of them and how it will be evaluated. Having the process defined and resources in place will take some time. But contractors should be informed now that DoD is work- ing to make security a competitive discriminator in future procurements.

- Beyond the prime, as noted, security risks are present at the lower tiers, where DoD has less leverage and no direct contract authority. Clearly, the Department needs to reinforce cyber and supply chain security at every level. Such initiatives will have significant effect upon thousands of private sector enterprises. Some of the responsibility will vest in the primes and higher tier companies. As suggested above, establishing a mechanism for credentialing using common standards and a consistent process will be most helpful. It will

reduce friction within the private sector and avoid unproductive expense and frustration of attempting to conform to multiple, inconsistent reviews and demands.

It may be necessary to reconcile procurement reform with security enhancement. There is widespread enthusiasm for measures to "reform" procurement to reduce barriers to commercial sources, encourage innovation, speed purchase and delivery, and eliminate unproductive regulatory costs. The Department should consider the tension between security objectives and procurement reform. Security measures, as recommended here, should not be just "more cost and time" but should add to the bottom line and be integrated into the procurement process. In acquisition planning, DoD may need to distinguish, and treat separately, acquisitions for high-impact platforms and programs and involving sensitive but unclassified technologies. It will not always be possible both to reform procurement to make it faster, cheaper, and more accessible to commercial suppliers, and to improve and sustain the security of the suppliers. Choices and priorities need to be established and shared with the DIB.

Annex IV: Proposed Section 841-843 NDAA Authority Extensions—Never Contract With the Enemy

	NDAA2012 Subtitle D—Provisions relating to Contracts in support of Contingency Operations in Iraq & Afghanistan	NDAA 2015 SubtitleE—Never Contract with the Enemy	NDAA 2019 (If enacted into bill) Subtitle X—Never Contract with the Enemy
Applicability	DoD; Contracts greater than $100K performed outside U.S. in CENTCOM AOR	WOG; Contracts performed outside the U.S. greater than $50K, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.	WOG; Contracts performed outside the U.S. (or inside the U.S. to foreign vendor(s)) regardless of dollar value and operation type
Identification Authority	Sec Def through CENTCOM Commander—"identified by the Commander of the United States Central Command"	"the Sec Def shall…establish a program…" (24 Jan 17—OSD formal Legal opinion confirmed Sec Def ID authority until delegated)	Sec Def until delegated down through implementation policy
Identification Criterion	…provides funding directly or indirectly to a person or entity that has been identified by the Commander of the USCENTCOM as actively supporting an insurgency or otherwise actively opposing U.S. or coalition forces in a contingency operation in the USCENTCOM theater of operations. …failed to exercise due diligence to prevent funds from being provided to a person or entity actively opposing U.S. or coalition forces…	(1) provide funds, including goods and services,…directly or indirectly to the enemy (2) fail to exercise due diligence to ensure that none of the funds, including goods and services,…are provided directly or indirectly to the enemy	1) provide funds, including goods and services,…directly or indirectly to a covered person or entity; (2) fail to exercise due diligence to ensure that none of the funds, including goods,… are provided directly or indirectly to a covered person or entity; (3) directly or indirectly support a covered person or entity or otherwise pose a force protection risk to United States Government agencies or Coalition Forces; or (4) pose an unacceptable national security risk.
Covered Person or Entity aka "theEnemy"	Person or entity actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation in the United States Central Command theater of operations	A person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.	A person or entity that is (A) engaging in acts of violence against the U.S. Gov't agencies or coalition forces, or providing support, in the form of financing, logistics, training, or intelligence, to those that do; ~~(B) directly or indirectly opposing the interests of U.S. Gov't agencies or coalition forces;~~ (C) engaging in foreign intelligence activities against U.S. Gov't agencies or coalition forces; (D) engaging in transnational organized crime or criminal activities. E) engaging in other activities that present a direct or indirect risk to the national security of the United States or coalition forces;

Annex V: Tax Incentives and Private Insurance Initiatives

Supply Chain Tax Proposals

Tax incentives are a powerful and effective tool to shape corporate behavior in the supply chain process. Tax credits, subsidies, new market incentives, and capital gains rewards are some of the potential ways to make supply chain security investment and deployments profitable. Some proposed recommendations to be explored:

- Tax Credit/Subsidy for Supply Chain Security
  Tax credits or subsidies, such as 26 USC § 48C, or the energy credit in the tax code, have encouraged the use of solar power, wind turbines, fuel cells, and heat pumps. The business energy investment tax credit was passed as part of the Energy Policy Act of 2005 and allows for a 30 percent offset of an investment in an alternative energy system. Similarly, companies that deployed state-of-the-art security would apply for specific tax credits for the taxable year the innovations or products were deployed and could enjoy a similar type of discount. Moreover, tax credits could be used to improve security at lower levels of the supply chain. Apart from encouraging investments by individual vendors and suppliers, a tax credit or rebate could be offered to primes that make investments that improve the means available to subcontractors to improve security, such as offering security as a service.

