



March 10, 2020

Mr. Timothy F. Soltis
Deputy Controller
White House Office of Management and Budget

RE: Initial Comments to Proposed Revisions to 2 CFR 25, 2 CFR 170, 2 CFR 200
OMB-2019-0005

Dear Mr. Soltis:

On behalf of the members of the National Council of Nonprofits and the National Human Services Assembly, we write to provide initial comments to proposed revisions to the OMB Uniform Guidance published in the Federal Register on January 22, 2020. In a subsequent submission, we will provide more detailed comments on a section-by-section basis. At this initial stage, we offer on behalf of our collective membership – charitable nonprofit organizations operating in all 50 states and the District of Columbia – initial comments, questions, and recommendations related to the rules governing indirect cost reimbursements. In these comments, we:

1. Share general observations about the nonprofit experience under the Uniform Guidance;
2. Support revisions to §200.414 (Indirect (F & A) Costs) that expand the availability and management of the *de minimus* rate and recommend extending the public disclosure provision to apply to indirect cost rates negotiated by pass-through entities and nonprofits; and
3. Raise questions seeking additional refinement to proposed revisions to §200.331 (Requirements for Pass-Through Entities) to clarify how parties are to determine which negotiated indirect cost rates should be applied.

About Our Organizations

The National Council of Nonprofits (www.CouncilofNonprofits.org) is a trusted resource that advocates for America's nonprofits nationwide. Through its network of state associations of nonprofits and 25,000-plus member charitable nonprofits, faith-based groups, and foundations – the nation's largest network of nonprofits – it serves as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. It identifies emerging trends, shares proven practices, and promotes solutions that benefit charitable nonprofits and the communities they serve. Over the past decade, the Council of Nonprofits has engaged with nonprofits and governments to promote grants reforms at the federal, state, and local levels. As in the past, we see the Uniform Guidance as a potential model for all governmental entities to reduce administrative burdens for governments, taxpayers, and nonprofits; promote consistency, transparency, and oversight; and secure the greatest impact and outcomes for the public.

The National Human Services Assembly (www.NationalAssembly.org) is a Washington, D.C.-based association comprised of some of the largest national nonprofit human service organizations. Collectively, human services work to bring out the full potential of everyone, so that all can contribute to our communities in meaningful ways. The sector achieves this through a diverse set of strategies designed to build sturdy structures of well-being throughout life. This includes providing opportunities for young people to develop and learn, helping adults with disabilities stay fully engaged in their communities, and fostering social connections in later life. It also includes shoring up well-being during life's storms – such as the loss of a job or an unexpected illness. Human services bring a

deep commitment and expertise to addressing complex societal challenges through thoughtful planning, research, advocacy, and program development. The entire sector will be affected, either directly or indirectly, by the outcome of this rulemaking.

1) General Observations about the Proposed Revisions to the Uniform Guidance

The proposed revisions published in January would update the 2014 reforms (Uniform Guidance) governing federal grants to state and local governments, Indian tribes, institutions of higher education, and charitable nonprofits. The 2014 rules expressly stated – for the first time – that governments and other passthrough entities must pay nonprofits for their indirect costs incurred when providing services on behalf of governments when using federal funds. The Uniform Guidance mandated that nonprofits must be paid either their negotiated indirect cost rate or a *de minimus*¹ rate of 10 percent of modified total direct costs.² The Uniform Guidance also reemphasized the right of nonprofits to negotiate indirect cost rates with the federal government and other pass-through entities that pass federal funds through to nonprofits for work performed. Although groundbreaking and long overdue, the mandate as originally worded was misinterpreted by some in ways that thwarted the will of the federal government and imposed unreasonable, unnecessary, and costly burdens on the nonprofits they hired to provide vital services in communities.

Nonprofits providing services in their communities pursuant to government grants appreciate this opportunity to share the challenges they have faced in seeking to apply the Uniform Guidance. We welcome the goals expressed by OMB in the introductory comments: “These proposed revisions are intended to reduce recipient burden, provide guidance on implementing new statutory requirements, and improve Federal financial assistance management, transparency, and oversight.” It is in this spirit of collaboration and mutual respect that we offer these comments.