- New Market Tax Credit Model—Small Businesses
  The new market tax credit program 26 USC § 45D, established as part of the Community Renewals Tax Relief Act of 2000, helped usher in a wave of investment in low-income communities. The credits spurred investments by community development entities and were administered by the Treasury Department. The program was extended by the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010, and was again reauthorized until 2014. This successful program could be adapted for supply chain purposes. Treasury could extend conditional subsidies as refundable tax credits for security investments by small businesses. If administered by Treasury, thresholds could be established and penalties imposed if fraud or gross negligence were found in a security breach.

- Capital Gains Tax Incentive
  This tax incentive would reward shareholders with a lower capital gains tax on the sale of assets of corporations that had voluntarily adopted certified and well-recognized supply chain security processes, frameworks, and applications. Investors and shareholders would have an economic incentive to pressure boards of directors to adopt state-of-the-art security measures. The approach would produce long-term value creation for shareholders and the corporations. The Securities and Exchange Commission could be a logical enforcement agency that would impose penalties for misrepresentation and help set security metrics.

Supply Chain Insurance Proposals

It has been estimated that the cyber insurance premium market has the potential to reach $7.5 billion in a few years. Currently the market is estimated to be in the $2.5 billion range. At this time there is no standardized federal policy that regulates cyber insurance carriers or coverage. Nothing now requires DIB companies to acquire insurance for cyber or IT processes. Private insurance carriers can play an important role in setting standards for coverage and in the assessment of enterprise security that figures into underwriting decisions. However, insurance coverage today is oriented toward liability protection against the financial consequences of a breach that produces loss of confidentiality of personally identifiable information or other commercial or consumer records subject to privacy requirements. DoD's interests are different. DoD may consider working with the insurance industry and the DIB to establish

coverage objectives, security norms, and use of DFARS contracting tools to require coverage.

It has been noted that the cybersecurity insurance market has remained tentative due to a number of factors—there is a lack of sufficient actuarial data; insurance portfolios do not have standardized categories of risk; and defense contractors lack the information to understand the scope of appropriate coverage. In contrast, the use of risk assessment is well established within the federal government. The recently released *Federal Cybersecurity Risk Determination Report and Action Plan* (May 2018) required by Executive Order 13800 emphasizes risk assessment, as does OMB Memorandum M-17-25 (May 2017). These subjects also are well explored by FIPS-199 and receive new emphasis in the recently released draft of NIST SP 800-37 Rev. 2, which is to "develop the next generation Risk Management Framework (RMF)." These provide a sound foundation for extension of risk assessment methods to the DIB and other private sector enterprises, and will help in establishing a set of agreed-upon metrics and taxonomy for cybersecurity, as they will facilitate increasing and effective use of insurance to improve supply chain security. We propose the following for examination:

- Support Creation of the Cyber Incident Data and Analysis Repository (CIDAR) at DHS or DoD
  The lack of actuarial data has been a major impediment to establishing a robust cyber insurance market and standardized policies. DHS has been exploring the possibility of creating a trusted space so member corporations could share anonymous sensitive cyber incident data, the CIDAR. This data collection and repository would provide this information to appropriate insurers so that standardized policies could be created. The process would help establish standardized categories and a common taxonomy for cyber incidents for the industry. This self-reporting should be conducted under the auspices of the Cybersecurity Information Sharing Act of 2015 (CISA) and its protection from liability (CISA § 106 (b)). The same concept could be undertaken by DoD, independent of DHS, building upon the existing DIB Cybersecurity Program and expanding information sources beyond present members who are cleared contractors and whose participation is voluntary.

- Government as Guarantor—Terrorism Risk Insurance Act (TRIA)
  Government should establish an insurance fund to cover the possibility of a catastrophic supply chain disaster of either a national cross-sector cascading effect of a cyber attack or an attack by a foreign power as an APT. TRIA was passed after 9/11 to provide compensation for large losses resulting from acts of terrorism so insurers would be able to recoup their losses as a national security asset. TRIA ensured the affordability of insurance for terrorism risk, built insurance capacity, and shared the losses between the public and private insurance sectors. In addition, a number of policies in the cyber insurance arena have "acts of war" or "act of God" exclusions, and in the event of a cyber intrusion by a foreign power, both the insured and insurers should have state protection.

- Amend DFARS to Require Insurance Coverage
  A standard contract clause could be added to DFARS requiring contractors to obtain commercial insurance coverage for cyber and supply chain security. The cost of such coverage would be an allowable cost. The Department could work with insurance carriers and industry stakeholders to develop the coverage objectives, metrics, and standards, as well as the methods to be used by carriers to assess and validate the eligibility of contractors for coverage. Accordingly, at the front end, the coverage process would utilize private sector resources (carriers and their third-party assessors) to promote adoption of security measures consistent with DoD's objectives. At the back end, the liability coverage would give assurance to companies that they are protected against direct damages and third-party liability in the event of any breach producing injury to enterprise

operations or compromise of DoD or other source data. This approach also would help establish a baseline of standards and practices and spread cyber and supply chain risk across the marketplace. Just as fire insurance places a number of structural requirements in building codes, based on the requirements of the cyber and supply chain insurance policy, the DIB would have to maintain fundamental standards in a variety of areas, such as (for illustration) encryption of data at rest. New security issues, such as those arising from the increasing use of IoT instrumentalities to connect enterprise systems, also are candidate areas to align DoD objectives with the private insurance industry.

- Use Authority of Public Law 85-804—Indemnification
  This rarely used authority, originally passed during World War II, provides contract relief and indemnification for companies engaged in unusually dangerous activity on behalf of the government. This power could be used to protect private companies against the possibility of extraordinary liability as might arise in working with DoD in high-risk cyber activities, including "full spectrum" measures. Public Law 85-804 also might be applied as a backstop of indemnification to encourage the DIB to share critical information on cyber breaches, should the existing CISA mechanism prove inadequate.

Other Supply Chain Measures

- IP Trusts and "Golden Shares"
  DoD remains reliant upon global sources, but some technologies and some sources are more critical than others. Measures may be needed to protect against the loss of specific sources or technology. The Department could enter into agreements with some DIB participants to create IP Trusts between prime contractors and key suppliers. The primes would be trustees, with the DoD as the third-party beneficiary. The trusts would protect the critical IP and companies entering the trust. In certain specified events, such as a change of control presenting concerns of foreign ownership, control, or influence, or where there is a disabling security breach at the subcontractor level, DoD could exercise its authority as trustee to recover IP in an uncompromised state. In the area of software assurance, a trust mechanism might be used to assure DoD that it has the gold standard of code for purposes of forensics, patch management, or other security or restorative measures. DoD could also be granted "golden shares" in the trust that would allow it to outvote all board members. In the event of a critical bankruptcy or potential sale, the authority over the golden shares would allow DoD to shape the outcome, enabling it to condition approval upon adequate mitigation measures or, if necessary, block ownership or technology transfers altogether, where potential transactions are found to violate national security interests.

Biographies

Christopher Nissen
Director, Asymmetric Threat
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The MITRE Corporation

Christopher Nissen is Director of Asymmetric Threat Response at The MITRE Corporation, a not-for-profit which operates and manages seven FFRDCs serving in the national interest. He works across the corporation developing essential strategic elements to address non-kinetic, full-spectrum asymmetric threats to national security in both the public and private sectors. He has developed extensive work programs in these and other domains across the technology, policy, and legislative solution spaces. He has also served as Director of the Communications and Networking Technical Center, leading a division of over 230 engineers in a diverse port- folio of programs and technology development spanning microelectronics to satellite communications.

He has 30 years of experience in developing solutions for extremely complex national security challenges. Some of his accomplishments include putting forth an original vision for the development of an anti-jam capability for the nation's Global Positioning Satellite system, and the development and implementation of several special communications techniques. He holds BSEE and MSEE degrees and also has a background in structured analytical techniques.