2) Rules Governing the *De Minimus* Rate [200.414]

We are delighted that the proposed revisions to the Uniform Guidance seek to remedy many of the challenges nonprofits have experienced when struggling to implement the protections guaranteed in the Uniform Guidance. The proposed changes, if adopted, would significantly improve the rights of nonprofits to be reimbursed for costs they incurred providing services to the public on behalf of governments at a rate of at least 10 percent of modified total direct costs. We expressly support the three key changes proposed for 2 CFR Sec. 200.414:

- A. Expanding Access to *De Minimus* Rate: The option of electing the 10 percent *de minimus* rate would be made available to all nonprofits and some non-federal entities receiving funds that originate as federal grants. Nonprofits and others would have sole discretion over whether to continue utilizing the *de minimus* rate indefinitely. Currently, the *de minimus* rate can only be used by entities that have never received a negotiated indirect cost rate. As initially written, this limitation excluded many nonprofits that may have negotiated an indirect cost rate in the past several decades that has since expired. In some cases, nonprofits that merged with others would discover that a past negotiated rate disqualified the new organization from selecting the *de minimus* rate. The challenge for these and other organizations was that the word “never” put them in between protections – neither having access to the *de minimus* rate nor working under a grant directly from a federal agency that

¹ In these comments, we have elected to use the spelling of *de minimus* most commonly used in the proposed revisions. The alternative spelling, *de minimis*, is utilized in the current Uniform Guidance.

² The definition of “modified total direct costs,” formerly defined in §200.68, would be defined alphabetically at §200.1 in the proposed revisions to the Uniform Guidance.

could negotiate an indirect cost rate. As a result, many organizations that do not have the capacity to negotiate new indirect cost rates are left with no options, meaning some pass-through entities interpreted the rule to deny any obligation to pay for these essential costs.

We applaud OMB's recognition through these proposed revisions that the expiration of a negotiated rate "may be due to breaks in Federal relationships and grant funding, or lack of resources for preparing an indirect cost proposal." In the proposed regulations, it states, "This proposed change will further reduce the administrative burden for non-federal entities and Federal agencies and shift more resources toward accomplishing the program mission." **We agree, and support this improvement.**

- B. Reduced Documentation Burdens: The proposed changes to §200.414(f) expressly state, "No documentation is required to provide proof of costs that are covered under the *de minimus* indirect cost rate." This clarification addresses a repeated challenge that nonprofits have experienced. Often, pass-through entities sought to force nonprofits electing the *de minimus* rate to fully document their costs, essentially imposing new paperwork challenges on organizations that don't have the capacity to negotiate rates. From the outset, the point of the *de minimus* rate was to ensure greater fairness for nonprofits and to relieve administrative burdens, both for nonprofits and governments. The proposed language should prevent overly zealous grants managers from imposing unnecessary data collection requirements. As OMB states in the preamble to the proposed revisions, "the 10% *de minimus* rate was designed to reduce burden for small non-federal entities and the requirement to document the actual indirect costs would eliminate the benefits of using the *de minimus* rate." **We agree, and support this improvement.**
- C. Public Disclosure of Rates: The proposed revisions include a new subsection 200.414(h) requiring that "All rate agreements from non-Federal entities must be available publicly on an OMB-Designated Federal website." Properly implemented, we believe collection and disclosure of indirect cost rates would empower nonprofits to protect their rights to reimbursement of their negotiated indirect cost rate or the *de minimus* rate. Therefore, **we see the proposed language as needed to improve accountability and compliance.**

RECOMMENDATION: We support the proposed language in §200.414(h) and ask that OMB make an additional clarification that the collection and disclosure obligation apply not only to federally negotiated indirect cost rates, but also to rates negotiated by non-federal entities, such as state and local government pass-through entities. As will be discussed below, OMB is proposing revisions to §200.331 that, if implemented, should lead to many pass-through entities relying on indirect cost rates negotiated with non-federal entities by other pass-through entities. Since many entities will be relying on the same rates, we believe it essential that those rates be readily accessible on the central OMB-designated federal website. Therefore, we ask that OMB clarify the language of §200.414(h) to explicitly state that it is the duty of federal agencies and pass-through entities to post negotiated indirect cost rates on the specified website.³

³ We are aware of at least one commenter who expressed concern about the public disclosure of indirect cost rates that some non-federal entities may consider proprietary, and thus confidential. We anticipate that additional comments will address whether negotiated indirect cost rates should be treated as confidential and, if so, what alternative disclosure regime would help ensure that negotiated indirect cost rates are honored across multiple pass-through entities.