John E. Gronager, Ph.D.
Director, Special Enterprise Capabilities

Dr. Gronager recently joined The MITRE Corporation as the Director of Special Enterprise Capabilities within the MITRE National Security Sector. He serves as a senior technical contributor in MITRE's cyber, critical infrastruc- ture, nuclear, and supply chain work programs. In collab- oration with MITRE's work program leaders, Dr. Gronager has worked to develop MITRE's work program, create intellectual capital, and identify and develop talent in these critical areas.

Before joining MITRE, Dr. Gronager had 38 years' experience in managing technical programs across the national security mission of Sandia National Laboratories. As a former Distinguished Member of the Technical Staff and Senior Manager, Dr. Gron- ager developed and managed programs in nuclear reactor safety, nuclear weapons design, testing, and manufacturing, the national transportation infrastructure, interna- tional security programs, and for over 28 years provided support to the Intelligence Community.

Robert S. Metzger, J.D.
Shareholder, ROGERS JOSEPH O'DONNELL,
a Professional Law Corporation

Robert S. Metzger, an attorney in private practice, heads the Washington, DC, office of Rogers Joseph O'Donnell, P.C., a firm that has specialized in public contract matters for more than 35 years. He has an active practice that includes civil and administrative litigation, compliance counseling, national security matters, export issues, and other regulatory advice. Mr. Metzger represents leading U.S. and international technology companies in several industry sectors.

Mr. Metzger is recognized for subject area leadership in cyber, supply chain, and related security subjects and has many publications on these subjects. Named a 2016 "Federal 100" awardee, he was cited by *Federal Computer Week* for his "ability to integrate policy, regulation and technology." *Federal Computer Week* said of him, "In 2015, he was at the forefront of the convergence of the supply chain and cybersecurity, and his work continues to influence the strategies of federal entities and companies alike."

Chambers USA (2018) ranks him among top government contracts lawyers and said that "[h]e is particularly noted for his expertise in cyber and supply-chain security with clients regarding him as the 'preeminent expert in cybersecurity regulations and how they affect government contractors.'"

For RSA Conference 2018, Mr. Metzger served on a panel on "First Recourse or Last Resort? The National Interest in Regulating the IoT" and moderated a second panel on "IOT and Critical Infrastructures: A Collision of Fundamentals?" For RSA Conference 2017, he moderated a discussion on "Cyber/physical Security and the IoT: National Security Considerations." A member of the International Institute for Strategic Studies, his articles on national security topics have appeared in *International Security* and the *Journal of Strategic Studies*, among other publications.

The Legal 500 in 2016 cites Mr. Metzger as an "expert" in cyber and supply chain security; in prior years, he was recognized by *The Legal 500* for telecommunications (litigation and appellate). He is among the 49 U.S. lawyers rated as "Expert" in govern- ment contracts by *Who's Who Legal* (2016, 2017). He was featured in the Government Contracts 2017 Discussion of *Who's Who Legal*.

Mr. Metzger attended Georgetown University Law Center, where he was an Editor of the *Georgetown Law Journal*. Subsequently, he was a Research Fellow, Center for Science & International Affairs, Harvard Kennedy School (now, "Belfer Center"). As a Special Government Employee of the Department of Defense, he was a member of the Defense Science Board task force that produced the Cyber Supply Chain Report in April 2017.

Mr Metzger served as a subject-matter expert subcontractor to The MITRE Corporation for this study.

Harvey Rishikof, J.D.

Harvey Rishikof's career includes experiences in the private sector, academia, and public service. He is a lifetime member of the Council on Foreign Relations and the American Law Institute. Mr. Rishikof is currently Senior Advisor to the American Bar Association (ABA) Cybersecurity Legal Task Force, Chair of the Advisory Committee to the ABA Standing Committee on Law and National Security, and is working on a number of projects with MITRE and the MacArthur Foundation. For the next year he will be a Visiting Professor at Temple Law School. Mr. Rishikof was a Teaching Professor and Director of the Cybersecurity and the Law program in the iSchool and Earle Mack School of Law at Drexel University. He is the former Convening Authority for the Military Commissions and senior policy advisor to the director of the National Counterintelligence Executive in the Office of the Director of National Intelligence. He has held several positions in the National War College (NWC) at the National Defense University in Washington, DC, including Dean of the NWC, Chair of the Department of National Security Strategy, and Professor of Law and National Security Studies. Academically and professionally, Mr. Rishikof specializes in the areas of national security, civil and military courts, terrorism, international law, civil liberties, and the U.S. Constitution.