3) Obligations of Pass-Through Entities [200.331]

The proposed revisions to the Uniform Guidance would also clarify that all grantmaking entities – whether federal, state, or local governments, Indian tribes, or other nonprofits – must pay nonprofits any previously negotiated indirect cost rates and provides guidance on negotiating and recognizing indirect cost rates. The intention of these proposed changes is welcome because, in nonprofits’ experiences, some pass-through entities have interpreted the rules in ways that deny nonprofits their rights granted under the Uniform Guidance. Under the proposed regulations (at 2 CFR Sec. 200.331):

- A. Negotiated Rate Rules: The proposed revisions would add this new language at §200.331(a)(4): “The pass-through entity must not require use of a *de minimus* indirect cost rate if the subrecipient has a federally approved rate.” As nonprofits see it, this was always the rule and the new language simply clarifies and reinforces the point. Far too many nonprofits with federally negotiated indirect cost rates have been forced to challenge the misinterpretations of pass-through entities, causing delays, stress, and damaged relationships as nonprofits seek to defend their rights. The simple rule is and should be that nonprofits with federally negotiated rates should be paid that rate by all entities expending federal funds. The rule guarantees adherence to the federal cost principles, simplicity, consistency, and fairness.

RECOMMENDATION: The clarifying language proposed for §200.331(a)(4) is greatly appreciated by frontline nonprofits that struggle to secure consistent interpretation and application of the federal rules to pass-through dollars. All too often, nonprofit subrecipients have been told their federally negotiated indirect cost rate would not be honored by a state or local pass-through entity. Many have been told they must accept the *de minimus* rate or been told that the pass-through entity did not pay for indirect costs. **We believe the quoted language is needed and support its inclusion.**

- B. Accepting Negotiated Rates: Section 200.331(a)(4) would be further refined to clarify what happens when a pass-through entity is working through nonprofit subrecipients that do not have a federally negotiated indirect cost rate. The proposed revisions offer three options that are explained in the following language:

“If no federally approved rate exists, the pass-through entity must accept:

- (i) The negotiated indirect cost rate between the pass-through entity and the subrecipient;
- (ii) The negotiated indirect cost rate between a different pass-through entity and the subrecipient; or
- (iii) The *de minimus* indirect cost rate[.]”

The proposed language demonstrates that payment of indirect costs is expected by the federal government and provides direction as to which rates to apply. We read this language as providing that a pass-through entity must pay the indirect cost rate it has negotiated with the subrecipient. If no such rate exists, the pass-through entity must recognize and pay the indirect cost rate that another (“different”) pass-through entity has negotiated with the subrecipient. The third option is acceptance of the *de minimus* rate, if elected by the nonprofit subrecipient.

QUESTIONS PRESENTED: While clarifying, the proposed language raises several questions, three of which we present in this initial set of comments:

- 1) **Are the three options listed in order of priority?** By this we mean: is a pass-through entity required to apply its own negotiated rate, and only if none exists, is it required to look for rates negotiated by different pass-through entities? We believe that is the appropriate interpretation, but think that OMB should state that specifically.
- 2) **Is it OMB's expectation and intention that only one indirect cost rate will be applied by all pass-through entities to an individual non-federal entity?** This makes sense as a general rule. We encourage OMB to state it expressly because our experience indicates that different grants managers interpret the rules in disparate ways, usually to the disadvantage of nonprofits.
- 3) **Does the recognition of rates negotiated by different pass-through entities apply across state lines?** We believe this is the intention of the proposed language, but request that the point be made expressly in the Uniform Guidance.

We present these initial comments to alert OMB and other nonprofits to the critical, longstanding challenges subrecipient organizations have faced in the area of indirect costs. As stated previously, we intend to submit additional comments on these and other matters presented in the proposed revisions to achieve reforms that “reduce recipient burden, provide guidance on implementing new statutory requirements, and improve Federal financial assistance management, transparency, and oversight.”

Respectfully submitted,

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