He is a former member of the law firm Hale and Dorr, the former Dean of the Roger Williams University School of Law, in Bristol, RI, and has been a consultant to the World Bank and the USAID on law reform. As Legal Counsel to the Deputy Director of the FBI, he focused on FBI policies concerning national security and terrorism, and served as liaison to the Office of the Attorney General at the Department of Justice. He worked on developing a variety of programs (e.g., the National Integrated Ballistic Information Network), and was involved in the drafting of Presidential Decision Directives in the national security area.

As Administrative Assistant to the Chief Justice of the Supreme Court (1994-96), Mr. Rishikof, a former federal court of appeals law clerk in the Third Circuit for the Honorable Leonard I. Garth, served as chief of staff for the Chief Justice and was involved in general policy issues concerning the federal court system. In this capacity, he acted as liaison to the Executive Branch, Congress, the Federal Judicial Center, and the Administrative Office of the United States Court.

Mr. Rishikof has participated in numerous international seminars and projects in Latin America, Europe, Russia, Southeast Asia, Pakistan, India, and China. His most recent books are co-edited with Roger George, *The National Security Enterprise–Navigating the Labyrinth* (Georgetown Press, 2d ed. Quad 2017) and co-edited with Stewart Baker and Bernard Horowitz, *Patriots Debate–Contemporary Issues in National Security Law* (ABA Press, 2012). Mr. Rishikof has participated in numerous international seminars and projects in Latin America, Europe, Russia, SE Asia, Pakistan, India, and China. His publications include *Morality, Ethics, and Law in the War on Terrorism (The Long War)*, part of

the West Point terrorism series Countering Terrorism and Insurgency in the 21st Century: International Perspectives.

Mr. Rishikof holds a JD from New York University School of Law, an MA from Brandeis University, an MA from the National War College, and a BA from McGill University.

Mr. Rishikof served as a subject-matter expert subcontractor to The MITRE Corporation for this study.

Acronyms

A&S Acquisition and Sustainment

ABA American Bar Association

APT Advanced Persistent Threat

CI Counterintelligence

CIDAR Cyber Incident Data and Analysis Repository

CISA Cybersecurity Information Sharing Act of 2015

COA Course of Action

COTS Commercial off the Shelf

CUI Controlled Unclassified Information

CVE Common Vulnerabilities and Exposures

DEPSEC-DEF Deputy Secretary of Defense

DHS Department of Homeland Security

DIA Defense Information Agency

DIB Defense Industrial Base

DNI Director of National Intelligence

DoD Department of Defense

DODI Department of Defense Instruction

DOJ Department of Justice

DPAP Defense Procurement and Acquisition Policy

DSS Defense Security Service

DU Deliver Uncompromised

FBI Federal Bureau of Investigation

FedRAMP Federal Risk and Authorization Management Program

FFRDC Federally Funded Research and Development Center

FIPS Federal Information Processing Standard

FPAP Field-Programmable Gate Array

FTCA Federal Tort Claims Act

IC Intelligence Community

IoT Internet of Things

IP Intellectual Property

ISAO Information Sharing and Analysis Organization

IT Information Technology

LT Long Term

MDAP Major Defense Acquisition Program

MT Medium Term

NCSC NationalCounterintelligenceandSecurityCenter

NCSC National Counterintelligence Security Center

NCTC National Counterterrorism Center

NDAA National Defense Authorization Act

NIST National Institute of Standards and Technology

NSIC National Supply Chain Intelligence Center

NTIA National Telecommunications and Information Administration

NWS National War College

OMB Office of Management and Budget

OSD Office of the Secretary of Defense

OTA Other Transaction Agreement

OUSD(I) Office of the Under Secretary of Defense for Intelligence

R&E Research and Engineering

RFP Request for Proposal

SBOM Software Bill of Materials

SCRM-TAC SupplyChainRiskManagement–ThreatAnalysis Cell

SIS Security Integrity Score

SSDL Software Design Life Cycle

SSP System Security Plan

ST Short Term

TRIA Terrorism Risk Insurance Act

TSN Trusted Systems and Networks

TTPs Tactics, Techniques, and Procedures

US-CERT UnitedStatesComputerEmergencyReadinessTeam

USD(I) Under Secretary of Defense for Intelligence

USG U.S. Government

WOG Whole-of-Government